

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Mr. Justice Christopher J. Mainella
Madam Justice Jennifer A. Pfuetzner

BETWEEN:

<i>HER MAJESTY THE QUEEN</i>)	<i>J. C. Pinx</i>
)	<i>for the Appellant</i>
)	
<i>Respondent</i>)	<i>E. E. Magas</i>
)	<i>for the Respondent</i>
<i>- and -</i>)	
)	<i>Appeal heard and</i>
<i>JOSHUA JACOB WASSERMAN</i>)	<i>Decision pronounced:</i>
)	<i>December 17, 2019</i>
<i>(Accused) Appellant</i>)	
)	<i>Written Reasons:</i>
)	<i>January 13, 2020</i>

On appeal from 2017 MBQB 166; and 2018 MBQB 151

MAINELLA JA (for the Court):

[1] The accused appealed his convictions for possession of cocaine and ecstasy for the purpose of trafficking and possession of property obtained by crime relating to over a hundred thousand dollars worth of drugs and drug money. The two issues on the appeal are whether the judge erred by not excluding the evidence under section 24(2) of the *Canadian Charter of Rights and Freedoms* (the *Charter*) and by refusing to reopen the trial post-conviction. After hearing the appeal, we dismissed it with reasons to follow. These are our reasons.

[2] The accused was subject to a lawful traffic stop for improper display of a temporary licence plate. Although the accused was cooperative with the

two investigating officers, he was unusually nervous and gave unresponsive and evasive answers at times. His interaction with the officers ultimately led to him being arrested for a stolen-vehicle investigation. As he exited the vehicle at the request of police, to their surprise, he was seen to have a baggie with rocks of crack cocaine in his possession which he discarded in the vehicle. He was re-arrested and a warrantless search of the vehicle led to the discovery of non-bodily physical evidence. The accused did not testify on the *voir dire*.

[3] In thoughtful and comprehensive reasons, the judge decided that, although the officers had reasonable grounds to detain the accused for a criminal investigation of a stolen vehicle, they lacked reasonable grounds to arrest him, resulting in a breach of his rights under sections 8 and 9 of the *Charter*.

[4] In her *Grant* analysis (see *R v Grant*, 2009 SCC 32), the judge characterised the officers' conduct as "rather serious" (2017 MBQB 166 at para 36) because of acting hastily and failing to have a proper appreciation of the limits of their authority. She found the police misconduct, however, was not "deliberate, blatant or egregious" (at para 45). She concluded that the impact of the *Charter* infringements on the accused's protected interests was "significant" (*ibid*) despite the reduced expectation of privacy in a motor vehicle. However, in her view, the impact was somewhat attenuated because an investigative detention, as opposed to an arrest, "would likely have led to discovery of the drugs and money in any event" (*ibid*). She accepted the officers' evidence that, in order to make roadside inquiries in their stolen-vehicle investigation on a busy Winnipeg street and to avoid flight, it would have been reasonably necessary to direct the accused to exit the vehicle, thereby resulting in the observation of him discarding the baggie of crack

cocaine in his possession. In her view, the discoverability of the evidence, “while relevant, is not determinative” (at para 43). Finally, on the question of society’s interest in an adjudication on the merits, she noted that the evidence was “highly reliable” and related to “very serious charge[s]” (at para 45) but that fact alone “should not take on a disproportionate significance and overwhelm the s. 24(2) analysis” (at para 44). After weighing and balancing the various factors, in light of all of the circumstances, she was satisfied that admission of the evidence would not bring the administration of justice into disrepute.

[5] The numerous cases counsel cited to us illustrate the point that section 24(2) decisions are highly fact specific and different judges can reasonably come to divergent results on comparable facts. As was explained in *Grant*, determination of whether admission of evidence would bring the administration of justice into disrepute is a “qualitative” exercise, not a “mathematical” one (at paras 86, 140; see also *R v Paterson*, 2017 SCC 15 at para 54). Therefore, on appellate review, a trial judge’s discretionary decision under section 24(2) of the *Charter* is entitled to considerable deference unless it is tainted by a legal error relevant to the ultimate conclusion or a clear and determinative error in the assessment of the facts (see *R v Côté*, 2011 SCC 46 at paras 44, 52, 87).

[6] There is no merit to the argument that the judge’s reasons were insufficient when read in context. Many of counsel’s submissions overlook the subtle and careful findings of the judge. We also decline counsel’s invitation to recharacterise the nature of the *Charter* violations on the spectrum of the seriousness of state conduct, come to a different factual conclusion on the discoverability of the evidence or to reassess the circumstances of the traffic stop, with the benefit of hindsight. We are

satisfied that the judge came to a reasoned section 24(2) conclusion. She considered the proper section 24(2) factors and did not make an unreasonable finding.

[7] We are also not persuaded that the judge misdirected herself or unreasonably refused to exercise her discretion to grant the exceptional remedy of reopening a trial post-conviction (see *R v Hailemokolot (BW) et al*, 2014 MBCA 90 at para 10). Following conviction, but prior to the sentencing, counsel learned that he had another client who had been arrested by one of the officers almost 55 months after the accused's traffic stop. That later arrest was based on a tip from a confidential informant. Counsel wanted to file a police report and cross-examine the officer on the later arrest to demonstrate a pattern of abuse of his police powers, namely, making hurried and illegal arrests (see *Grant* at para 75). We see no basis to interfere with the judge's decision that the proposed further evidence of an unproven third party *Charter* violation was too remote, too dissimilar factually to the accused's case and not of sufficient cogency that, if believed, it could reasonably, when taken with the other evidence adduced at the trial, be expected to have affected the section 24(2) result (see *Palmer v The Queen*, [1980] 1 SCR 759 at 775).

[8] In the result, the appeal is dismissed.

Mainella JA

Monnin JA

Pfuetzner JA
