



**IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR**

Citation: *R. v. Summers*, 2019 NLCA 11

Date: March 4, 2019

Docket Number: 201701H0016 & 20171H0008

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT

AND:

BLAIR WILLIAM SUMMERS,
LAILYND VINCENT GRANDBOIS,
LLOYD SCOTT WHITE AND
ALYSSA BRIDGET BUCKMASTER

RESPONDENTS

Coram: Welsh, O'Brien and Goodridge JJ.A.

Court Appealed From: Provincial Court of Newfoundland and Labrador
Harbour Grace

Appeal Heard: November 13, 2018

Judgment Rendered: March 4, 2019

Reasons for Judgment by: Welsh J.A.

Concurred in by: O'Brien and Goodridge JJ.A.

Counsel for Her Majesty the Queen in Right of Canada: Suhanya Edwards

Counsel for Her Majesty the Queen in Right of Newfoundland and

Labrador: Dana Sullivan

Counsel for Blair William Summers: Stephen Orr

Counsel for Alyssa Bridget Buckmaster: Randolph Piercey Q.C.
Counsel for Lailynd Vince Grandbois: No One Appearing
Counsel for Lloyd Scott White: Self Represented

Welsh J.A.:

[1] This is an appeal by the Crown against the exclusion of evidence and resulting dismissal of charges under the *Criminal Code* and the *Controlled Drugs and Substances Act*, based on a breach of the Respondents' right not to be arbitrarily detained as guaranteed by section 9 of the *Canadian Charter of Rights and Freedoms*. The four Respondents, Blair Summers, Lailynd Grandbois, Lloyd White and Alyssa Buckmaster were jointly charged with theft, break and enter, possession of property obtained by the commission of an offence, possession of instruments suitable for break and enter, breach of probation, possession of cocaine, and possession for the purpose of trafficking of several types of scheduled substances under the *Controlled Drugs and Substances Act*, including fentanyl and oxycodone. Summers was also charged with attempting to obstruct the course of justice by bribing Grandbois. (Grandbois was not present or represented for purposes of the appeal.)

[2] The Crown appeals on the basis that the trial judge erred in law by misapprehending the evidence.

BACKGROUND

[3] The charges stem from a break and enter at Tricon Pharmacy in Old Perlican, NL, which is located in a rural area on the Avalon Peninsula. In response to an alarm at the Pharmacy at about 4:20 a.m. on June 23, 2015, RCMP Constables Russell and Oulette travelled in marked police cars from the Harbour Grace detachment toward Old Perlican. In order to intercept any vehicle leaving Old Perlican, the constables took the only two possible routes, one using route 70 and the other using the combination of routes 74 and 80. Police in the region were particularly vigilant because there had been a series of break-ins and thefts from other pharmacies in the area.

[4] Constable Russell testified that, approximately twenty to twenty-five minutes after he was dispatched, a black Dodge Ram pickup truck passed him at a high rate of speed, travelling in the opposite direction. Constable Russell

turned around, activated the emergency lights on his vehicle and pursued the truck. The truck sped away and Constable Russell was unable to keep up with it though he estimated he was travelling at 140 to 150 kilometres per hour in an area where the posted speed limit is 80 kilometres per hour. Constable Russell continued to attempt to catch up to the truck, but was unsuccessful. A black Dodge Ram truck was later located, abandoned in a parking lot in Carbonear, with the four doors left open. The licence plate did not match the truck or its serial number. With the assistance of a police dog, a bag of tools was located in a field adjacent to where the truck was found.

[5] Meantime, following a notification from the dispatcher regarding the Tricon Pharmacy alarm, Corporal Clarke returned to duty at approximately 4:26 a.m. He followed the route taken by Constable Russell. He observed a blue Jeep Compass travelling toward him at a very high rate of speed, followed a few seconds later by a black Dodge Ram, also travelling at a very high rate of speed. He activated his emergency lights and followed the vehicles. However, despite travelling at up to 150 kilometres per hour he was not able to catch up.

[6] Corporal Clarke was familiar with an internal police bulletin that included information that a blue Jeep Compass was suspected to be involved in other break-ins of pharmacies in the region. He advised the dispatcher to call out any available officers. He described a blue Jeep Compass and a black Dodge Ram as suspect vehicles travelling at a high rate of speed along a route from Old Perlican where there had been a recent break-in at Tricon Pharmacy.

[7] After losing sight of the vehicles, Corporal Clarke continued his search. He advised Corporal Butler and Constable Francis to watch for the two vehicles. Corporal Butler testified that he had been called into work at 4:52 a.m. to assist officers who were in pursuit of a black Dodge pickup in relation to a break-in at the pharmacy in Old Perlican. He asked the dispatcher to advise other officers to also watch for a blue Jeep Compass with licence plate HNS 488, which police suspected was linked to break-ins at other pharmacies that were under investigation.

[8] Corporal Butler proceeded to Route 75, which leads to the Trans-Canada Highway, to watch for the two vehicles. At approximately 6:30 a.m., Constable Francis advised that a blue Jeep Compass had just passed his location, heading south on route 75. Corporal Butler entered onto route 75 heading south towards the Highway in order to get ahead of the Jeep while Constable Francis followed the Jeep and confirmed the licence plate HNS 488. Corporal Butler asked

officers from the Holyrood RCMP detachment to close a portion of the Highway in order to stop the Jeep.

[9] Corporal Butler testified that he believed, based on the totality of the circumstances, that he had the necessary grounds to arrest the occupants of the Jeep. He also testified that he believed that closing the Highway would be the safest way to apprehend the individuals in the Jeep, reducing the risk to the police, the public and those in the Jeep.

[10] At approximately 7:05 a.m., the Jeep was stopped where the Highway had been closed, with Corporal Butler's vehicle blocking the Jeep in front and Constable Francis' behind. The two officers approached the Jeep with their firearms drawn. They shouted "Police" and ordered the four Respondents who were in the Jeep to show their hands. The Respondents complied with the officers' directions to get out of the Jeep and lie face-down on the ground, at which time they were hand-cuffed. Corporal Butler explained that he was concerned about the possible presence of a weapon, either a firearm or a tool used in a break and enter. At 7:10, Corporal Butler advised the Respondents that they were under arrest for break and enter and theft and informed them of their rights. This was repeated for each individual by Constable Francis at 7:30.

[11] The Respondents were detained and the Jeep was towed to the RCMP detachment. A warrant was obtained and the Jeep was searched. All of the drugs that were stolen from Tricon Pharmacy (oxycodone, percocet, dilauidids, morphine) and tools consistent with committing a break and enter were found in the Jeep. No evidence was led as to what was seized incident to the arrests.

[12] On June 26, 2015, the police, having obtained a warrant, searched Mr. Summers' residence where they found a map of Newfoundland with the location of various pharmacies, including Tricon Pharmacy in Old Perlican, highlighted. A number of items consistent with drug trafficking were also seized.

[13] In an oral decision, the trial judge found that the rights of the Respondents under section 9 of the *Charter* had been breached. He then excluded all the evidence obtained in relation to the arrests and subsequent warrants. In the result, the Crown called no evidence and all the charges were dismissed except the charge against Mr. Summers of attempting to obstruct the course of justice. That charge was set over to be dealt with separately and is not part of this appeal.

ISSUES

[14] At issue is whether the trial judge erred: (1) in finding that the Respondents' rights under section 9 of the *Canadian Charter of Rights and Freedoms* were breached on the grounds that (a) the arresting officers did not have reasonable and probable grounds to arrest the Respondents, and (b) the manner in which the arrests were made was unreasonable; and (2) in excluding the evidence pursuant to section 24(2) of the *Charter*.

ANALYSIS

Appeal by the Crown

[15] An appeal by the Crown is governed by section 676 of the *Criminal Code*:

The Attorney General or counsel instructed by him for the purpose may appeal to the court of appeal

(a) against a judgment or verdict of acquittal ... of a trial court in proceedings by indictment on any ground of appeal that involves a question of law alone;

[16] In addition to the limitation requiring a ground involving a question of law alone, Fish J., for the majority in *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609, cautioned:

[14] It has been long established, however, that an appeal by the Attorney General cannot succeed on an abstract or purely hypothetical possibility that the accused would have been convicted but for the error of law. Something more must be shown. It is the duty of the Crown in order to obtain a new trial to satisfy the appellate court that the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal. The Attorney General is not required, however, to persuade us that the verdict would necessarily have been different.

[17] As applied to this appeal, I am satisfied that the Crown has raised a question of law which might reasonably be thought to have had a material bearing on the acquittal of the Respondents. Whether the trial judge erred in his assessment of the existence of reasonable and probable grounds to support the arrests is a question of law reviewable on a standard of correctness. In *R. v. Shepherd*, 2009 SCC 35, [2009] 2 S.C.R. 527, McLachlin C.J.C. and Charron J., for the Court, reiterated:

[20] While there can be no doubt that the existence of reasonable and probable grounds is grounded in the factual findings of the trial judge, the issue of whether the

facts as found by the trial judge amount *at law* to reasonable and probable grounds is a question of law. ... However, this Court has repeatedly affirmed that the application of a legal standard to the facts of the case is a question of law: see *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 18; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, at para. 23. ... Although the trial judge’s factual findings are entitled to deference, the trial judge’s ultimate ruling is subject to review for correctness. [*Italics in original.*]

Misapprehension of the Evidence

[18] The Crown appeals on the basis that the trial judge misapprehended the evidence with the result that he erred in concluding that the Respondents’ rights under section 9 of the *Charter* had been breached. A misapprehension of the evidence “may refer to a failure to consider evidence relevant to a material issue, a mistake as to the substance of the evidence, or a failure to give proper effect to evidence”. As applied to an appeal, the misapprehension of the evidence must be material to the judge’s reasoning in the sense that it could have affected the verdict. (See *R. v. A.A.M.*, 2013 NLCA 26, 335 Nfld. & P.E.I.R. 199, at paragraphs 16 to 18.)

Grounds for the Arrests

[19] Section 9 of the *Charter* provides:

Everyone has the right not to be arbitrarily detained or imprisoned.

[20] To comply with this right, a police officer must have reasonable and probable grounds for making an arrest. The question of reasonable and probable grounds, considered in the context of an arrest, is discussed in *R. v. Storrey*, [1990] 1 S.C.R. 241. Cory J., for the Court, explained, at pages 250 to 251:

In summary, then, the *Criminal Code* requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a *prima facie* case for conviction before making the arrest.

[21] In assessing whether that test is met, the “cumulative effect” of the whole of the evidence must be considered (*Storrey*, at page 251; *R. v. Nolet*, 2010 SCC 24, [2010] 1 S.C.R. 851, at paragraph 48). In *Mugesera v. Canada (Minister of*

Citizenship and Immigration), 2005 SCC 40, [2005] 2 S.C.R. 100, the majority reiterated that more than mere suspicion is required, and summarized:

[114] ... In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information

[22] In *R. v. Golub* (1997), 117 C.C.C. (3d) 193 (Ont. C.A.), Doherty J.A., for the Court, referenced the dynamics at play in the context of an arrest:

[18] ... In determining whether the reasonableness standard is met, the nature of the power exercised and the context within which it is exercised must be considered. The dynamics at play in an arrest situation are very different than those which operate on an application for a search warrant. Often, the officer's decision to arrest must be made quickly in volatile and rapidly changing situations. Judicial reflection is not a luxury the officer can afford. The officer must make his or her decision based on available information which is often less than exact or complete. The law does not expect the same kind of inquiry of a police officer deciding whether to make an arrest that it demands of a justice faced with an application for a search warrant.

...

[21] In deciding whether reasonable grounds exist, the officer must conduct the inquiry which the circumstances reasonably permit. The officer must take into account all information available to him and is entitled to disregard only information which he has good reason to believe is unreliable

[23] In this case, a review of the trial judge's decision leads to the conclusion that he misapprehended the evidence when he neglected to consider the whole of the evidence in context, particularly given the significant background information on which the officers were relying when they stopped the Jeep Compass and arrested the Respondents. These errors led the judge to conclude that the police officers did not have the required objective grounds to arrest the Respondents.

[24] Because there had been a series of break and enters into pharmacies in the area, with the theft of drugs, the police in the region had taken action to collect information to be used in the apprehension of the offenders. The officers had reason to believe that the same persons were involved in the break and enters given the similarities in how they were executed. The focus of the police was evident on the morning of the Tricon Pharmacy break and enter when three additional police officers were called to report for duty in the early morning hours after the alarm had been triggered. The officers were satisfied this was not a false alarm given that three sensors had been triggered.

[25] One of the arresting officers, Constable Francis, had previously prepared an internal police bulletin, which was shared with the other officers, outlining information regarding the break and enters and related investigations. The other arresting officer, Corporal Butler, testified that he was familiar with the bulletin, which was entered into evidence.

[26] In preparing the bulletin, Constable Francis testified that he was aware of an interprovincial drug trafficking investigation in which wiretap authorizations had been obtained where Mr. Summers was a target. Using the wiretaps, Constable Francis produced transcripts of recordings of Mr. Summers' conversations regarding pharmacy break and enters, including the method of operating. In particular, multiple people and more than one vehicle were involved when a break and enter was committed. During their investigations, the police also had reason to suspect a link between Mr. Summers and a blue Jeep Compass with licence HNS 488. All this information formed part of the cumulative evidence on which the officers were relying when the Respondents were arrested.

[27] The trial judge dismissed the wiretap evidence as irrelevant because there was no indication from that evidence that any of the Respondents planned to break into Tricon Pharmacy. At the same time, the judge stated in his decision that he was satisfied from the wiretap evidence that:

There is no doubt that the police, at the time, would have had, obviously, knowledge that Mr. Summers had been involved in previous break and enters of a similar type. The circumstances, in terms of what occurred at the pharmacy in Musgrave Town were suspicious. There is nothing in the wiretap observations, however, that would have indicated in any way, shape or form, that Mr. Summers or any of the co-accuseds were planning to break into the Tricon Pharmacy.

The court has to conclude that there would have been no mention whatsoever of the Tricon Pharmacy in the wiretaps; otherwise one would have expected that the Crown certainly would have brought this information forward. So, up to the point of 6:30 a.m., what exactly ties either Mr. Summers or Mr. Summers' vehicle, this blue Jeep Compass to the crime? The alarm went off at 4:20, this particular Jeep was confirmed at 6:30, two hours and ten minutes later. It was by that point nowhere near the area where the break and enter occurred. There is nothing in any information whatsoever that the police would have [that] indicated that Mr. Summers and/or the co-accuseds were intending or planned to break into this particular pharmacy.

So, the pursuit of the blue Compass, blue Jeep Compass, essentially, begins at 6:30 when it's observed to be being operated by a female driver. The vehicle was followed for some 35 minutes prior to being finally stopped ...

[28] This demonstrates a failure by the judge to consider the cumulative effect of the whole of the evidence. The wiretap evidence was intended to provide context, in particular regarding the group's manner of breaking into pharmacies. The police gleaned from the wiretaps that Mr. Summers worked with others and used two vehicles. Further, the internal police bulletin stated "it is suspected that Mr. Summers et al. will attempt to break into another pharmacy in the near future".

[29] More importantly, the judge ignored the evidence of the early identification and pursuit of a blue Jeep Compass and a black Dodge Ram by the various officers, together with the difficulties they encountered in attempting to stop the vehicles which were travelling at a high rate of speed away from Old Perlican. This amounted to a mistake as to the substance of the evidence and a failure to give proper effect to the evidence.

[30] The error relates, at least partially, to the trial judge's misapprehension of Constable Clarke's evidence regarding identification of the Jeep Compass. The information on which the police relied referred to a blue Jeep Compass which was travelling towards the intersection with the Highway at a very high rate of speed, and which did not slow or stop when pursued by a marked police car with emergency lights activated. The judge drew a distinction between a "dark Jeep Compass" and a "blue Jeep Compass". In fact, the officer never referred to a dark Jeep Compass. This distinction, which was not based on the evidence, appeared to be an important factor in the trial judge's analysis due to the significance he placed on the police officers' identification of the vehicle.

[31] The trial judge also made an incorrect assumption that it was dark when the Jeep Compass and Dodge Ram were first seen by Corporal Clarke. In fact, it was June 22, and the Corporal testified that it was daylight when he observed the vehicles. Further, none of the officers testified as to any difficulty in identifying the two vehicles that were the subject of the pursuit. While the police lost sight of the vehicles at times, there was virtually no traffic and they were able to re-establish contact as the Jeep travelled at a high rate of speed on a route anticipated by the police, and the Dodge Ram was located abandoned. The trial judge's comment that he would have expected that those attempting to avoid detection would not necessarily choose the most obvious route is pure speculation, and not a reason on which to question the officers' testimony.

[32] In summary, the trial judge failed to take account of factors such as the police officers' familiarity with the area and traffic routes, as well as their training and experience in assessing the Respondents' likely escape routes, identifying vehicles, and observing details such as the colour and make of a vehicle.

[33] The trial judge expressed concern with the location and the manner in which the Jeep Compass was finally stopped. He referred to other places where he thought the Jeep could have been stopped, commenting, "I don't see any rationale or justifiable rationale for not attempting to at least stop the vehicle in the usual manner". This ignores two considerations. First, the police had tried earlier to stop the speeding vehicles which did not slow or stop, but continued on at a rate too fast for the police to catch up.

[34] Second, the trial judge failed to consider the whole of the circumstances from the perspective of "a reasonable person placed in the position of the officer" (*R. v. Storrey, supra*, at page 251). This assessment must take account of the knowledge and experience attributable to a police officer. In *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 S.C.R. 250, Moldaver J., for the majority, commented:

[62] Officer training and experience can play an important role in assessing whether the reasonable suspicion standard has been met. Police officers are trained to detect criminal activity. That is their job. They do it every day. And because of that, "a fact or consideration which might have no significance to a lay person can sometimes be quite consequential in the hands of the police"

[35] Further, Moldaver J. cautioned that, while a police officer's testimony must not be "accepted uncritically" by the courts:

[65] ... it is equally vital that the police be allowed to carry out their duties without undue skepticism or the requirement that their every move be placed under a scanning electron microscope.

While *MacKenzie* addressed the standard of "reasonable suspicion", Moldaver J. also referenced the equal application of the principle to the standard of reasonable and probable grounds necessary to support an arrest.

[36] In this case, the trial judge concluded:

So, essentially what we have, in my view at least, is an assumption by the police, given the fact that Mr. Summers had been involved in previous break and enters, and that Mr. Summers had a blue Jeep Compass and that vehicle had been

observed in Mr. Summers driveway, that when this blue Jeep Compass was observed at 6:30 a.m. on Veterans Memorial Highway, that one, this Jeep Compass had been involved in the break and enter at Tricon; two, that the vehicle would not stop if the police attempted to conduct a stop in the usual course. And to be quite frank, I don't find on an objective basis that any of these beliefs were sustainable. I find it a rather great leap of faith on the police part to assume that one, this vehicle was involved in the break and enter, having no nexus of time and place, two, that Mr. Summers would in fact be in the vehicle, and three, that it could not be stopped in the usual fashion.

I find that the police conduct in this particular case was cavalier and potentially quite dangerous. Therefore, I do find that there was a breach of the accuseds' rights under s. 9 and the court must consider s. 24(2).

[37] Read in light of all the above, this summary by the trial judge clearly misapprehends the evidence by failing to consider relevant, material evidence, mistaking the substance of some of the evidence, and failing to give proper effect to the whole of the evidence.

[38] In the result, I am satisfied that the trial judge erred in concluding that the police did not have reasonable and probable grounds to arrest the Respondents. Considering the cumulative effect of the whole of the evidence, it is clear that the arresting officers, Corporal Butler and Constable Francis, subjectively had reasonable and probable grounds for making the arrests and that those grounds were justifiable from an objective point of view.

Manner of the Arrests

[39] Regarding the manner of the arrests, reviewing the conduct of the police requires a consideration of whether the officers acted reasonably given the circumstances known to them at the time. In addition to the comments cited above from the decision in *MacKenzie*, I would refer to the discussion regarding the review of an unannounced, forced entry in *R. v. Cornell*, 2010 SCC 31, [2010] 2 S.C.R. 142. Cromwell J., for the majority, explained:

[22] The main question is whether the police had reasonable grounds for concern to justify use of an unannounced, forced entry while masked in this case. ...

[23] First, the decision by the police must be judged by what was or should reasonably have been known to them at the time, not in light of how things turned out to be. Just as the Crown cannot rely on after-the-fact justifications for the search, the decision about how to conduct it cannot be attacked on the basis of circumstances that were not reasonably known to the police at the time Whether there existed reasonable grounds for concern about safety or destruction of evidence must not be viewed "through the 'lens of hindsight'"

[24] Second, the police must be allowed a certain amount of latitude in the manner in which they decide to enter premises. They cannot be expected to measure in advance with nuanced precision the amount of force the situation will require It is often said of security measures that, if something happens, the measures were inadequate but that if nothing happens, they were excessive. These sorts of after-the-fact assessments are unfair and inappropriate when applied to situations like this where the officers must exercise discretion and judgment in difficult and fluid circumstances. The role of the reviewing court in assessing the manner in which a search has been conducted is to appropriately balance the rights of suspects with the requirements of safe and effective law enforcement, not to become a Monday morning quarterback.

This approach applies equally to arrests such as took place in this case.

[40] In *R. v. Nasogaluak*, 2010 SCC 6, [2010] 1 S.C.R. 206, LeBel J., for the Court, discussed the use of force by the police where Mr. Nasogaluak had been injured:

[32] ... But police officers do not have an unlimited power to inflict harm on a person in the course of their duties. While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. ...

[41] Applying these principles to this case, considering all the circumstances, this was a situation where caution was indicated. The Jeep was found travelling away from Tricon Pharmacy where an alarm had been triggered, on one of only two possible routes, and at a very high rate of speed, clearly acting so as to elude the police. The police had reasonable grounds to believe that Mr. Summers, along with some companions, was involved in the suspected break and entry. Firearms are frequently present when quantities of drugs are involved, such as could be expected following a break and enter into a pharmacy. There were four people in the Jeep each of whom could have had access to a weapon, attempted to flee or interfered with the arrest of the others. I am satisfied that the police acted reasonably in setting up a road block, approaching the Jeep with their firearms drawn, and requiring the occupants of the Jeep to lie face-down on the ground while they were handcuffed.

[42] In the circumstances, the actions of the police officers were consistent with the principles of proportionality, necessity and reasonableness. The trial judge erred when he failed to apply a standard of reasonableness to their conduct, measured in light of the whole of the evidence.

Summary

[43] In summary, in finding that the police did not have reasonable and probable grounds to make the arrests and that the manner in which the arrests were made was unreasonable, the trial judge erred by misapprehending the evidence. The misapprehension of the evidence, leading to exclusion of the evidence, was central to his decision and clearly had a material bearing on the acquittals (*R. v. Graveline, supra*, at paragraph 14).

SUMMARY AND DISPOSITION

[44] The trial judge erred in finding that the arresting officers did not have reasonable and probable grounds to arrest the Respondents, and in determining that the manner in which the arrests were made was unreasonable. There is no basis on which to conclude that the Respondents' rights under section 9 of the *Charter* were breached. Accordingly, there is no basis on which to exclude the evidence pursuant to section 24(2) of the *Charter*.

[45] In the result, I would allow the appeal and order a new trial.

B. G. Welsh J.A.

I Concur: _____

F. P. O'Brien J.A.

I Concur: _____

W. H. Goodridge J.A.