



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

**Citation:** *R. v. Kinsella*, 2022 NLCA 40

**Date:** June 30, 2022

**Docket Number:** 201901H0092

**BETWEEN:**

HER MAJESTY THE QUEEN

as represented by the Attorney General of Canada      APPELLANT

**AND:**

PATRICK KINSELLA

RESPONDENT

**Coram:** Fry C.J.N.L., Hoegg and Goodridge JJ.A.

**Court Appealed From:** Provincial Court of Newfoundland and Labrador  
St. John's, 2018-1418019

**Appeal Heard:** March 17, 2022

**Judgment Rendered:** June 30, 2022

**Reasons for Judgment by:** Hoegg J.A.

**Concurred in by:** Fry C.J.N.L. and Goodridge J.A.

**Counsel for the Appellant:** Scott Millar

**Counsel for the Respondent:** Brian D. Wentzell

## Authorities Cited:

**CASES CITED:** *R. v. Tim*, 2022 SCC 12; *R. v. Shepherd*, 2009 SCC 35, [2009] 2 SCR 527; *R. v. Graveline*, 2006 SCC 16, [2006] 1 SCR 609; *R. v. Stillman*, [1997] 1 SCR 607; *R. v. Caslake* [1998] 1 SCR 607; *R. v. Storrey*, [1990] 1 SCR 241; *R. v. Debot*, [1989] 2 SCR 1140; *R. v. Santos*, 2022 SKCA 50; *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 SCR 250; *R. v. Yeh*, 2009 SKCA 112; *R. v. Day (R.)*, 2014 NLCA 14, 349 Nfld. & P.E.I.R. 1; *R. v. Al-Amiri (H.)*, 2015 NLCA 37, 368 Nfld. & P.E.I.R. 146; *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100; *R. v. Chehil*, 2013 SCC 49, [2013] 3 SCR 220; *R. v. Sanchez*, (1994) 93 C.C.C. (3d) 357 (Ont. Ct. (Gen. Div.)), 20 O.R. (3d) 468; *R. v. Vu*, 2013 SCC 60, [2013] 3 SCR 657.

**STATUTES CONSIDERED:** *Controlled Drugs and Substances Act*, SC 1996, c 19, sections 5(1), 5(2); *Canadian Charter of Rights and Freedoms*, sections 8, 9, 24(2), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11; *Criminal Code*, RSC 1985, c C-46, sections 495 (1)(a), 676(1)(a).

**Hoegg J.A.:**

## INTRODUCTION

[1] This appeal concerns the reasonable grounds required for arrest.

[2] On September 21, 2018, an RCMP officer arrested Patrick Kinsella for the indictable offences of trafficking cannabis marihuana, and possession for the purpose of trafficking cannabis marihuana, in violation of sections 5(1) and (2) of the *Controlled Drugs and Substances Act*, SC 1996, c 19, (“CDSA”). Mr. Kinsella was arrested outside of the Canada Post office on Water Street, St. John’s, Newfoundland and Labrador, and searched incident to the arrest. A box containing approximately 13 pounds of cannabis was found on his person. It was seized, and the Crown sought to introduce it into evidence at his trial.

[3] Mr. Kinsella sought to exclude the box of cannabis from the evidence on the basis that it was obtained in violation of his sections 8 and 9 *Charter* rights (*Canadian Charter of Rights and Freedoms*, ss. 8, 9, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11). After a *voir dire*, the trial Judge ruled that Mr. Kinsella’s section 9 *Charter* right not to be arbitrarily detained had been violated because the officer’s grounds for arrest

were not objectively reasonable, which in turn rendered the search of his person unreasonable in violation of his section 8 *Charter* right. The Judge went on to exclude the evidence under section 24(2) of the *Charter*. Without the evidence, the Crown's case collapsed, and Mr. Kinsella was acquitted.

[4] The Crown appeals, alleging that the Judge erred in law in finding that the investigating officer did not have reasonable grounds to arrest Mr. Kinsella, and by excluding the box of cannabis from the evidence.

[5] For the reasons that follow, I would allow the appeal. It is my view that in the totality of the circumstances, the investigating officer did have reasonable grounds to arrest Mr. Kinsella, and that the Judge erred in not so finding. Given my conclusion on that issue, it is not necessary to consider the Crown's section 24(2) argument.

### **The Judge's Decision**

[6] Corporal David Emberley was the investigating officer who arrested Mr. Kinsella. In ruling that Corporal Emberley's grounds for arrest were not reasonable, the Judge stated:

There are a number of factors that might be considered suspicious, but there was nothing that pointed specifically to drug activity. It appears actually on review of the evidence of Mr. Goodyear as brought forward by Corporal Emberley. That is the reason Canada Post did not search the parcel, absent a specific finding such as smell that would identif[y] the parcel as being linked to drug activity. I found as a result that there was no valid basis for arrest for the search and as a result there was a breach of the accused[']s Section 8 and 9 *Charter Rights*. (Appeal Book, Volume 1, Tab 3, at 14, lines 12-20 (*Charter* decision ss. 8 and 9))

### **The Appeal**

[7] Corporal Emberley's subjective belief that he had reasonable grounds to arrest Mr. Kinsella is not contested. What is contested is whether Corporal Emberley's grounds for arresting Mr. Kinsella were objectively reasonable. The Crown says that they were, and that the Judge erred by piecemealing them rather than considering them cumulatively. The Crown also argues that the Judge discounted Corporal Emberley's grounds for arrest because he had not been qualified as an expert, and that the Judge relied on Canada Post's decision not to search the box because it did not smell of cannabis when deciding Mr. Kinsella's *Charter* application.

[8] Mr. Kinsella submits that the Judge committed none of these errors. He argues that the Judge's comment about Corporal Emberley not being qualified as an expert is of no consequence, that the Judge did not piecemeal the evidence, and that he did not rely on Canada Post's decision not to search the box. Rather, Mr. Kinsella says, the Judge simply found that Corporal Emberley's grounds were insufficient to support his arrest.

## **ISSUE**

[9] Were Corporal Emberley's grounds for arresting Mr. Kinsella objectively reasonable?

## **BACKGROUND AND DISCUSSION**

[10] Corporal Emberley is a police officer whose training and experience has often qualified him as an expert in matters related to drug prosecutions. In this case, he was not qualified as an expert witness. Rather, he testified as the officer investigating a complaint of a crime.

[11] Corporal Emberley testified that on September 21, 2018 he received a call from a Canada Post employee that a box suspected to contain drugs had been identified at the St. John's Canada Post depot, and that it was the seventh such box that had gone through Canada Post in St. John's in as many weeks. The employee advised Corporal Emberley that the seven boxes were new Home Depot boxes addressed to Patrick Kinsella from John Kinsella, whose return address was Vancouver, British Columbia. The employee further advised that the seven boxes had been requested by the sender (through Canada Post Flex) to be delivered to at least six and maybe seven different postal stations for pick up in the St. John's and Mount Pearl area (the evidence was uncertain respecting whether the boxes were to be sent to six or seven different postal stations for delivery).

[12] Corporal Emberley testified that he had been previously contacted by Canada Post (on September 13, 2018) respecting the sixth such box addressed to Mr. Kinsella, which the Canada Post employee thought was suspicious. However, Corporal Emberley did not have the resources available to deal with the Canada Post complaint at that time, so he advised Canada Post to let the box be delivered as addressed.

[13] When Corporal Emberley received the call from the Canada Post employee respecting the seventh box on September 21, 2018, he did have resources available to handle the complaint, and he proceeded to the Canada

Post depot to see the box himself. He described seeing a Home Depot box addressed to Patrick Kinsella from John Kinsella in Vancouver, British Columbia. He saw that the seams of the box were taped on all sides, and said that in his experience, taping the seams of packages is a technique used by persons sending drugs by post or courier to prevent the strong smell of cannabis emanating from the packages. Corporal Emberley also stated that he had been informed by the Canada Post employee that Home Depot boxes attract attention in the postal system because they are uncommon; they are uncommon because most packages are marked as coming from commercial or business senders or vendors such as Amazon.

[14] Corporal Emberley testified that the box's weight to volume ratio suggested that it contained a light-weight material, such as cannabis. He also said that the box had been sent by overnight post, and that in his experience, overnight post, although expensive, was used by persons sending parcels of drugs so as to minimize the length of time such parcels would be in the postal system, which in turn reduced the chances of detection. As well, Corporal Emberley said that British Columbia was a province from which much cannabis was known to be exported to Newfoundland and Labrador.

## ANALYSIS

### The Law

[15] A police officer may arrest a person without a warrant if they have reasonable grounds to believe the person has committed or is about to commit an indictable offence (*Criminal Code*, s. 495 (1)(a)). Reasonable grounds involve an arresting officer's belief, on reasonable grounds, that an offence has been or is about to be committed.

[16] The Crown's right to appeal an acquittal is limited to a question of law alone (section 676(1)(a) of the *Criminal Code*, RSC 1985, c C-46). It is well established that whether the grounds on which an officer relies to effect an arrest are reasonable is a question of law, for which the standard of review is correctness (*R. v. Tim*, 2022 SCC 12, at para. 25; and *R. v. Shepherd*, 2009 SCC 35, [2009] 2 SCR 527, at para. 20). Further, if it is determined that an error of law was made, the error must be one that "in the concrete reality of the case" might reasonably have had "a material bearing on the acquittal" (*R. v. Graveline*, 2006 SCC 16, [2006] 1 SCR 609, at para. 14).

[17] It is settled law that an officer may search a person incident to arrest provided the officer has the requisite reasonable grounds for arrest (*R. v. Stillman*, [1997] 1 SCR 607 at paras. 633-634, and *R. v. Caslake*, [1998] 1 SCR 607, at 60-62, 66).

[18] Every case involves different facts, so what constitutes reasonable grounds for arrest differs from case to case. In *R. v. Storrey*, [1990] 1 SCR 241, the Supreme Court of Canada stated that reasonable grounds for a warrantless arrest comprises both subjective and objective grounds (250-251). The arresting officer must honestly believe he has grounds for arrest, and the grounds must actually exist and be justifiable from an objective point of view (250). In *R. v. Debot*, [1989] 2 SCR 1140, the Supreme Court of Canada stated the objective grounds must be based on the totality of the circumstances known to the officer (1168). This principle was endorsed in *Tim*, wherein the Court stated, “the objective assessment is based on the totality of the circumstances known to the officer at the time of arrest...” (para. 24). (See also *R. v. Santos*, 2022 SKCA 50 at para. 29).

[19] The reasonableness of a police officer’s grounds was considered by the Supreme Court of Canada in *R. v. MacKenzie*, 2013 SCC 50, [2013] 3 SCR 250, which involved assessing the officer’s grounds on the lesser standard of reasonable suspicion. The officer in *MacKenzie* was very experienced, and his training and experience informed his evaluation of the circumstances which led to his reasonable suspicion. In ruling that the officer’s training and experience can be taken into account without qualifying the witness as an expert for the purposes of giving opinion evidence, the Court cited with approval the following from *R. v. Yeh*, 2009 SKCA 112, at para. 57:

... it should be underlined that, in order to take into account a police officer’s training and experience in these sorts of matters, it is not necessary that the officer have the qualifications of an “expert” in the technical sense of being someone entitled to give opinion evidence. (*MacKenzie*, at para. 57) (underlining in original)

[20] The Court went on to reject the argument that the reasonable suspicion standard means that such suspicion must be reasonable to the ordinary person, saying:

[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” (*Yeh*, at para. 53). (See also para. 60)

[21] Accordingly, an experienced officer investigating a particular crime can give evidence which is informed by the officer's training and experience. Just as there is no requirement for an officer to be qualified as an expert in order to testify to matters within his training and experience, there is no requirement for an officer who could be or frequently is qualified as an expert to divorce himself from his training and experience in the course of conducting an investigation or in giving evidence. Rather, such an officer's training and experience can inform his assessment of whether reasonable grounds for arrest exist "as seen from the perspective of a reasonable person with comparable knowledge, training, and experience as the arresting officer" (*Tim*, at para. 24). Neither is a court required to accept without question such an officer's evidence because the officer is more experienced, knowledgeable, or trained in the subject matter in issue. As Justice Moldaver said in *Mackenzie*, an officer's testimony must not be "accepted uncritically" by the courts, neither should it be considered with undue skepticism or placed under a "scanning electron microscope" (paras. 64-65).

[22] In *Tim*, which involved reasonable grounds for a warrantless arrest, the Supreme Court of Canada recently confirmed the principles respecting reasonable grounds in *Storrey*, and *MacKenzie*, at paragraphs 23-25. Further in *Tim*, the Court stated that an objective assessment of the totality of the circumstances known to the officer at the time of an arrest includes consideration of the dynamics of the situation, as seen from the perspective of a reasonable person with comparable knowledge, training and experience as the arresting officer (para. 24). See also *R. v. Day (R.)*, 2014 NLCA 14, 349 Nfld. & P.E.I.R. 1, wherein this Court applied the above principles in determining whether an officer had reasonable grounds to effect an arrest, and *R. v. Al-Amiri (H.)*, 2015 NLCA 37, 368 Nfld. & P.E.I.R. 146, wherein this Court applied the above principles in determining whether reasonable grounds existed for obtaining a search warrant.

[23] The "reasonable grounds to believe" standard can be difficult to describe. In *Mugesera v. Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100, the Supreme Court of Canada described it as "something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities" (para. 114). In *R. v. Chehil*, 2013 SCC 49, the Supreme Court of Canada stated that the reasonable grounds to believe standard engages the probability of crime (para. 27). See also *R. v. Sanchez*, (1994) 93 C.C.C. (3d) 357 (Ont. Ct. (Gen. Div.)), 20 O.R. (3d) 468, wherein the standard of reasonable grounds was described as grounds "of reasonable or

credibly based probability [which] envisions a practical, non-technical and common sense probability as to the existence of the facts and inferences asserted” (367), quoted with approval in *R. v. Vu*, 2013 SCC 60, [2013] 3 SCR 657, on a related matter (para. 16). While probability is engaged, the jurisprudence does not require, nor suggest, that reasonable grounds must be proved on a balance of probabilities.

### **The Crown’s Arguments**

#### ***Corporal Emberley – an expert or an investigating officer?***

[24] The Crown argues that the Judge discounted Corporal Emberley’s grounds for arrest because he had not been qualified as an expert. In rendering his decision that Mr. Kinsella’s sections 8 and 9 *Charter* rights were violated because Corporal Emberley did not have reasonable grounds to arrest him, the Judge noted that Corporal Emberley had not been qualified as an expert when he gave his evidence, saying:

I would note that Corporal Emberley was not qualified as an expert witness. Police officers can testify in some circumstances based on their experience as set out in *Chehil*. (Appeal Book, Volume 1, Tab 3, at 12, lines 3-6 (*Charter* decision on ss. 8 and 9))

[25] It is difficult to know why the Judge made this statement or what he meant by it. The context of the Judge’s remarks is not helpful, and he did not say anything further about Corporal Emberley or how the officer formulated his grounds.

[26] On its face, the statement appears to be a simple observation. While observations generally are made for a reason, the circumstances of the Judge’s comment do not show that he regarded Corporal Emberley’s evidence negatively or differently, or discounted it, because he was not qualified as an expert. Accordingly, I would not give effect to this ground of appeal.

#### ***The Judge’s reliance on Canada Post’s decision***

[27] The Judge stated in his decision of July 18, 2019 that Canada Post’s reason for not opening the box was because it did not smell of cannabis. As noted in paragraph 6 above, he referenced that Canada Post did not authorize a search of the box because there was no smell from it which would link the box to drug activity. The Judge then said, “I found *as a result* that there was no



valid basis for arrest or the search...”. (emphasis added) (Appeal Book, Volume 1, Tab 3, at 14, lines 18-19 (*Charter* decision on ss. 8 and 9)).

[28] It is clear that the Judge found no valid basis for the search “as a result” of Canada Post’s decision not to open the box because there was no smell coming from it, and therefore that Corporal Emberley’s grounds for arresting Mr. Kinsella were not reasonable. He also stated the absence of a “specific finding such as smell that would identi[fy] the parcel as being linked to drug activity”, as a reason for his ruling (Appeal Book, Volume 1, Tab 3, at 14, lines 17-18 (*Charter* decision ss. 8 and 9)). The Judge’s reasoning in this regard is reinforced by his remarks respecting Corporal Emberley’s proceeding to arrest Mr. Kinsella while aware that “Canada Post did not agree that there was a basis to search the package” (Appeal Book, Volume I, Tab 4, (*Charter* decision s. 24(2))).

[29] A word about the evidence respecting Canada Post. As described above, a Canada Post employee informed Corporal Emberley of his suspicion that a box addressed to Patrick Kinsella might contain illegal drugs. The employee said it was the seventh such box sent to Mr. Kinsella from British Columbia in as many weeks, so he sought permission from his supervisor in Ottawa to open the box. Permission was denied because there was no smell of cannabis coming from it. Nevertheless, the employee contacted the RCMP about his concern.

[30] Canada Post is a creature of statute. Its governing legislation specifies protocols and requirements respecting if and when a posted package that presents concern can be opened. Whatever these requirements and protocols are, they do not determine whether Corporal Emberley had reasonable grounds to arrest Mr. Kinsella.

[31] An arresting officer must decide on his own whether he subjectively believes a crime is being committed and whether his grounds for so believing are objectively reasonable. If he is content with his belief and his grounds, as Corporal Emberley was in this case, the officer carries out the arrest in the knowledge that his grounds can be challenged for their reasonableness and subjected to judicial scrutiny in the course of the trial process.

[32] Simply put, it is all well and good for Canada Post to refuse to authorize the opening of a parcel on the basis that there was no smell coming from it, but Canada Post’s decision does not determine whether an officer’s grounds for arresting an individual are reasonable.

[33] The Judge's specific reference to Canada Post's decision not to authorize opening the package because it did not smell shows that he was strongly influenced by Canada Post's reasoning that the absence of smell meant that the search of the impugned box should not take place. Insofar as the Judge can be said to have relied on Canada Post's decision not to search the box to support his own conclusion that Corporal Emberley's grounds for arrest were not reasonable, he was in error.

***Piecemealing the evidence***

[34] It could also be said that rather than relying on Canada Post's reasoning, the Judge simply agreed with Canada Post's reasoning and adopted it as his own, because it appears that the Judge agreed that the absence of smell from the box was sufficient to negate Corporal Emberley's reasonable grounds for arresting Mr. Kinsella.

[35] Smell is a factor known to be associated with cannabis. However, there is no requirement that smell must be present in order for the grounds to arrest a person for trafficking in cannabis to be adjudged reasonable. Likewise, the absence of smell does not negate the reasonableness of grounds for such an arrest. In any event, the Judge did not restrict his reasoning to the absence of smell; he elaborated by saying there was nothing in Corporal Emberley's grounds "that pointed specifically to drug activity" or that "would identif[y] the parcel as being linked to drug activity" (Appeal Book, Volume 1, Tab 3, at 14, lines 13-14, 17-18 (*Charter* decision ss. 8 and 9)).

[36] The Judge's reasoning amounts to holding that something "that points specifically to drug activity" is required in order for an officer's grounds for arrest to be adjudged reasonable. There is no requirement that a factor pointing specifically to drug trafficking, like smell in a cannabis trafficking case, be present in order for the grounds for arrest to be reasonable. Neither is there a requirement for a specific factor to be present in order for the grounds for arrest respecting any other criminal offence to be reasonable. Although it could be that the presence of a particular factor might be so obviously associated with a particular crime that it is determinative of reasonable grounds for arrest, it is not the presence or absence of any one factor on its own that determines reasonableness. It is the totality of the circumstances — all of the grounds and circumstances taken together — that must be considered in evaluating the reasonableness of grounds for arrest (*Tim, Day, and Debot*). (See also *Santos*, at paragraphs 26 and 29(e) (f) and (g)). Further, to require that a factor pointing specifically to the criminal activity in issue must exist in order for grounds for

arrest to be adjudged reasonable not only sets the standard well above that which is well established in the jurisprudence, but it defies common sense. It defies common sense because criminals, like traffickers of cannabis, are not likely to leave behind visible clues pointing specifically to the particular criminal activity in which they are engaged.

[37] Additionally, as Corporal Emberley explained, cannabis traffickers have become adept at masking the pungent smell of cannabis when transporting it by taping the seams of the packages containing it and vacuum sealing the drugs. As a matter of logic, if the absence of smell is a consideration, so too, is evidence respecting the masking of smell, like taping and possible vacuum sealing. It does not appear that the Judge factored Corporal Emberley's evidence in this regard into his decision.

[38] In the result, the Judge erred in deciding that Corporal Emberley's grounds for arrest were not reasonable because there was no smell from the box nor any other factor that pointed specifically to drug trafficking. In so doing, he failed to consider the totality of the circumstances respecting Corporal Emberley's grounds for arrest.

### **Evaluation of Corporal Emberley's grounds**

[39] It now falls to this Court to determine whether Corporal Emberley's grounds for arresting Mr. Kinsella were reasonable.

[40] Corporal Emberley's evidence was that the box was the seventh Home Depot box sent by post to Mr. Kinsella from John Kinsella in British Columbia in as many weeks. Further, the seven boxes were to be delivered to Mr. Kinsella at either six or seven different postal stations within the St. John's region. These facts alone deserve considerable weight in the consideration of whether Corporal Emberley's grounds to arrest Mr. Kinsella were reasonable, because the likelihood of Mr. Kinsella changing addresses to receive an ostensibly personal package six or seven times within seven weeks is questionable.

[41] Other grounds stated by Corporal Emberley were that the seams of the box examined by him were taped on all sides, which could suggest an attempt to mask the smell of cannabis, and that the volume the box could hold relative to its light weight suggested that its contents were very light in weight, like cannabis. Further, the fact that the box had been sent from British Columbia, a province from which drugs were well known to be exported to Newfoundland

and Labrador and sent by overnight express, also informed Corporal Emberley's grounds.

[42] In my view, Corporal Emberley's grounds for arrest, taken together in the totality of the circumstances "including the dynamics of the situation" (*Tim*, at para. 24), were reliable and objectively capable of supporting his belief that Mr. Kinsella was committing the offences charged. Corporal Emberley's arrest of Mr. Kinsella and the search of his person incident to the arrest were lawful.

[43] Accordingly, I am of the view that there was no breach of Mr. Kinsella's section 8 or 9 *Charter* rights, and that the box of cannabis was admissible evidence at trial. In the result, I would allow the appeal, and remit the matter to Provincial Court for trial.

[44] Given the above decision, it is not necessary to deal with the Crown's appeal respecting the Judge's decision to exclude the box of cannabis under section 24(2) of the *Charter*.

## **DISPOSITION**

[45] I would allow the appeal and remit the matter to the Provincial Court for trial.

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L. R. Hoegg J.A.

I concur:

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D. E. Fry C.J.N.L.

I concur:

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W. H. Goodridge J.A.