ONTARIO COURT OF JUSTICE

CITATION: *R. v. S*█, 2019 ONCJ 821
DATE: 2019 11 14
COURT FILE No.: Toronto 17-15010101

2019 ONCJ 821 (CanLII)

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

A█ S█

Before Justice Patrice F. Band
Reasons for Judgment
November 14, 2019

Mr. A. Gibbons ....counsel for the Crown
Mr. M. Montes ....counsel for Mr. S█

BAND J.:

I. INTRODUCTION

1. Mr. S█ stood trial on charges of impaired operation, "Over 80" and "theft under."[1] It was a run-of-the mill matter in which the central issue was the impact on Mr. S█'s rights of the delay surrounding the approved screening device ("ASD") demand and its arrival on scene. Yet, the police testimony in this case was troublesome and left me with serious concerns. The police officers involved in this relatively simple roadside investigation had different recollections of the reasons for Mr. S█'s arrest and the time at which it took place. It is impossible to determine the time of arrest in this case with any satisfying degree of confidence. That, in my experience, is unusual in a case of this nature. Based on the officers' evidence, it is also difficult to determine what Mr. S█ was told about the reasons for his arrest. Most importantly, the arresting officer

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[1] During the trial, Mr. S█ conceded that the Crown had proved the theft charge beyond a reasonable doubt. Once that was done, the Crown invited me to dismiss the charge as he was not seeking a conviction for it.

displayed a profound misunderstanding concerning what triggers the right to counsel and the content of that right. Her notetaking regarding these important matters was poor and her testimony was at times convoluted and difficult to follow – especially surrounding Mr. S█'s utterances and the times at which important things happened.

2. I have already told the parties that the charges against Mr. S█ are dismissed. These are my reasons.

II. BRIEF OVERVIEW OF THE EVIDENCE AND PROCEDURE

3. During the evening of December 22, 2017, three police officers were patrolling the area of Queen Street West on bicycles: PCs McGuire, Josephs and Murphy. Their attention was drawn to a black SUV (the "SUV") that was coming from behind them. They heard honking and turned around. It was dark out and the SUV did not have its headlights on. Also, it made at least one lane change, or pulled over, without signalling, before stopping by the curb outside a Loblaws. The officers decided to investigate for these reasons. Also, earlier in the day, they had heard that a similar black SUV had been involved in an accident and had left the scene. It turns out that it was the same SUV, and it had some damage to its front end.

4. Mr. S█ was the driver. PC McGuire began to investigate and formed a reasonable suspicion. She did not make an ASD demand right away. Also, because she and her colleagues were on bicycles, they did not have an ASD on hand. PC McGuire called for one, which arrived 20 minutes after she made the demand. During that time, Mr. S█ made incriminating admissions: that he was drunk, that he drove because he was less drunk than his friend and that he knew it was a "stupid decision." He also admitted it was "dumb" to steal the beer. I will refer to these utterances as "Mr. S█'s admissions" from this point forward, for simplicity's sake and to distinguish them from earlier utterances going to grounds.

5. When PC McGuire was asking Mr. S█ if he had been drinking, they migrated towards the entrance of a nearby bank along with her two partners. A little while later, after she had made the ASD demand, PC McGuire believed that Mr. S█ was trying to flee because he had taken a few steps away from her while she was speaking to him. So, she decided to handcuff him to the rear. PC McGuire did not advise Mr. S█ of his right to counsel until after he had provided a breath sample into the ASD. According to PC McGuire, this is when she arrested Mr. S█, advised him of his rights and cautioned him. The evidence of PCs Josephs and Murphy suggests that the arrest took place much earlier. In any event, Mr. S█ invoked his right to counsel immediately after being informed of it at the scene. Search incident to arrest at the scene led to the discovery of a baggie with what appeared to be traces of cocaine in it.

6. When Mr. S█ arrived at the division, he was subjected to a strip – or "level three" – search. When PC McGuire called duty counsel on Mr. S█'s behalf at the

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division, duty counsel responded immediately. Thereafter, Mr. S provided breath samples indicating that his BAC was well over the legal limit.

7. The Defence raised a number of *Charter* issues and argued that Mr. S's utterances had not been proved voluntary beyond a reasonable doubt. The trial proceeded in a "blended" fashion. Mr. S did not testify.

8. I will provide a more detailed account of the evidence in the context of the specific issues raised.

III. THE ISSUES

9. The Crown seeks findings of guilt in relation to both driving offences. To assist in proving the impaired driving count, the Crown seeks to rely on Mr. S's admissions. While those were made between the ASD demand and the arrest, the Crown argues that they were both spontaneous and voluntary.

10. The issues in this trial are the following. With respect to the *Charter*, they are whether Mr. S's s. 8, 9 and 10(b) rights were infringed by and during the delays surrounding the ASD. If he was arrested before the ASD demand, the question is whether those same rights were violated, albeit in a different way. Mr. S also argues that he was not properly informed of the reasons for his arrest, contrary to s. 10(a). As a result, Mr. S seeks the exclusion of the breath samples and his admissions, pursuant to s. 24(2) of the *Charter*.

11. On the trial proper, Mr. S conceded that the Over 80 charge is proved beyond a reasonable doubt if the breath samples are admitted. With respect to the impaired driving count, the issue is whether or not the Crown has proved impairment beyond a reasonable doubt. Mr. S argues that there is a reasonable doubt about the voluntariness of the utterances the Crown wishes to rely upon because they were made in an atmosphere of oppression.

A. Evidence surrounding the delay and information provided at the roadside: *Charter* ss. 8, 9 10(a) and (b)

12. PC McGuire first noticed the SUV at around 6:30 p.m. She heard honking from behind her and then saw that its lights were not on and that it did not signal when pulling over to the curb in front of the Loblaws. At approximately 6:32 p.m., Mr. S got out of the driver's side and went up to the Loblaws. She took a look around the SUV and had someone "run" the plate. When information came back about the registered owner, she believed that it was the same SUV they had heard about earlier. The SUV was damaged, just as the dispatcher had said. PC McGuire went to speak to the passenger who was "very very drunk." She asked him about the fail to remain. He seemed nervous. He told her "OK, we got into an accident, but I wasn't driving." At 6:37 p.m., while she was still speaking to the passenger, Mr. S returned holding two six-packs

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of beer. She approached him and he said "I'm just going back to my car." She noticed that he had extremely glossy eyes and that he was slurring. She asked him how much he had to drink. "I'm not drunk," he said. "Ok, but how much alcohol have you had tonight?" she asked. "Four beers." He did not seem to want to talk to her and appeared nervous. All of this made her suspect that he had alcohol in his body. In fact, she had formed her suspicion while she was talking to the passenger, before her conversation with Mr. S█. At that time, it was already "evident to [her] that [she] was dealing with intoxicated individuals." During her conversation with Mr. S█, they "made [their] way" across the sidewalk to the entrance of a bank along with PCs Josephs and Murphy, who stood close by.

13. Because she was not certain of the extent of Mr. S█'s drinking, PC McGuire decided to use an ASD. At 6:46 p.m., she told him she suspected that he was intoxicated and immediately read him the ASD demand. She testified in-chief that she made the demand two minutes after forming her reasonable suspicion. In cross-examination, she agreed that she had formed her suspicion by 6:38 p.m.

14. Mr. S█ said he understood the demand. It was at this time that PC Murphy told PC McGuire that a Loblaws loss prevention officer had advised him that Mr. S█ stole the beer from Loblaws. She left that issue to PC Murphy. Her focus was on the question of Mr. S█'s intoxication.

15. Because they were on bicycles, the officers did not have an ASD on hand. PC McGuire went on the radio to call for one and was told that PCs Sukhdeo and Hoy would deliver it. She did not ask whether they had one with them, where they were or how long it would take. She knew that not every police car had one. But she did not think it would take very long because it was the middle of winter at around 6:30 p.m., traffic should not be as busy as in the summer and all officers know that it is very important to do these things in a timely fashion. So, she knew they would arrive as soon as they could. She did not have notes of telling Mr. S█ how long it might take.

16. PCs Sukhdeo and Hoy were asked for the ASD at 6:48 p.m. They did not have one in their car but decided it would be quickest for them to retrieve one. They went to the division to get one. PC Sukhdeo did not recall where they were at the time, other than being within the boundaries of 14 Division. He could not recall how long it took them to get to the station; it was "not long." En route to the scene, PC Sukhdeo took the steps required to satisfy himself that the ASD was in good working order and prepared it for PC McGuire to use. According to him, they arrived on scene at 7:06 p.m.

17. Early during the wait for the ASD, PC McGuire became concerned that Mr. S█ was trying to flee, as he took a few steps away from her. She decided to cuff him to the rear. PC McGuire did not say what time this took place and could not say how long Mr. S█ was in cuffs prior to the arrival of the ASD. According to PC Josephs, Mr. S█ was cuffed at 6:44 p.m. In examination-in-chief, PC McGuire explained that she did so for his safety but also "because he was detained at that point." In cross-examination, she agreed that another reason was that she did not know how

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long the ASD would take to arrive. Prior to cuffing Mr. S█████, she had never told him where to stand or to stay put. She could not recall whether she gave him a verbal command to remain or whether she only reached out physically when she felt that he began to walk away. Until that point, he had been cooperative. At no point was he rude or belligerent. PC McGuire was never afraid of Mr. S█████, nor did she have reason to suspect that he was carrying weapons.

18. During the wait, PC McGuire wanted to keep conversation going with Mr. S█████; it is “general practice” to do so, “to add to the evidence.” In cross-examination, she said that the investigation was at a “halt” until the ASD arrived; that was the “next step” in her investigation. She also testified that Mr. S█████ made “more admissions” after the ASD demand and that she had noted that he was “having a hard time answering questions.” She agreed that this meant she was asking him questions and he was trying to answer. She later testified that she did not ask him questions; rather, he began to ramble. Yet, her notes also indicate that she asked him about the theft of the beer from Loblaws. She maintained that Mr. S█████’s admissions had not been prompted by any question from her.

19. PC McGuire gave various answers regarding the time at which Mr. S█████ was detained. In chief and in cross-examination, she testified that he was detained by the time she placed him in cuffs. In cross-examination, she agreed that he was detained when she read him the ASD demand.

20. Regarding the delay and the right to counsel, PC McGuire gave the following evidence. She did not ask how long it would take to receive an ASD. Nothing she “could have ascertained would have changed anything” and “nothing was going to change what [she] did.” Whether it was going to take “two minutes or ten,” PC McGuire was “just going to wait.” Between the ASD demand and the arrival of the device, PC McGuire did not turn her mind to the right to counsel because Mr. S█████ had not been placed under arrest. She did not ask Mr. S█████ if he had a cellular phone because “there was no reason to; it was during the wait for the ASD.” (Mr. S█████ had a cell phone on his person or in his satchel, which was seized and searched.)[2] She advised Mr. S█████ of his right to counsel after the ASD test “because that’s when he [was] under arrest.” When asked if there are other times when a person is entitled to be advised of the right to counsel, PC McGuire responded that it is “situational.” In this case, the appropriate time was after Mr. S█████’s arrest.

21. PC McGuire did not note the time at which the ASD arrived. She administered the ASD test at 7:06 p.m., and Mr. S█████’s sample registered a “fail.” She immediately placed him under arrest and advised him of his right to counsel. Mr. S█████ understood and invoked his rights. At 7:07 p.m., she read him the breath demand. During a search incident to arrest she found a small baggie with traces of what she believed was cocaine in the pocket of Mr. S█████’s hoodie.

[2] See evidence of PC Sukhdeo.

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22. According to PC McGuire, she is the only officer who arrested Mr. S████ that evening. She arrested him for "Over 80." PCs Josephs and Murphy agree that PC McGuire was the primary officer involved with Mr. S████. PC Josephs did not arrest Mr. S████, but believed that both PCs McGuire and Murphy had, for impaired driving. PC Murphy denied arresting Mr. S████; his recollection was that PC McGuire arrested him for impaired driving after the ASD test. In cross-examination, he was taken to his notes, which referred to an arrest for impaired driving and theft. PCs Sukhdeo testified that PC McGuire informed him that Mr. S████ had been arrested for Over 80 and impaired driving, "theft under" and possession of a Schedule I substance.

23. PC McGuire placed Mr. S████ in the police car and re-read him the breath demand and his *Charter* rights on the in-car camera before sending him on his way. PCs Sukhdeo and Hoy took Mr. S████ to Toronto Traffic Services for testing. PC McGuire followed on her bicycle. She arrived while Mr. S████ was being paraded. Right away, she called duty counsel, who answered immediately. Mr. S████ took the opportunity to speak to counsel right away. Later, when the qualified breath technician was explaining the procedure to him in the breath room, Mr. S████ named a lawyer he knew and would like to call. PC McGuire took him back to the cells to allow him to do so "in case he didn't like duty counsel's advice." Mr. S████ told her she could look up the lawyer under "Home Improvements." Despite her efforts, she was unable to find the named lawyer and told Mr. S████ so. He said "ok" and was returned to the breath room. His first sample was received at 8:07 p.m. and his second sample at 8:30 p.m.

B. Time of arrest

24. PC McGuire testified that she arrested Mr. S████ at 7:06 p.m., immediately after he failed the ASD test. PC Josephs said that he heard PC McGuire tell Mr. S████ that he was under arrest at 6:44 p.m. His notes indicated that PC McGuire had arrested Mr. S████ for impaired driving. Later, PC McGuire called for the ASD. Mr. S████ was later arrested for the theft. Mr. S████ was placed in handcuffs shortly afterwards. PC Murphy's notes indicated that the arrest took place shortly after Mr. S████ came out of the Loblaws. He heard PC McGuire tell him he was under arrest for impaired driving and theft. He was sure that Mr. S████ was placed in handcuffs shortly afterwards. This was before PC McGuire called for the ASD. In re-examination, the Crown explored this apparent anomaly and took him to a passage in his notes that indicated "male only in custody for theft; [PC McGuire] reads ASD demand." PC Murphy's recollections were not clear; however, based on that review, he explained that he could "only interpret that perhaps [he had] made an error regarding the [ASD] in his notes." This would suggest that Mr. S████ was not under arrest for impaired driving before PC McGuire made the ASD demand, but that was "an assumption he [was] making just now." With all that said, PC Murphy indicated that his "best recollection" was that Mr. S████ was arrested after he failed the ASD test.

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25. All officers testified that they had not threatened or assaulted Mr. S[redacted] or made any promises or inducements to him in exchange for information. They had not seen their colleagues do any such thing either.

D. Additional evidence relating to impairment

The driving

26. PC Sukhdeo could not ascribe the honking to the SUV; it is what caused her to look back. Then, she saw that it did not signal when it was pulling over to the curb. She found it odd that the SUV did not have its lights on because it was quite dark at 6:30 p.m. in December. However, there was nothing unusual about how the SUV came to a stop. PC Josephs believed that the SUV was honking its horn. He first testified that the SUV made more than one lane change without signalling. In cross-examination, he said he could not recall if it was more than one, or from which lane. PC Murphy did not recall anything abnormal about the driving.

Mr. S[redacted]'s appearance, behaviour and speech

27. PC McGuire testified that Mr. S[redacted]'s speech was slurred and that his eyes were very glossy. She did not note that he was swaying or having trouble with balance. She did not note any odour of alcohol emanating from him. PC Josephs testified that Mr. S[redacted] was unsteady on his feet and was slightly slurring his speech when they all stood near the entrance to the bank. PC Murphy said it appeared to him that Mr. S[redacted] had been drinking because of the odour of alcohol, slurred speech, glassy eyes and "he didn't appear very steady on his feet" when police were talking to him. He expanded: "trying to keep him from going back to the motor vehicle; he wasn't really standing still in that spot; he was kind of swaying around a lot."

28. PC Sukhdeo described Mr. S[redacted] at the station. His eyes were very glossy, a very strong odour of alcohol emanated from his mouth, he was mumbling when answering questions and had a very difficult time maintaining his balance while putting his pants back on after the strip-search.

IV. APPLICABLE LEGAL PRINCIPLES

Forthwith and the* Charter*: ss. 8, 9 and 10

29. Central in this case is the interplay between s. 254(2)(b) of the *Criminal Code* and s. 10 of the *Charter*. Both place important temporal constraints on an officer who detains a motorist. Absent unusual circumstances, an officer must make an ASD demand forthwith upon forming a reasonable suspicion that a motorist has alcohol in his or her body and must provide the opportunity to comply with that demand forthwith: see *R. v. Quansah*, [2012] O.J. No. 779 at para. 26 (C.A.).

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30. Among the guarantees set out in s. 10 of the *Charter* are the rights, upon arrest or detention, (a) to be informed promptly of the reasons therefore and (b) to retain and instruct counsel without delay and to be informed of that right. In the ordinary course, the terms "promptly" and "without delay" both mean "immediately": see *R. v. Kelly* (1985), 17 C.C.C. (3d) 419 at 424 (Ont. C.A.); *R. v. Evans*, [1991] 1 S.C.R. 869; *R. v. Bartle*, [1994] 3 S.C.R. 173 at 191-192; *R. v. Suberu*, [2009] 2 S.C.R. 460 at paras. 41-42 ("*Suberu*").

31. As the Court of Appeal explained in *Quansah*, *supra*, at paras. 26-27 and 45-49, where the demand is not made or cannot be facilitated forthwith, it may not be valid. Where tests cannot be administered immediately, the delay must be no more than is reasonably necessary to enable the officer to properly discharge his or her duty. Any delay not so justified exceeds the immediacy requirement, rendering the demand invalid. It may also lead to violations of a detainee's ss. 8, 9 and 10(b) *Charter* rights.

32. The period of justified delay, sometimes referred to as the "forthwith window," is determined with respect to the right to counsel. Where the police could have implemented the right to counsel before requiring the sample, the forthwith requirement is not met. Put another way, the question is whether there was "a realistic opportunity for the detainee to consult counsel before being confronted with the ASD and required to provide a suitable sample." Justice Durno has provided the following useful list of non-exhaustive considerations:

- the time the officer believed the ASD would;
- the time between the demand and the taking of the sample;
- the time between the demand and the ASD's arrival;
- the day of the week and/or time at which the detainee would have been attempting to contact counsel;
- whether the detainee had a cell phone, although this factor in itself is not determinative;
- the actual time it took for the ASD to arrive;
- whether there was an explanation for the delay; and
- whether the detainee contacted counsel at the station after being arrested.
- when the detainee has a cell phone, whether they had the number for counsel or would rely on duty counsel with its "call back" feature.

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See *R. v. Gill*, [2011] O.J. No. 3924 at paras. 31-32 (internal citations omitted).

33. Where there is a realistic opportunity to consult counsel, the implementational duty requires that police refrain from eliciting incriminatory evidence from the detainee until he or she has had a reasonable opportunity to reach a lawyer (or has waived the right to do so): see *R. v. Lau*, [2018] O.J. No. 2123 at paras. 29-35 (S.C.A.C.) and the cases cited therein.

34. The Ontario Court of Appeal has held that "greater flexibility can be tolerated" between the formation of a reasonable suspicion and the making of the demand "where the suspect has not been detained" during that period: see *R. v. MacMillan*, [2013] O.J. No. 727 at para. 35.

35. My colleague Justice B.M. Greene recently canvassed the authorities regarding the impact that handcuffing detainees pending an ASD test can have on their ss. 8 and 9 *Charter* rights: see *R. v. Ramnath*, [2018] O.J. No. 6471. The Ontario courts have been very vigilant about this because being suspected of having alcohol in one's body while operating a motor vehicle is not a crime and one is not under arrest while awaiting the arrival of the ASD. It must also be recalled that the constitutional validity of the roadside screening regime depends on minimal intrusion into *Charter*-protected rights. Among the list of cases she reviewed is *R. v. Virk*, [2018] O.J. No. 5651 (C.J.) where Justice Stribopoulos explained, at paras. 53 and 56, that

> Although a motorist subject to an approved screening device breath demand validly made (*i.e.* a demand prefaced on the required grounds) is subject to lawful detention, such a motorist is not under arrest. Therefore, unless a motorist's conduct gives rise to objectively grounded safety concerns, for example, where the person's behaviour causes a police officer to reasonably believe they pose a threat to the police, the public, or themselves, it is not reasonably necessary to use handcuffs. Without reasonable justification, restraining a motorist in handcuffs during roadside breath testing is unlawful.
>
> … unjustified handcuffing by police during efforts to obtain an approved screening device breath sample violates a motorist's section 9 *Charter* right not to be arbitrarily detained. If police secure a breath sample while a motorist is unjustifiably handcuffed, these same cases also hold that the manner of the resulting seizure (or search), due to the unlawful use of handcuffs, is unreasonable and violates section 8 of the Charter.

Voluntariness and oppression

36. In *R. v. Oickle*, [2000] 2 S.C.R. 3 at para. 60, the Supreme Court of Canada explained why a confession given to police under circumstances of oppression is not voluntary. Factors that can create such an atmosphere "include depriving the suspect

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of food, clothing, water, sleep, or medical attention; denying access to counsel; and excessively aggressive, intimidating questioning for a prolonged period of time."

Impairment

37. The Crown must prove beyond a reasonable doubt that Mr. S█'s ability to operate a motor vehicle was impaired by alcohol. Impairment need not be extreme – any degree, ranging from slight to great, is sufficient: see *R. v. Stellato*, (1993), 78 C.C.C. (3d) 380 (Ont. C.A.), p. 384 aff'd (1993), 90 C.C.C. (3d) 160 (S.C.C.).

V. FINDINGS OF FACT AND ANALYSIS

A. Delay and information provided at the roadside: *Charter* ss. 8, 9 and 10

38. Based on the entirety of PC McGuire's evidence, and the fact that she had formed the suspicion that Mr. S█ was intoxicated when he was in the Loblaws and she was speaking to the passenger, I find that her suspicion was formed by approximately 6:38 p.m. and not, as the Crown submits, closer to 6:46 p.m. Her failure to make the demand until 6:46 p.m. is not reasonably explained in this case. As the Crown points out, the Court of Appeal indicated that such delays can be legitimate when the officer is taking steps to ascertain if there are grounds to arrest, to learn more if that may lead to the release of a motorist or where there are exigent circumstances: see *Quansah*, *supra*, at para. 40. PC McGuire testified to no such reason. She did not perform any field sobriety tests. She suspected Mr. S█ was "intoxicated" and her decision to use the ASD was to learn the extent of that "intoxication". Therefore, the "forthwith window" in this case is a period of approximately 28 minutes between 6:38 and 7:06 p.m.

39. I find that, in all the circumstances, the forthwith requirement has not been satisfied in this case. I acknowledge that it is open to me to make that finding on the basis of time alone: see *R. v. Grant*, [1991] 3 S.C.R. 139 at para. p. 150; see also *Quansah*, *supra*, at paras. 35-44. In *Grant*, the Court found that a 30-minute period violated the forthwith requirement independently of any analysis as to whether there was a realistic opportunity to consult counsel. The same could very well be said in this case, given PC McGuire's approach and mindset. However, I also remind myself that the forthwith analysis must be made contextually and in light of all the circumstances: see *Quansah*, *supra*, at para. 45-49. Therefore, I find it more prudent to consider the question through the lens of the reasonable opportunity to consult counsel in this case.

40. Applying the factors set out in *Gill*, *supra*, I find that it is more likely than not that Mr. S█ had a realistic opportunity to consult counsel during the 28-minute window. PC McGuire believed that the ASD would arrive as soon as possible because she believed PCs Sukhdeo and Hoy were within the division boundaries and understood the importance of acting swiftly. But she did not ask any questions to determine when it would arrive. To the contrary, she believed that nothing she could have ascertained would have mattered. Aside from being vague, her belief cannot be said to have been

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reasonable. The time between the demand and the arrival of the ASD, approximately 20 minutes, is significant in its own right and ample for consultation with counsel. The same interval exists relative to the taking of the sample. The investigation took place on Friday December 22 in the mid-evening. Mr. S██ had a cell phone in his possession. The only explanation for the delay is the fact that PC McGuire and her colleagues did not have an ASD on hand. Mr. S██ contacted counsel immediately when given the opportunity. In the circumstances of this case, that contact satisfied the implementational duty. The fact that he later indicated that he wanted to speak to another lawyer who could not be found does not change the analysis. What is more, since the qualified breath technician did not testify and the video was not played, the context in which that request was made is not known to me. What is known to me is that PC McGuire gave him another opportunity to consult counsel "in case he didn't like duty counsel's advice."

41. The informational and implementational components of Mr. S██'s right to counsel were also violated. The ASD demand was invalid and the ensuing test was not authorized by law. The subsequent breath demand and seizure were not authorized by law. Mr. S██'s ss. 8 and 9 rights were also violated.

42. Also contrary to the Crown's submission, I find that Mr. S██ was detained prior to the ASD demand, starting at approximately 6:38 p.m., when, as PC McGuire put it, he and the three officers "made their way" to the bank entrance. She testified that moments earlier, it was clear to her that Mr. S██ did not want to interact with her. Yet, during their interaction, they all moved together. That migration led Mr. S██, a racialized young male, to a bank entrance surrounded by three uniformed officers who stood within arm's reach of him. I find it more likely than not that a reasonable person in such conditions would feel that he or she must follow and remain with those officers. Also, even if he took a few steps away from the officers at some point, I do not see that as evidence of a belief on his part that he was free to go. If PC McGuire cuffed him before making the ASD demand, which is possible based on her lack of clarity as contrasted with PC Joseph's chronology, this only reinforces the point. Also, the evidence as to what Mr. S██ did in this regard is far from clear. PC Murphy described him as swaying and unable to stand in one spot. PC Josephs did not testify that he appeared to be trying to flee. PC Murphy's evidence in that regard was vague.

43. Whether it took place before or after the ASD demand, PC McGuire's decision to handcuff Mr. S██ constituted an arbitrary detention in its own right or compounded the arbitrary detention that had developed as a result of the forthwith problem. PC McGuire understood that Mr. S██ was detained from the moment she made the ASD demand. Yet, she never told him to remain at any particular location. Based on her lack of notes and poor recall in this context, I find that she did not caution him verbally when she believed he was trying to flee. She decided to handcuff him right away for that reason alone. While I agree with the Crown that PC McGuire could have had objectively valid concerns about his intention to flee based on the fail to remain and his earlier behaviour, I do not accept that she held those concerns subjectively. She testified about her reasons: (1) Mr. S██'s safety, (2) Mr. S██ was detained, and (3)

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she did not know when the ASD would arrive. None of those reasonably justified handcuffing Mr. S[redacted] in these circumstances.

44. The officers' inconsistent evidence regarding what, exactly, Mr. S[redacted] was arrested for (and when) leads me to believe that it is likely that he was not advised of the all of the reasons for his detention or arrest in a prompt fashion, contrary to s. 10(a).

B. Time of arrest

45. Based on the evidence of PCs Josephs and Murphy, it is open to me to find that PC McGuire placed Mr. S[redacted] under arrest for impaired driving at approximately 6:44 p.m., before making the ASD demand. Such an arrest would have been unlawful. As I stated earlier, I come to a different conclusion, albeit with less than a satisfying degree of confidence. PC McGuire was best placed to give evidence about the arrest she effected. Also, she agreed in cross-examination that she did not have reasonable and probable grounds to arrest Mr. S[redacted] for impaired driving until he registered a "fail" on the ASD. I find that it is more likely than not that PCs Joseph and Murphy's belief that Mr. S[redacted] was under arrest earlier was the result of PC McGuire's unusual decision to handcuff him around the time she read him the ASD demand. Also, neither of them was directly involved in the arrest and it was apparent that they both struggled to recall details due to the passage of time. In any event, little turns on this point given my other findings.

C. Circumstances surrounding Mr. S[redacted]'s admissions

46. I find that it is more likely than not that Mr. S[redacted]'s admissions (after the ASD demand) were made in response to questioning by PC McGuire. Her denial is difficult to accept in the context of her evidence as a whole. First, she was intent on gathering evidence as a matter of "general practice". Second, she noted that Mr. S[redacted] was "having difficulty answering questions" and acknowledged asking him about the stolen beer. It was only after the ASD demand that PC Murphy told her about the theft. Also, as I stated earlier, PC McGuire's evidence as to when she was and was not asking questions was convoluted.

47. Because this trial unfolded in blended fashion, it is convenient to address the voluntariness issue at this point. I am satisfied beyond a reasonable doubt that none of the officers threatened, assaulted or induced Mr. S[redacted] to provide information. I am not left in a state of reasonable doubt as to whether his decision to speak to PC McGuire at the scene was voluntary. While I have no doubt that Mr. S[redacted] felt that he was required to stay put and comply with police directions, the circumstances at the scene – a busy Toronto street on a weekday evening – fell well short of oppressive.

VI. THE *GRANT* INQUIRY

A. The law

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48. Section 24(2) of the *Charter* allows a court to exclude evidence where admitting it would bring the administration of justice into disrepute. I must consider three factors: (1) the seriousness of the violation; (2) the impact of the violation on the accused's *Charter*-protected interests; and (3) society's interest in the adjudication of the case on its merits: *R. v. Grant,* 2009 SCC 32, at para. 71. The focus must be on the long-term and prospective effect of a remedy or lack of remedy. At paras. 68-70, the Supreme Court explained these concepts.

> The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute.
>
> Section 24(2)'s focus is not only long-term, but prospective. The fact of the *Charter* breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system.
>
> Finally, s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system.

See also paras. 72-86.

B. The position of the parties

Argument of Mr. S

49. Mr. S argues that the breath samples and admissions ought to be excluded. The police conduct is serious. It involved a number of *Charter* breaches. These were aggravated by PC McGuire's inadequate understanding of *Charter* rights and poor notetaking regarding s. 10(b) in particular. Further aggravating is the fact that none of the officers at the scene thought to advise Mr. S of his rights when that ought to have been done – including PCs Josephs and Murphy, who believed he had been arrested well before the ASD arrived. The impact of these breaches, including being denied access to counsel while in a vulnerable position, being questioned by police, being unjustifiably handcuffed before being arrested, being subjected to a strip search

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and seizures of breath samples, was significant. Mr. S[redacted] acknowledges that society's interest in a trial on the merits based on reliable evidence favours admission.

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Argument of the Crown

50. The Crown submits that any police misconduct surrounding the delay at the scene is not serious, because the "forthwith window" is difficult for officers to gauge as they wait at the scene. He also points to the fact that PCs Sukhdeo and Hoy moved quickly once dispatched and that PC McGuire did her best to put Mr. S████ in touch with counsel once she arrived at the station. The Crown argues that any breach of s. 10(b) had a minimal impact on Mr. S████ as he was required, by law, to provide a sample of his breath into the ASD. He also argues that the seizure of breath samples is minimally intrusive: see *Grant*, *supra*, and *R. v. Jennings*, 2018 ONCA 260. That said, he fairly acknowledged that *Jennings* is distinguishable to the extent that multiple *Charter* breaches, each reflecting different interests, are in play. That concession is reasonable and consistent with the governing authorities: see *R. v. Skurski*, 2019 ONSC 2943 and cases cited therein at paras. 28-31 (S.C.A.C.).

C. Analysis and balancing

Seriousness of the breach

51. I agree with Mr. S████ that the police conduct in this case was serious. First, while some of the breaches are clearly more serious than others, their very number is itself aggravating. Second, the breaches of ss. 9 and 10 reflected an ignorance on PC McGuire's part of well-known and important *Charter* norms. That includes the temporal requirements imposed by the *Charter* as well as the obligation on police to hold off from attempting to elicit incriminating evidence where, as here, there is a reasonable opportunity to consult with counsel. Further aggravating the seriousness of the police conduct are the fact that PC McGuire:

- deliberately elicited incriminating evidence from Mr. S████;
- unlawfully placed him in handcuffs: see *MacMillan*, *supra*, at para. 50; and
- failed to make note of important times relating to the delay (and its relationship to the right to counsel).

52. This factor strongly favours exclusion. The fact that PC McBride acted quickly once at the station does not change this conclusion: *R. v. Gill*, [2015] O.J. No. 3974 at paras. 27-28 (S.C.A.C.).

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Impact of the breach on Charter*-protected interests*

53. The impact of the breach on Mr. S█'s *Charter*-protected interests was significant and also strongly favours exclusion. In *Suberu*, *supra*, at para. 40, the Supreme Court of Canada explained that the right to counsel exists to

> ensure that individuals know of their right to counsel, and have access to it, in situations where they suffer a significant deprivation of liberty due to state coercion which leaves them vulnerable to the exercise of state power and in a position of legal jeopardy.
>
> Specifically, the right to counsel is meant to assist detainees regain their liberty, and guard against the risk of involuntary self-incrimination.

In *R. v. Rover*, 2018 ONCA 745, at para. 45, Doherty J.A. referred to the right to counsel as a "lifeline" through which

> detained persons obtain, not only legal advice and guidance about the procedures to which they will be subjected, but also the sense that they are not entirely at the mercy of the police while detained. The psychological value of access to counsel without delay should not be underestimated.

54. Mr. S█'s is a case in point. He was given no information as to when he would be able to speak to counsel. During the delay, he was deprived of the advice necessary to assist him in guarding against the risk of voluntary self-incrimination, and incriminating evidence was elicited from him. It also bears noting that his ability to seek <u>complete</u> advice from counsel (had that opportunity been provided) would have been hampered by PC McGuire's failure to advise him of all the reasons for his detention. During much of the relevant period, he was unlawfully restrained in handcuffs: see *MacMillan*, *supra*, at para. 50. Ultimately, he was subjected not only to arrest and the seizure of breath samples, but also to a strip-search. (This last factor was not pled or fully argued on the merits. While it cannot be ignored, I place little weight upon it.)

55. The impact of the breaches on Mr. S█'s *Charter*-protected interests was significant and also strongly favours exclusion.

Society's interest in adjudication on the merits

56. The breath samples are reliable evidence without which the Crown's case on the Over 80 count is gutted. The same cannot be said for Mr. S█'s admissions as they relate to the impaired driving count; they are neither as crucial nor as reliable. That said, both charges are serious. However, I must caution myself that the seriousness of the charges ought not to take on a disproportionate significance; moreover, it can "cut

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both ways”: see *R. v. Harrison*, [2009] 2 S.C.R. 494 at para. 34; *Grant*, *supra*, at para. 84; and *R. v. Paterson*, [2017] 1 S.C.R. 202 at para. 55.

57. This factor favours admission of the breath samples. If it favours admission of Mr. S█████’s admissions, it does so only weakly.

Balancing

58. The balancing exercise does not lend itself to mathematical precision. The question is whether, having regard to all the circumstances, the admission of the evidence would bring the administration of justice into disrepute. I find that it would. The *Charter*-infringing conduct in this case was serious. When viewed in its entirety, it evinced a troubling ignorance of *Charter* rights and calls on the court to dissociate itself from its fruits. It had a serious impact on Mr. S█████’s rights and left him in a very vulnerable position in which incriminating evidence was elicited directly from him. While the public clearly has an interest in drunk driving prosecutions being resolved on their merits, I believe that a reasonable and informed member of that same public also has an interest in seeing that these prosecutions are fair and that the police live up to what is expected of them under the *Charter*. On balance, my conclusions concerning the first two lines of inquiry clearly outweigh society’s interest in the truth-seeking function of a trial on the merits.

59. The breath samples and Mr. S█████’s admissions are therefore excluded from these proceedings.

VII. Impaired Driving

60. I appreciate that the evidence of PCs Josephs, Murphy and Sukhdeo could lead to a finding that Mr. S█████’s ability to operate a motor vehicle was impaired by the consumption of alcohol. However, as the principal investigator, PC McGuire felt that she did not have sufficient grounds to arrest Mr. S█████ for that offence based on her observations. It bears mentioning that the only evidence of the driving at issue is that the SUV did not have its headlights on and changed lanes or pulled over without signalling. For what it is worth, I place little weight on the testimony of officers who ascribed the honking to the SUV as it came from behind them on a busy downtown Toronto street. I also reject the Crown’s argument that Mr. S█████’s decision to steal beer is evidence of impairment. Such an inference is without foundation.

61. In the final analysis, PC McGuire’s evidence left me with a reasonable doubt that Mr. S█████’s ability to operate a motor vehicle was impaired by alcohol.

VIII. Conclusion

62. The Over 80 and impaired driving charges are dismissed.

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Released: November 14, 2019

Justice Patrice F. Band

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