R. v. Kona, [2021] O.J. No. 2146

Ontario Judgments

Ontario Court of Justice

N. Dwyer J.

Heard: April 8 and 9, 2021.

Judgment: April 22, 2021.

Newmarket Court File No.: 4911-998-19-07750-00

[2021] O.J. No. 2146

Between Her Majesty the Queen, and Dhanumjaya Kona

(57 paras.)

Counsel

N. Murphy, counsel for the Crown.

M. Engel, counsel for the accused Dhanumjaya Kona.

Reasons for Judgment

N. DWYER J.

I. The Charge

1 Dhanumjaya Kona is charged that on August 14, 2019 he committed the offence of operating a conveyance with a blood alcohol content that exceeded 80 milligrams of alcohol in 100 millilitres of blood.

2 *Charter* issues have been raised by defence motion. The Crown and defence have agreed to proceed by way of a blended trial and the defence has admitted the readings from the approved screening device and the approved instrument subject to the *Charter* application. This case is thus to be decided on the admissibility of the approved screening device result and the approved instrument readings. All other essential elements of the offence have been conceded by the defence.

II. The Evidence and Section 8 *Charter*

A. The Evidence re Section 8

3 On August 14, 2019, PC Benni Zaiser was driving westbound on Stouffville Road when he observed a vehicle approaching eastbound. Mr. Kona was operating the eastbound vehicle. There is no identification issue in this case. It is admitted that Mr. Kona was operating the eastbound vehicle. PC Zaiser observed the vehicle weaving and crossing the median. Concluding that the driver might be distracted or impaired, PC Zaiser made a U-turn to follow the vehicle. PC Zaiser caught up to the vehicle at a red light at Stouffville Road and Highway 48. PC Zaiser followed the vehicle as it made a left turn onto northbound Highway 48. The vehicle drove onto the shoulder of the road. The vehicle then turned right into an industrial lot at 12731 Highway 48. The vehicle drove slowly in the lot, mounted a curb, hit a tree, ran into a building and came to a stop.

4 The first observation was made at 1:51:37 a.m. and the vehicle hit the building at 1:54:43 a.m. At 1:55:15 a.m., PC Zaiser approached the vehicle and observed the driver conscious but visibly shaken in the car. It took a short while for eye contact to be made. PC Zaiser told the lone occupant, Mr. Kona, that he was to be investigated as a possible impaired driver and cautioned him at 1:57:50 a.m. Mr. Kona complained of chest pain. PC Zaiser did not detect any odour of alcohol, only the strong odour of the airbags that had deployed in the car.

5 Mr. Kona was not asked to leave the car, in anticipation of EMS arriving. Other officers arrived on scene. In response to questions by PC Zaiser, Mr. Kona advised that he was coming from work, was not on medication and had been up since the previous afternoon. Fire and EMS arrived on scene about 2:02:28 a.m. and tended to Mr. Kona who was put in the back of an ambulance. PC Zaiser also walked to the ambulance. Prior to going to the ambulance and while waiting, PC Zaiser spoke to other officers on scene and discussed the absence of the odour of alcohol. By 2:05:47 a.m. Mr. Kona was in the back of the ambulance.

6 At about 2:08:19 a.m., PC Zaiser spoke to Sicil Thambipillai, Mr. Kona's wife, while he was being treated and told her he would let him call her back. PC Zaiser testified that at this point he had suspicion that Mr. Kona had alcohol in his system and that an Approved Screening Device (ASD) test was going to be administered as soon as Mr. Kona was medically cleared. At about 2:10:56 a.m., the ASD was retrieved from the cruiser by the officer. At about 2:12:26 a.m. the ASD demand was read and at about 2:14:15 a.m. Mr. Kona registered a fail on the test. At about 2:16:41 a.m., Mr. Kona was arrested for over 80, while still in the care of the EMS. He was given the standard right to counsel, to which he replied no by shaking his head, when asked if he wished to speak to counsel. Shortly after 2:16:41 a.m., PC Zaiser gave the secondary caution to Mr. Kona.

7 At about 2:20:42 a.m. Mr. Kona was taken from the ambulance to PC Zaiser's police cruiser where he was searched at 2:28 a.m. At 2:32:03 a.m., in the cruiser, PC Zaiser gave the breath demand to Mr. Kona.

B. Section 8 Argument and Analysis

8 The defence raises a section 8 *Charter* issue as a result of this aspect of the police action. The defence argues the search inherent in the ASD was unlawful and that, as a warrantless search, the onus is on the Crown to show the reasonableness of the search.

9 The defence makes two arguments, first that objectively there did not exist reasonable suspicion to make an ASD demand, and second that the ASD demand was not made immediately.

10 The lack of reasonable suspicion argument is based on the absence of an odour of alcohol. The defence argues firstly that suspicion must be objectively reasonable, and secondly that on the evidence this threshold was not met.

11 There was no odour of alcohol and the defence argues that this is necessary to ground a reasonable suspicion, in this situation. I do not agree with this submission. An odour of alcohol is not necessary for the existence of a reasonable suspicion. See: *R. v. Hryniewicz*, *[2000] O.J. No. 436* (Ont. CA). One must look at all the factors. See: *R. v. Singh*, *[2006] O.J. No. 5133* at para. 12 (S.C.J.) The Crown points to: the driving on Stouffville Road and Highway 48, crossing the median and driving on the shoulder respectively, and mounting the curb and driving into a wall, as being the basis for reasonable suspicion. I agree that those factors combined amount to a basis for reasonable suspicion.

12 The immediately requirement in section 320.27(1)(b) of the *Criminal Code* replaces the forthwith requirement in the old section 254(2) of the *Criminal Code*. The evidence of PC Zaiser is that he observed the bad driving from 1:51:37-1:55:11 a.m. The ASD demand was read at 2:12:26 a.m., about 12 minutes later.

13 In *R. v. Quansah*, *[2012] O.J No. 779*, at paras. 45-49, (Ont. CA), Justice LaForme summarises the immediately requirement based on the old section 254(2) term forthwith. The analysis is contextual; there may be factors that affect the timing of the demand yet do not offend the immediately requirement:

> 47 Third, "forthwith" connotes a prompt demand and an immediate response, although in unusual circumstances a more flexible interpretation may be given. In the end, the time from the formation of reasonable suspicion to the making of the demand to the detainee's response to the demand by refusing or providing a sample must be no more than is reasonably necessary to enable the officer to discharge his or her duty as contemplated by s. 254(2).
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> 48 Fourth, the immediacy requirement must take into account all the circumstances. These may include a reasonably necessary delay where breath tests cannot immediately be performed because an ASD is not immediately available, or where a short delay is needed to ensure an accurate result of an immediate ASD test, or where a short delay is required due to articulated and legitimate safety concerns. These are examples of delay that is 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.

14 In this case Mr. Kona had been involved in an accident, running his vehicle into a wall. Emergency personnel had attended to tend to him. He was taken to an ambulance by the EMS personnel to be examined. The demand was made while he was in the ambulance after an initial examination. By then serious injury was not apparent. PC Zaiser took an opportunity to read the ASD demand at about 2:12:26 a.m. This timing was immediate in the context of the investigation.

15 When PC Zaiser first approached the vehicle at 1:55:11 a.m. Mr. Kona was visibly shaken up and not

fully attentive. The officers communicated with him and did not ask him to step out of the vehicle, preferring instead to wait for EMS, out of concern for his health. The officers wanted to make sure he was ok.

16 It is important to note that Sicil Thambipillai, Mr. Kona's wife, called his phone at 1:55 a.m. and did not get an answer. She called back at 2:00 a.m. and spoke to an officer, PC Zaiser. She was told that he had been in an accident and was suffering from chest pain. She lives 2 minutes from the accident and decided to drive there. She was not allowed to see him and was told that they would call her if they needed to. Ms. Thambipillai was not told that he was in trouble. She went back home. This all took place from about 1:55 a.m. to shortly after 2:00 a.m.

17 PC Zaiser cautioned Mr. Kona and asked him where he was coming from and whether he was on medication. Mr. Kona responded. EMS arrived at about 2:04 a.m. There was some discussion, among some of the officers on scene, about the accident and the absence of the odour of alcohol, with some of the officers saying to PC Zaiser, do an ASD and "box him" (meaning do an ASD). These discussions took place between 2:03 a.m. and 2:10 a.m. Mr. Kona was taken to the ambulance and checked out. During a break in his care at 2:13 a.m., the ASD demand was read. On cross-examination, PC Zaiser stated that he understood the temporal requirement of the Approved Instrument demand to be made as soon as practicable. Mr. Kona failed the ASD at 2:16:41 a.m. and was arrested. The standard right to counsel was read.

18 In response to the question, "Do you wish to call a lawyer now" he responded with a shake of his head indicating "No." Mr. Kona declined an offer to take him to the hospital. He was given the secondary caution at about 2:20:42 a.m. From this time to about 2:25 a.m. Mr. Kona was taken to PC Zaiser's police car. He was searched at 2:28 a.m. then put into the cruiser. He was given the approved instrument demand while in the cruiser at 2:33 a.m.

19 PC Zaiser conceded on cross-examination that he could have done the approved instrument demand earlier than 2:33 a.m., however he stated it was his training to do it in the police car where it could be recorded. This is problematic, given the temporal importance of making the demand.

20 Given the health concerns and Mr. Kona's uncertain medical condition, waiting until the initial medical care was completed to make the ASD demand was entirely reasonable. The ASD demand was done immediately in that context.

21 Waiting from 2:16 a.m. to 2:33 a.m., some 17 minutes to make the approved Instrument demand is problematic as previously stated. By 2:16 a.m. the initial medical examination had been done such that the ASD demand and testing could proceed. There is no formula of words to give the Approved Instrument demand, so long as the person is given the meaning of the demand. There was no reason to wait until Mr. Kona was in the police cruiser, nor is there a requirement that the demand be recorded. Immediately after his arrest, he was given his right to counsel and caution without any concern about comprehension of the words. The issue of medical concerns had passed by this point. There was in my view no reason to delay making the Approved Instrument demand.

22 I do not agree with the Crown submission that Mr. Kona was not detained until the ASD demand was made at 2:16 a.m. Clearly Mr. Kona was not free to leave after he ran into the building. He could not have simply walked away from the scene. He would have been stopped by the police.

23 The Crown has not discharged their onus in this regard. I find that the delay in making the approved instrument demand was a breach of section 8 of the *Charter*.

III. Right to Counsel *Charter* Section 10(b)

A. Evidence Right to Counsel

24 Shortly after 2:33 a.m., Mr. Kona was driven to 5 District Police Station, arriving there at 2:52 a.m. and arriving in the Booking Area, before Staff Sergeant Kemp, some minutes later. Sgt. Kemp addressed the right to counsel and had Mr. Kona read the printed right to counsel on a poster in the booking area.

25 After the right to counsel review, Mr. Kona told Sgt. Kemp (with PC Zaiser present) that he did not have a lawyer and that he could call his supervisor, who would be able to get him a lawyer. Mr. Kona gave the name Douglas Quan and was provided with his phone to search for the number. Mr. Kona was asked, "If he does not pick up, do you want us to call Duty Counsel?" and Mr. Kona assured the police that his supervisor would pick up. Mr. Kona added that his wife could be called if his supervisor did not pick up. The booking-in process lasted until about 3:14 a.m.

26 PC Zaiser made calls to Doug Quan at 3:16 a.m., 3:18 a.m., 3:19 a.m. and 3:22 a.m. without getting an answer. He recalls that he left a voice message on the first call, not on any of the other calls. He does not recall the content of the message, though as I will explain he does recall information not included in the message. PC Zaiser could have sent texts to the number he was calling but did not. Further PC Zaiser did not inquire about any other numbers.

27 Of great importance in this case, the message left did not indicate what Mr. Kona had been charged with. This was in accordance with the practice at the station and was sanctioned by Sgt Kemp. At the time PC Zaiser was a relatively inexperienced officer of about 2.5 years experience, involved in one of his first drinking and driving investigations.

28 The practice of the York Regional Police was to facilitate calls to counsel by making the calls themselves. The defendants in their custody were not able to make the calls on their own.

29 At 3:23 a.m., PC Zaiser called Ms. Thambipillai, Mr. Kona's wife, and advised that Mr. Kona wanted a lawyer. Ms. Thambipillai said that she did not know a lawyer. She was told by PC Zaiser that she could search the internet or check the yellow pages for a lawyer. The call took about 7 minutes and 20 seconds ending at 3:30:30 a.m.

30 After this call to Ms. Thambipillai, PC Zaiser spoke briefly with Sgt. Lemmon, the breath technician and also an investigating officer who had been on scene night. Sgt. Lemmon was at the station preparing to administer the approved instrument and asked PC Zaiser if he had told Ms. Thambipillai about the availability of Duty Counsel. PC Zaiser had not and was instructed to call Ms. Thambipillai and tell her about Duty Counsel.

31 PC Zaiser called Ms. Thambipillai for a second time at about 3:31:59 a.m. and suggested Duty Counsel

as an option. PC Zaiser did not recall all the details of the call. He did recall however that he told Ms. Thambipillai that Mr. Kona needed a lawyer now. He explained the Duty Counsel option.

32 Ms. Thambipillai testified that she received the second call shortly after the first call. In the 90 seconds between the calls, with the help of her daughters, she had started the process of trying to get a lawyer. Ms. Thambipillai was upset and felt rushed. She was given the Duty Counsel option and was left with the impression that Duty Counsel was the same as any other lawyer. Whatever the exact words of the conversation, she felt pressure. She decided that in the circumstances Duty Counsel was the best option. Her reasoning was that given the urgency, using Duty Counsel was better than not having a lawyer.

33 Immediately after speaking to Ms. Thambipillai, PC Zaiser spoke to Mr. Kona and told him that his wife had preferred Duty Counsel and that they had not reached Mr. Quan. PC Zaiser did not tell Mr. Kona that he was entitled to wait a reasonable time for a response from Mr. Quan. This portion of his interaction with Mr. Kona was not recorded. Neither did he tell Mr. Kona the steps that Ms. Thambipillai had taken to find a lawyer. Mr. Kona agreed to speak with Duty Counsel.

34 Mr. Kona gave evidence on the *Charter* motion. He testified that he wanted his own lawyer and thought that Duty Counsel was a police lawyer. Mr. Kona stated that he had a good rapport with his work supervisor and felt that he would refer him to a good lawyer. He was also aware that his supervisor had been a high-ranking police officer during his career. He was also not given any detail by PC Zaiser about the efforts made by Ms. Thambipillai or the extent of the efforts to find Mr. Quan.

35 On cross-examination, Mr. Kona stated that he was not told that he could wait longer for a call from Mr. Quan. Mr. Kona further testified that he asked if he could wait for the call from Mr. Quan, and was told by PC Zaiser that he could not, and that he had to make a decision now. This evidence is to be considered carefully. The defence did not pose this question to PC Zaiser directly on cross-examination pursuant to *Browne v. Dunn*. This takes away from the weight I attach to this evidence.

36 In the end, Mr. Kona stated that Duty Counsel was presented as an option, but he felt that he could not wait. He was never told that he could wait a reasonable time.

37 Mr. Kona spoke to Duty Counsel for about 5 minutes and never expressed dissatisfaction to the police. Mr. Kona then provided two samples of his breath.

38 Mr. Douglas Quan also testified for the defence on the motion. Mr. Quan is a retired Superintendent of Police with the Toronto Police Service. He was at the time the proprietor of a private investigation business and was the supervisor and employer of Mr. Kona. He received a message from the York Regional Police in the early morning hours of August 14, 2019, stating that Mr. Kona was arrested. Mr. Quan returned the call and was told that Mr. Kona wanted to talk to him and wanted counsel. PC Zaiser refused to tell Mr. Quan what Mr. Kona was charged with and refused to allow Mr. Quan to speak directly to Mr Kona. PC Zaiser told Mr. Quan that he would talk to his supervisor and call Mr Quan back. He did not call back. He was told by Sgt. Kemp that no direct conversation between Mr. Kona and Mr. Quan was permitted.

39 The call by Mr. Quan was between the two breathalyzer tests. Neither Mr. Quan nor Mr. Kona were aware of this. They were not told by PC Zaiser. The defence pointed out that a plain reading of PC Zaiser's notes gave the impression that the call by Mr. Quan was after both approved instrument tests had been

completed. The defence was able to discover the true timing of Mr. Quan's call after specifically requesting disclosure of call logs from the station. The defence submits that this demonstrates an attempt at deception by PC Zaiser. PC Zaiser denied this when confronted on cross-examination, saying that it was not the intent of his note taking. I am suspicious about the reason for this anomaly in the officer's notes.

B. Section 10(b) Argument and Analysis

40 The defence submits that Mr. Kona was denied counsel of choice in breach of his section 10(b) *Charter* rights. The right to counsel is among the most fundamental of *Charter* rights. It provides a detained person the means to clarify their rights and obligations and guards against self incrimination. See *R. v. Taylor*, *[2014] S.C.J. No. 50* and *R. v. Panigas*, *[2014] O.J. No. 2058*.

41 The right to counsel includes the right to contact a third party to facilitate contact with counsel. In *R. v. Kumarasamy*, *[2002] O.J. No. 303* (S.C.J.), at paras. 22-26, Justice Durno explains that counsel of choice includes the right to contact third parties where the purpose is to facilitate counsel of choice, including the right to speak directly to the third party. Justice Durno explains that this right is not unfettered. One needs to consider the circumstance, for example where direct third-party contact might jeopardize an investigation. Justice Durno stated as follows:

> 22 In R. v. McCallen *(1999), 131 C.C.C. (3d) 518* (Ont. C.A.) O'Connor J.A. wrote that it is well established that the s. 10(b) rights include not only the right to retain and instruction, "but the right to retain and instruct counsel of the accused's choice ...". The importance of the right to counsel of choice is set out in paragraphs 34 through 40 of the McCallen judgment.
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> 23 Is there a breach of s. 10(b) if the police do not permit the detainee to contact a friend or relative to facilitate contact with counsel? In R. v. Tremblay *(1987), 60 C.R. (3d) 59* (S.C.C.), the accused was permitted to contact his wife and asked her to call back when she had reached his lawyer. The Court found a breach of s. 10(b), when the officers did not wait for the return call before asking the accused to provide a breath sample. Had the right to counsel not included the right to do so through the assistance of a third party, there would have been no violation of s. 10(b).
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> 24 Relying on Tremblay, supra, Borins J. concluded in R. v. McNeilly *(1988), 10 M.V.R. (2d) 142* (Y.T.S.C.), the right to retain and instruct counsel includes the right to contact others to obtain counsel. Similar conclusions were reached in R. v. Oester *[1989] A.J. No. 648* (Alta. Q.B.), R. v. LaPlante *(1987), 40 C.C.C. (3d) 63* (Sask. C.A.), and R. v. Goodine *[1989] A.J. No. 220* (Alta. C.A.).
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> 25 In the vast majority of cases, once the detainee has expressed a desire to contact counsel, police must facilitate the detainee's efforts to do so: R. v. Brydges *(1990), 53 C.C.C. (3d) 330* S.C.C. This obligation includes facilitating contact with counsel of choice where a request has been made to speak to a specific counsel. This is so whether the person has counsel's number available or not. It also includes permitting a phone call to a friend or relative to obtain the name of counsel of choice.
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> 26 This is not to say that a detainee is always entitled to make one or a series of calls to friends or relatives. The determination must be made on a case by case basis. No doubt there will be rare cases where a call to a friend or relative in private could jeopardize an ongoing investigation. For example, if the detainee has accomplices who had not been arrested, or if persons or property

could be placed in jeopardy by permitting a call to someone other than a lawyer, a delay might be justified. That is not the case here.

42 The key factor is that the detained individual must make it clear that the purpose of contacting the third party is to facilitate the right to counsel of choice. See *R. v. Underhill*, *[1992] O.J. No. 1840* (General Division) at pages 3,4; *R. v. Sakhuja*, *[2020] O.J. No. 4695* (O.C.J.) at para. 51-55; *R. v. Pileggi*, [2021 O.J. No. 32 (Ont. CA) at para. 86.

43 When the police take the responsibility to contact counsel of choice, they have a duty to be diligent. See: *R. v. Maciel*, *[2016] O.J. No. 4789* (O.C.J.) at paras. 41-43.

> 42 Quite obviously, it is not my role to second-guess police operational procedures.25 And, to be clear, I do not believe there is anything constitutionally objectionable with the police assuming the responsibility of contacting counsel on behalf of those in their custody. That said, it is very much the function of the courts to assess the adequacy of police efforts in the discharge of their constitutional obligations. It follows that if the police assume the responsibility of contacting counsel of choice on behalf of a person who is in their custody, then it is for the courts to assess the adequacy of those efforts. Of course, this begs the question as to what standard should be used in evaluating the adequacy of police efforts.
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> 43 If the police did not assume this responsibility, those in detention would be expected to exercise reasonable diligence in contacting their lawyer of choice. Where the police take on this function on behalf of the detainee, it seems eminently sensible to subject their efforts to the same standard. Anything less would encourage token efforts by the police and imperil the right of those in detention to consult a lawyer of their choosing. In that regard, I completely agree with the comments of Justice Horkins, who noted:
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> > When the police, as an institution, decide to take control of the accused's means of accessing counsel of choice, they also assume the obligation to pursue that constitutional right with all the same effort and diligence that the accused himself would apply.26
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> I believe this standard is in keeping with the duty upon the police to facilitate contact with a detainee's counsel of choice. I therefore intend to apply it in assessing the adequacy of the police efforts in this case.

44 Applying the facts to this standard I find that counsel of choice was not fulfilled, in breach of section 10(b) of the *Charter*. Mr. Kona clearly expressed a desire to get his own lawyer and gave the officers his supervisor's name and his wife's name. The officers were then obliged to proceed with diligence having taken the responsibility of making the calls. The officers failed in the following ways:

* They allowed only 17 minutes for a return call from Mr. Quan .
* They gave Ms. Thambipillai 90 seconds to find a lawyer before proposing Duty Counsel. This was a properly proposed option, however without indicating that Mr. Kona was entitled to a reasonable period of wait time it created a misleading sense of urgency.
* They did not tell either Mr. Quan or Ms. Thambipillai the charges faced by Mr. Kona, making it difficult for them to make decisions as to the appropriate counsel.

* They did not act diligently after not allowing a direct call between Mr. Kona and Mr Quan. They may choose not to facilitate a direct conversation, however with this choice comes a responsibility to make the communication with the third party fully informed and transparent. This did not happen here. Mr. Quan was not told the charge faced by Mr. Kona and neither was told of Mr. Quan's call being between the two tests.
* They failed to advise Mr. Kona of Mr. Quan's call between the tests.

45 For those reasons I find a section 10(b) breach.

IV. Admissibility of Evidence *Charter* Section 24(2)

46 I have found two *Charter* breaches in this case. I must now consider whether the Approved Instrument results should be admitted. I must apply the *Grant* analysis to the circumstances of this case.

A. The Test

47 In *R. v. Le*, *[2019] SCC 34* at paras. 139 and 140, Justice Brown explains the focus of the 24(2) *Charter* analysis as follows:

> 139 Section 24(2) of the Charter provides that, where evidence was obtained in a manner that infringed a Charter right or freedom, that evidence shall be excluded if it is established that, having regard to all the circumstances, its admission would bring the administration of justice into disrepute. While the judicial inquiry under s. 24(2) is often rhetorically cast as asking whether evidence should be excluded, that is not the question to be decided. Rather, it is whether the administration of justice would be brought into disrepute by its admission (R. v. Taylor, *2014 SCC 50*, *[2014] 2 S.C.R. 495*, at para. 42). If so, there is nothing left to decide about exclusion: our Charter directs that such evidence must be excluded, not to punish police or compensate for a rights infringement, but because it is necessary to do so to maintain the "integrity of, and public confidence in, the justice system" (Grant, at paras. 68-70).
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> 140 Where the state seeks to benefit from the evidentiary fruits of Charter-offending conduct, our focus must be directed not to the impact of state misconduct upon the criminal trial, but upon the administration of justice. Courts must also bear in mind that the fact of a Charter breach signifies, in and of itself, injustice, and a consequent diminishment of administration of justice. What courts are mandated by s. 24(2) to consider is whether the admission of evidence risks doing further damage by diminishing the reputation of the administration of justice -- such that, for example, reasonable members of Canadian society might wonder whether courts take individual rights and freedoms from police misconduct seriously. We endorse this Court's caution in Grant, at para. 68, that, while the exclusion of evidence "may provoke immediate criticism", our focus is on "the overall repute of the justice system, viewed in the long term" by a reasonable person, informed of all relevant circumstances and of the importance of Charter rights.

48 The Supreme Court in *Le*, at paragraphs 141 and 142, articulated the test, adopting the summary by Justice Doherty in *R. v. McGuffie*:

141 In Grant, the Court identified three lines of inquiry guiding the consideration of whether the admission of evidence tainted by a Charter breach would bring the administration of justice into disrepute: (1) the seriousness of the Charter-infringing conduct; (2) the impact of the breach on the Charter-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits. While the first two lines of inquiry typically work in tandem in the sense that both pull towards exclusion of the evidence, they need not pull with identical degrees of force in order to compel exclusion. More particularly, it is not necessary that both of these first two lines of inquiry support exclusion in order for a court to determine that admission would bring the administration of justice into disrepute. Of course, the more serious the infringing conduct and the greater the impact on the Charter-protected interests, the stronger the case for exclusion (R. v. McGuffie, *2016 ONCA 365*, *131 O.R. (3d) 643*, at para. 62). But it is also possible that serious Charter-infringing conduct, even when coupled with a weak impact on the Charter-protected interest, will on its own support a finding that admission of tainted evidence would bring the administration of justice into disrepute. It is the sum, and not the average, of those first two lines of inquiry that determines the pull towards exclusion.

142 The third line of inquiry, society's interest in an adjudication of the case on its merits, typically pulls in the opposite direction -- that is, towards a finding that admission would not bring the administration of justice into disrepute. While that pull is particularly strong where the evidence is reliable and critical to the Crown's case (see R. v. Harrison, *2009 SCC 34*, *[2009] 2 S.C.R. 494*, at paras. 33-34), we emphasize that the third line of inquiry cannot turn into a rubber stamp where all evidence is deemed reliable and critical to the Crown's case at this stage. The third line of inquiry becomes particularly important where one, but not both, of the first two inquiries pull towards the exclusion of the evidence. Where the first and second inquiries, taken together, make a strong case for exclusion, the third inquiry will seldom if ever tip the balance in favour of admissibility (Paterson, at para. 56). Conversely, if the first two inquiries together reveal weaker support for exclusion of the evidence, the third inquiry will most often confirm that the administration of justice would not be brought into disrepute by admitting the evidence.

B. Seriousness of the Breach

49 The first consideration in *Grant* is the seriousness of the breach. The Crown contends that there was no bad faith and that the breaches of the sections 8 and 10(b) *Charter* rights were primarily due to the inexperience of PC Zaiser. I disagree with this submission for two reasons.

50 Firstly, PC Zaiser was not the sole investigator; at the scene he had other officers present and discussed matters with them. On the section 8 *Charter* breach he said that his training was to do the approved instrument demand in the police car to record it. This led to a long delay which appeared to be accepted by the officer as an appropriate trade off.

51 The section 10(b) breach was also not based on a decision by PC Zaiser alone. There was a policy of the York Regional Police, expressed by PC Zaiser, but originating in Sgt. Kemp that third parties were not allowed direct contact with the charged person and were not entitled to know the charge faced by the person. This appears to be in the context of a person wishing to contact the third party to access counsel of choice. Further it is in the context of the York Regional Police making the calls to facilitate counsel of choice. This policy makes no sense.

52 There was a blatant disregard for Mr. Kona's right to counsel. The *Charter* breaches are serious and favour exclusion.

C. Impact of the Breach on the *Charter*-Protected Right

53 Here the Crown contends that in the end Mr. Kona spoke to Duty Counsel and was thus able to get legal advice. This must be weighed against the right to speak to counsel of your choosing. Mr. Kona felt that duty Counsel was a police lawyer which would have affected the relationship with the lawyer.

54 In my view, the effect on the *Charter*-protected right was great and favours exclusion.

D. Adjudication on the Merits

55 This factor favours admitting the evidence. Drinking and driving cases are of great public concern and having them decided on their merits is important for the administration of justice.

E. Conclusion

56 Balancing the factors, it is my view that admitting the Approved Instrument results would bring the administration of justice into disrepute. The evidence is excluded.

57 In the result the charge is dismissed.

N. DWYER J.

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