

File No: 182476-2-C
Registry: Vancouver

In the Provincial Court of British Columbia

REGINA

v.

**DAVID PHAM
BEA BEIN BADILLA**

**RULING ON VOIR DIRE
OF
THE HONOURABLE JUDGE DHILLON**

COPY

Crown Counsel:	C. Hough
Counsel for the Accused Pham:	J. Solomon
Counsel for the Accused Badilla:	J. Turner
Place of Hearing:	Vancouver, B.C.
Date of Judgment:	October 22, 2008

[1] THE COURT: Under Count 1 of Information Number 182476, David Pham and Bea Bein Badilla are charged with, on the 6th of June, 2007, unlawfully possessing 480 grams of marihuana for the purposes of trafficking contrary to s. 5(2) of the **Controlled Drugs and Substances Act**.

[2] Mr. Pham alleges that his legal rights under s. 8 and ss. 10(a) and 10(b) of the Canadian **Charter of Rights and Freedoms** were breached. He seeks exclusion of all evidence obtained under 24(2) of the **Charter**. Ms. Badilla is not asserting any breach of her **Charter** rights.

[3] The Crown led evidence on the voir dire from Detective Constable Lowe, then Constable Lowe, and Constable Jassal. Constable Lowe was a passenger in a police vehicle operated by Constable Jassal when he noted a vehicle stopped curbside on Kingsway in Vancouver. It was a black Civic with a spoiler on the back and it appeared to be idling with its lights on. A licence plate check indicated that it did not have active insurance.

[4] The Civic was seen to pull away from the curb. The officers followed it. On police activation of lights and siren, the Civic stopped. Mr. Pham was the driver and Ms. Badilla was in the front passenger seat.

[5] Constable Jassal approached the driver and Constable Lowe approached the passenger. Both occupants remained in the vehicle. Constable Lowe testified that from his position six inches from the door frame, he noted a strong odour of fresh marihuana emanating from the vehicle's closed passenger window.

[6] He testified that from his considerable police experience with investigation of marihuana offences ranging from undercover street purchases to marihuana grow operation enforcement, he was able to distinguish between smoked and fresh marihuana. Based on the odour he smelled, which was coming from the Civic and not from any other source, he believed that an amount of fresh marihuana could be found in the vehicle.

[7] He used his flashlight to shine into the vehicle and saw on the back seat a gift-style bag in plain view. He saw no other indicia of drug presence other than the odour and the shopping bag.

[8] In the meantime, Constable Jassal was making inquiries of Mr. Pham through the open driver's window as to his driver's licence and other motor vehicle enforcement information. When Constable Jassal heard Constable Lowe state that it smelled like marihuana, Constable Jassal put his head inside the

vehicle. Constable Jassal's own evidence in direct was to the effect that he was not able to determine what kind of smell there was, but in cross, said he noted the smell of marihuana. Constable Lowe said that Constable Jassal never expressly said that he could smell marihuana during the dealings with the driver.

[9] On Constable Lowe's comment about the smell of marihuana, Constable Jassal asked Mr. Pham if he had marihuana and Mr. Pham replied he had smoked a joint earlier in the day. This was the first statement elicited from Mr. Pham before any **Charter** caution or warnings were given. Constable Lowe testified that Mr. Pham's answer of smoked marihuana was inconsistent with the odour of fresh marihuana that he perceived.

[10] Constable Lowe told Constable Jassal to remove Mr. Pham and he removed Ms. Badilla from the vehicle. As Mr. Pham was moving to the sidewalk, Constable Lowe asked him if there were drugs in the vehicle. Mr. Pham said, "Yes, marihuana." Constable Lowe asked how much. Mr. Pham said, "About a pound." This conversation occurred about four or five minutes after the motor vehicle stop had commenced.

[11] On eliciting these statements, Constable Lowe went into the vehicle to search while Constable Jassal advised Mr. Pham

that he was under arrest for possession of marihuana and handcuffed him. Constable Jassal asked about weapons and Mr. Pham disclosed that he had a loaded pellet gun in his waistband. No **Charter** rights were given until after Constable Lowe had searched the vehicle and found a total of 480 grams of marihuana in the shopping bag on the back seat, packaged in plastic bags covered by dryer sheets in two shoeboxes.

[12] These are the court's findings.

[13] The accused contends that the police failed to advise him in a timely manner of the reason for his detention and, moreover, failed to advise him of his right to counsel before questioning him. He contends that any admissions he made or any search of his person or the vehicle based on those admissions were in breach of his **Charter** rights. He asks that any evidence thereby obtained ought to be excluded.

[14] The Crown responds that the police were conducting an investigative detention during which they were permitted to ask questions to assess the situation and no **Charter** rights were engaged at this preliminary stage. In making this argument, the Crown relies, among other cases, on the recent Ontario Court of Appeal decision of **R. v. Suberu** (2007) 218 C.C.C. (3d) 27, appeal to the Supreme Court of Canada heard and reserved April 15, 2008.

[15] In *Suberu*, police detained and questioned a person under a brief investigative detention without informing him of the reason for the detention or of his right to counsel. The Ontario Court of Appeal held that where an accused is formally arrested and not merely detained for investigatory purposes, the requirement to inform "without delay" under s. 10(b) means immediately unless police safety or other exigencies take precedence.

[16] On the other hand, short of lawful arrest and in the context of an investigative detention, the Ontario Court of Appeal held that "without delay" under s. 10(b) has a more elastic meaning. Police may momentarily hold off in advising a detained person of his or her s. 10(b) rights while police determine if anything more than a brief detention is necessary or justified. This interlude must be brief and for a truly exploratory purpose during which police are deciding on a course of action.

[17] The Ontario Court of Appeal further states at paragraph 61 that it is possible that persons will give incriminating answers to questions put to them during the brief interlude between the commencement of the detention and the obligation of the police to comply with s. 10(b). In such a case where police questions result in incriminatory answers, the answers

can be used by the officer to form the grounds for a subsequent arrest, but may not be admissible in evidence against the accused at the trial proper if the admission of such statements would render the trial unfair.

[18] Relying on the reasons in **Suberu**, the Crown contends that the accused's statement about the marihuana in the vehicle was during a brief exploratory interlude and used only to confirm a police suspicion about drugs. The information was used to establish reasonable and probable grounds for the subsequent and lawful arrest. The search was lawful as incidental to the arrest. The Crown is not seeking to tender the admission about the drugs into evidence in the trial proper.

[19] Now, as an aside, I asked counsel during submissions to comment on the law as it relates to police questioning of drivers in vehicle stops where the odour of alcohol as opposed to marihuana is detected. I thank counsel for their supplemental submissions on this issue.

[20] While not directly of assistance in this case, it is clear that the law as recently stated in **R. v. Elias and R. v. Orbanski**, 2005 SCC 37, does confirm that on detention and police questioning of a motorist in respect of a suspected impaired driving offence, **Charter** rights are engaged but suspended pending the application of screening measures.

These screening measures are sanctioned implicitly or expressly by highway traffic statutes which were found to be a reasonable limit prescribed by law under s. 1 of the **Charter**.

[21] In **Suberu**, on the other hand, the Ontario Court of Appeal states that s. 10(b) **Charter** rights are not engaged during a brief situational assessment by police. In conducting that situational assessment, police may ask cursory and preliminary questions that can be characterized as truly exploratory to determine if the detainee is implicated in any offence.

[22] The distinction between **Elias and Orbanski**, on the one hand, and **Suberu**, on the other hand, is that in the former, s. 10(b) rights arise, but their application is suspended by operation of law. That is a reasonable limit. In **Suberu**, the Ontario Court of Appeal has said that **Charter** rights cannot be said to have arisen or crystallized in the very early stages of a police assessment until there is a basis for a reasonable suspicion of an offence.

[23] I will leave it to the Supreme Court of Canada to determine whether **Suberu** is obviously upheld or reversed, but I have thought through the submissions of counsel on this very interesting turn in the law. I have also considered the following cases provided by counsel for the Crown: **R. v. Belnavis** (1997) 118 CCC 3d (405) SCC; **R. v. Schulz** (2001) 159

BCAC 146; **R. v. Munro** 2006 BCSC 1937; **R. v. Luu** (2006) BCJ No. 347; **R. v. Juan** (2007) 222 CCC (3d) 289 (BCCA); **R. v. Condon** (2006) 228 BCAC 89; **R. v. Collins** 35 DLR (4th) 508; **R. v. Fahbod** (1996) 74 BCAC 9; and **R. v. Washington and Shepherd** (2007) 227 CCC (3d) 214. For the defence, counsel referred the court to **R. v. Janvier** (2007) 227 CCC 3d 294, (2007) S.J. No. 646 (CA); **R. v. Hood** [2008] BCJ No. 1441; **R. v. Villeda** (2008) Vancouver Registry 176142-1 Howard, PCJ; **R. v. Vu** 2004 BCCA 230; **R. v. Brown** [2003] BCJ No. 1654; **R. v. Di Giacomo** (2008) BCJ No. 1187; **R. v. Thomsen** (1988) SCJ No. 31, [1988] 1 SCR 640; and **R. v. Mann** 185 CCC (3d) 308 (SCC), (2004) 2 SCR 59.

[24] In the case at bar, I find as a fact that when Constable Lowe approached the vehicle and detected the smell of fresh marihuana, the traffic investigation stopped and turned into a suspected drug investigation. He advised his partner about the smell who then asked Mr. Pham about the smell while he was still in the driver's seat.

[25] Constable Lowe said in direct testimony that Pham's answer about having smoked marihuana sometime earlier was inconsistent with the smell of fresh marihuana that he had detected. He said he formed the belief that the occupants were arrestable by reason of the fresh marihuana smell and the

presence of the gift bag.

[26] If Constable Lowe formed the opinion that the occupants were arrestable, the matter had moved beyond the exploratory stage as defined in **Suberu** by the Ontario Court of Appeal. Specifically, I note at paragraph 54, the Ontario Court of Appeal states as follows:

The police activity during the brief interlude contemplated by the words "without delay" must be truly exploratory in that the officer must be trying to decide whether anything beyond a brief detention of the person will be necessary and justified. If the officer has already made up his or her mind that the detained person will be detained for something more than a brief interval, there is no justification for not providing the individual with his or her right to counsel immediately. To echo the words of **R. v. Mann**, *supra*, in those cases, the investigative detention is a de facto arrest.

[27] In the case at bar, while it may be arguable that the first question posed by Constable Jassal to Mr. Pham when he was seated in the car about marihuana is permissible under **Suberu** as truly exploratory in order to rule in or rule out the necessity of continued detention and further investigation, Constable Lowe's view upon receiving the answer clearly showed, in his mind, that he thought the occupants were arrestable.

[28] I find that Mr. Pham's answer, in fact, did not square with Constable Lowe's suspicions about the presence of fresh

marihuana and there was, therefore, the prospect of a continued detention for investigation of a drug offence. This necessity required police to act in accordance with s. 10(a) and s. 10(b) of the **Charter of Rights**.

[29] Accordingly, police were obliged to inform Mr. Pham of his right to retain and instruct counsel and they were under an obligation to stop any attempt to interrogate him until such rights had been given to him. I find that the police failed to advise Mr. Pham promptly of the reason for his detention and of his right to counsel and this, I find, was in breach of his s. 10(a) and s. 10(b) rights.

[30] Crown has argued that the police had reasonable and probable grounds to arrest Mr. Pham and to search his vehicle under the common law power of a police search incidental to a lawful arrest. On this point, I find that notwithstanding Constable Lowe's suspicion about the presence of drugs based on the odour and the shopping bag in the vehicle, Constable Lowe on his own testimony did not have reasonable and probable grounds to arrest Mr. Pham for possession of drugs.

[31] Specifically, Constable Lowe's evidence in cross-examination was that the occupants were removed because he was intending to enter the vehicle to further investigate the source of the marihuana odour. Constable Lowe agreed that the

odour could have been from drugs just recently removed from the vehicle. I find that consistent with that intention to investigate and a subjective state of mind short of reasonable and probable grounds to arrest.

[32] Mr. Pham was removed from the vehicle. He was not handcuffed immediately. Most importantly, Constable Lowe admitted that his decision to arrest came only after removing Mr. Pham from the vehicle and after questioning him and getting the incriminating answer about the marihuana in the vehicle. Only after the admission of marihuana did police, in fact, handcuff Mr. Pham and tell him he was under arrest for a drug offence.

[33] They then searched Mr. Pham and found in his personal possession a loaded pellet gun and \$410 in cash. In short, police did not **Charter** Mr. Pham until after Constable Lowe had searched the vehicle and found the marihuana.

[34] I have considered the cases on the sufficiency of the smell of marihuana either alone or with other factors and whether that can form reasonable or probable grounds to arrest as set out in **R. v. Schulz** (supra), **R. v. Luu** (supra), or **R. v. Maton** (2005) BCSC 330.

[35] The evidence here falls short of the standard of a

credibly-based probability based on odour and the package in the vehicle because of the inconsistent evidence of Constable Lowe that he was intending to continue an investigation and a detention to firm up his grounds and he intended to search the vehicle for further evidence.

[36] I am satisfied that when Mr. Pham was removed from the vehicle, Constable Lowe did not subjectively believe that he had grounds to arrest Mr. Pham and objective reasonable grounds cannot be found to exist given Constable Lowe's interest in searching the vehicle for drugs as part of his ongoing investigation.

[37] Therefore, for the reasons outlined above, I am satisfied that Mr. Pham has established that his rights under s. 10(a) and 10(b) were breached.

[38] As for the s. 8 allegation, the search was a warrantless search. Such a search is presumptively unreasonable unless justifiable in law as a search incidental to an investigative detention or a search incidental to a lawful arrest. When Mr. Pham was removed from the vehicle, it was, I find, under an investigative detention; **R. v. Mann**, [2004] 2 S.C.R. 59.

[39] The **Mann** case states that a search incidental to an investigative detention is justified if it is for protective

purposes. It cannot be said that at the moment Constable Lowe decided to remove the occupants in order to search the vehicle for contraband, it was for any officer safety reasons. It was to uncover evidence of a drug offence.

[40] In summary, on the totality of the evidence in the voir dire, I find that the search of the vehicle was triggered by an incriminatory statement elicited in breach of the accused's rights. I find that the search of the accused's vehicle was a warrantless search in breach of the accused's s. 8 right to be free from unreasonable searches and seizures in this instance.

[41] I turn now to the issue of the exclusion or not of the evidence. Should the evidence of the drugs found in the car or the pellet gun on Mr. Pham's person be excluded under s. 24(2)?

[42] The burden is on Mr. Pham to establish on a balance of probabilities that to admit the evidence could bring the administration of justice into disrepute as stated in **Collins v. The Queen**, 35 D.L.R. (4th) 508. The evidence of the drugs and the gun is real evidence. It is not conscriptive. No real issue of trial fairness arises as a result of those items, and the Crown is not seeking to rely on the pre-**Charter** statement obtained from Mr. Pham, the statement that I have described as compelled.

[43] As to the seriousness of the breach, in determining this point, it is common ground that the police are expected to understand and properly apply the **Charter** in their interactions with persons who are detained or arrested. The failure to advise Mr. Pham without delay of the reason for his continued detention and his right to counsel is a matter of concern to this court.

[44] Moreover, there is an obligation to refrain from questioning the suspect until his rights have been provided. In this case, police wrongly questioned the accused directly about drugs in the car before giving him his s. 10 rights. Constable Lowe stated he intended to search the vehicle for evidence in the absence of any lawful authority to do so, and he then sought incriminating information from the detainee to support his search.

[45] This officer testified that he was experienced in drug investigations and is therefore presumed to know the law in relation to detained suspects and lawful authority of police to question or search such suspects. Constitutionally-permissible police action is the foundation on which rights of citizens in a democratic society are preserved and protected. Police must carry out their daily interactions in a manner consonant with **Charter** values.

[46] In my view, it ought to have been plain and obvious to the police in this case what the appropriate discharge of their duties required in the case of vehicle stops and questioning of detainees. I have concluded that there is an absence of good faith on the facts of this case in the sense that it cannot be said, as stated by Madam Justice Ryan in **R. v. Washington** that:

... good faith is present when the police have conducted themselves in a manner that is consistent with what they subjectively, reasonably, and non-negligently believe to be the law.

And that is from the case Crown provided, **R. v. Washington** (2007), 227 C.C.C. (3d) 214, at paragraph 78.

[47] Accordingly, I cannot conclude that the police here acted in good faith in that their actions clearly fall further down the "fault line," as stated in **R. v. Washington**.

[48] I turn lastly to the third **Collins** test to the effect of the exclusion on the administration of justice. The evidence obtained by a breach of the **Charter** is clearly central to the Crown's case and is necessary to substantiate the charge. Drug offences, too, are serious matters, and a pound of marihuana packaged such as alleged here indicates *prima facie* that it was intended for the commercial stream. Possession of a weapon, too, is a serious offence.

[49] I have considered that the reasonable expectation of privacy of Mr. Pham in the vehicle is below the privacy interests in one's bodily integrity or in one's residence. Police had sufficient grounds certainly to detain at the outset of this drug investigation based on the perceived smell of fresh marihuana that Constable Lowe testified to and that was not seriously challenged.

[50] Although failing to discharge their obligations to act consistently with the **Charter**, it is noteworthy that after the discovery of the drugs, Mr. Pham said, "No, not yet," when asked if he wanted a lawyer. Now, he did not unequivocally assert his right to counsel at that stage and the total incident from the vehicle stop to the **Charter** advice was of short duration, certainly under 10 minutes.

[51] In this case, the balancing to be done is between the conduct of police, who ought to know the most fundamental of tasks in providing **Charter** rights, and particularly, of a police officer who asks the court to accept his evidence on his expertise on being able to determine the odour of marihuana and yet is not able to meet the most cursory of expectations when it comes to **Charter** protections that are clearly available to citizens in a democracy.

[52] On the other hand, I do understand that in this instance

had the police continued with what was lawfully within the scope of their permissible conduct, they could have done a pat-down search of Mr. Pham, uncovered the gun, and that could have led to clearly an arrest on a weapons offence and then the right to search the vehicle.

[53] It is one of those cases in which the balancing is a very fine balancing between the ability of the police to pursue their lawful scope of authority and their clear failure to meet the most basic of their obligations to citizens. In this case, the amount of the drugs is not a significant amount. As I recall, in *R. v. Lam* [2003] BCJ No. 2565 (C.A.) it was some many pounds, 100 some odd pounds. I have forgotten the number.

[54] And in this case, I am of the view that there were no exigent circumstances. It was nothing short of just an abject failure of the police to turn their mind to what their obligations were as law enforcement officers, particularly in a situation where Constable Lowe testified to his expertise in drug enforcement.

[55] That leads me to believe that, in the underlying s. 24(2) analysis, police authorities must be obliged to respect the *Charter* and must be obliged to meet their obligations under the *Charter*, and therefore uphold the democratic laws under

which all of us operate.

[56] So in this case, having said it is a very fine balancing, I am of the view that Mr. Pham has persuaded me that in this case to admit the evidence would bring the administration of justice into disrepute and, accordingly, I am excluding the evidence obtained by the **Charter** breaches.

[57] Having said that, let me say this to both counsel and particularly to you, Mr. Hough, who really had the uphill battle, you have done a masterful job in presenting the case for the Crown and presenting the legal authorities on the argument, which led to what I think has been some difficult few weeks for me as I mulled through which way to go. So I thank you for that.

[RULING ON VOIR DIRE CONCLUDED]