

ONTARIO COURT OF JUSTICE

DATE: 2021 06 29
COURT FILE No.: Midland 20-38102603 & 20-38102604

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

LUAL NGONG

Before Justice Cecile Applegate
Heard on March 9, 10, 11, 12 & April 13, 16, 22 & May 31, 2021
Reasons for Judgment released on June 29, 2021

A. Meiners counsel for the Federal Crown
B. Bhangu counsel for the Provincial Crown
J. Goldlist..... counsel for the accused Lual Ngong

APPLEGATE J.:

Introduction

[1] Mr. Ngong is charged with drug, firearm and breach of recognizance offences. On April 5, 2020, police located a loaded handgun, 25 grams of cocaine and 2 oz of fentanyl/heroin in the trunk of the vehicle that Mr. Ngong was arrested in. Mr. Ngong was initially arrested for March 31, 2020 offences. The Crown withdrew these offences at the start of the trial and proceeded only on the April 5 offences.

[2] Mr. Ngong argues that his ss. 8, 9, and 10(b) *Charter* rights were violated. He seeks the exclusion of the evidence pursuant to s. 24(2) of the *Charter*. If the evidence is admitted, he submits that the Crown has not proven beyond a reasonable doubt that he had knowledge and control of the gun and drugs.

The Issues

Issue #1: Has the Crown proven that the warrantless search of the motor vehicle was reasonable?

Pertinent Facts

Arrests of Lual Ngong and Malek Cep

[3] On March 31, 2020, DC Prout concluded he had grounds to charge Lual Ngong with failing to comply with his recognizance, breach of probation and prohibited driving under the *Criminal Code*. On April 1, 2020, DC Prout sent an email to his fellow officers detailing these grounds and safety concerns. The email contained information pertaining to Mr. Ngong, a Niche photo of him and particulars of the involved vehicle (a silver Chevy Cruze with a specified licence plate). The officer safety concerns arose from a previous arrest where Mr. Ngong had been in possession of a loaded firearm. The defence concedes that the arresting officers, relying on DC Prout's email, had reasonable and probable grounds to arrest Mr. Ngong for the March 31 offences. The defence does not concede that DC Prout had reasonable and probable grounds to issue the email for the arrest of Mr. Ngong.

[4] On April 5, 2020, police observed an individual later identified as Lual Ngong and the Chevy Cruze on Yonge St near the Silver Star motel. This motel, along with others, had been converted into emergency housing for the homeless when the local shelter closed due to the COVID-19 pandemic. This area was known to be problematic and resulted in many calls for police service. Mr. Ngong had left the Chevy Cruze parked in a parking lot across the street and entered a unit of the Silver Star motel with a female and another male (later identified as Malek Cep).

[5] Police began discussing how to arrest Mr. Ngong for the March 31 offences. They decided to set up observation points of the motel and vehicle while waiting for the parties to return to the vehicle. The plan was to block the vehicle and the parties in to prevent them from leaving. The officers testified that they felt safer proceeding in this manner rather than approaching a motel room where a firearm might be involved. PC Graham believed this plan would keep the police, the public, Mr. Ngong and Mr. Cep safe.

[6] At 12:22 pm, police converged on the Chevy Cruze after the two males returned to the vehicle. PC Tuck and PC Wilson dealt with Mr. Cep while PC Graham dealt with Mr. Ngong. Given the contents of DC Prout's email, PC Graham arrested Mr. Ngong at gunpoint. Once Mr. Ngong put his hands up and was cooperative, PC Graham holstered his gun. PC Graham had Mr. Ngong step out of the vehicle and arrested him for breach of recognizance, breach of probation and drive while disqualified. Mr. Ngong was handcuffed and taken to PC Graham's cruiser.

[7] Prior to Mr. Ngong entering the cruiser, both PC Sibley and PC Graham conducted a pat down search of him. Some cash, a phone charger and a phone were located. Mr. Ngong verbally identified himself to PC Sibley as "Lual". Despite no last name being provided, PC Sibley was satisfied he was dealing with Lual Ngong. He advised Mr. Ngong that he was under arrest for drive disqualified, breach of probation and fail to comply with

recognizance. When Mr. Ngong stated that he was not driving the motor vehicle that day, PC Sibley explained that it was for an incident on March 31. PC Graham asked Mr. Ngong his name and he answered “Mark”. PC Graham took a closer look at Mr. Ngong and knew he matched the photo attached to DC Prout’s email. After being searched, PC Graham asked him his name again and he answered “Lual”.

[8] PC Wilson dealt with Malek Cep. He had no idea who Malek Cep was and whether he had any involvement in the criminal justice system. He ordered Mr. Cep face down on the ground at gunpoint while PC Tuck handcuffed him. The male identified himself as Malek Cep but had no identification with him. PC Wilson stated that Mr. Cep was under detention for officer safety until “they cleared to make sure there were no weapons around and no weapons in the vehicle”. He wanted to search Mr. Cep and the vehicle within the reach of both parties to make sure there were no weapons located given that “Mr. Ngong was known to have weapons on him”. In cross-examination, PC Wilson agreed the email did not use the phrase “known to have weapons on him”. It stated that Mr. Ngong had been arrested once with allegations of possessing a firearm. PC Wilson did not know how long ago that was. There was no information about Mr. Cep in DC Prout’s email and PC Wilson had no information that either male would be in possession of a firearm that day. He did not tell Mr. Cep that he was being arrested or detained and for what. He explained “it’s pretty tough to do in a situation when you’re telling someone to get on the ground”. He testified that, after Mr. Cep got to his feet, he would have told him he was detained until they figured out what was going on with the situation. He had no notes of having said this to Mr. Cep. In addition, PC Wilson did not provide Mr. Cep with his rights to counsel or caution despite knowing that the law requires him to when he places someone under investigative detention. He proceeded to ask Mr. Cep what he was doing in the area.

[9] PC Graham was not involved in the arrest of Mr. Cep and had no information about him prior to his detention. He testified that police were detaining Mr. Cep until they ensured everything was clear and safe. Based on DC Prout’s email, there was a concern of Mr. Ngong having access to a firearm. He stated that “if one or the other was to be released unconditionally, it’s just as easy to take the handcuffs off as it is to put them on, so it was more for safety aspect...”.

[10] PC Tuck arrived on scene and observed two Black males face down on the ground beside the vehicle. This evidence differed from PC Graham’s evidence that he did not place Mr. Ngong on the ground. PC Tuck noticed that PC Wilson had his gun drawn. He assisted by handcuffing Mr. Cep. He did not place Mr. Cep under arrest nor did he hear anyone arrest Mr. Cep. He did not know whether Mr. Cep was arrested or detained for investigation. He did not know why he was handcuffing Mr. Cep and stated he was taking instructions from PC Wilson. He searched Mr. Cep because he was told to search him. PC Tuck assumed there was a lawful arrest allowing him to search Mr. Cep. He was not told of the reason for Mr. Cep’s arrest and did not hear rights to counsel or caution being read.

[11] PC Sibley asked dispatch to query both males. He received information that Mr. Cep was bound by a recognizance of bail for drug and firearm related offences with a condition to remain in his residence with certain exceptions. Mr. Ngong was also bound

by a similar recognizance of bail for firearm and fraud related offences. At 12:46, Mr. Cep was arrested for breaching that bail and given his rights to counsel and caution.

[12] All officers agreed that the sole grounds to arrest Mr. Ngong emanated from the email sent by DC Prout. No officer observed Mr. Ngong or Mr. Cep conduct any illegal activities and nothing illegal was found on them on April 5. The officers agreed that the offences for which Mr. Ngong was arrested were non-violent and did not raise safety concerns. Some testified that, had they been dispatched to another call, they would have left to attend that call prior to arresting Mr. Ngong.

Search of the interior of the motor vehicle

[13] At 12:45 pm, PC Sibley completed a search of the passenger side where he located bills of money in the centre console and a health card in the name of an unrelated individual. He stated his authority to search the vehicle was “search incident to arrest”. His normal practice would have been to search the car seats, glove boxes, in between the seats and the console. He did not search the driver’s side. PC Sibley did not know what Mr. Cep was placed under arrest for – either at the time he searched the vehicle or at trial. When asked if he understood that a vehicle could only be lawfully searched: (1) with a search warrant; or (2) incident to arrest; or (3) based on exigent circumstances, PC Sibley answered “okay”. He later stated that he understood that, then added “okay. If that’s what you’re saying, yes”. When asked if he knew of any other ways, he answered “not off hand”. PC Sibley agreed that he encountered these situations regularly as a police officer. When confronted with the fact that he did not have a warrant to search the vehicle, he answered “well, I also could have searched a vehicle for towing it for property” but agreed that did not happen here. When it was suggested that he did not have grounds to obtain a warrant, he stated “... my thinking was not obtaining a warrant, my thinking was I’m gonna search the vehicle incident to arrest”. PC Sibley agreed that none of his observations of the Chevy Cruze or Mr. Ngong gave rise to exigent circumstances.

[14] PC Tuck testified that he did not search the interior of the vehicle when the males were arrested. PC Reddecop, however, recalled attending the scene and assisting PC Tuck in searching the vehicle. PC Reddecop had no notes of who was involved in searching the car, but his personal recollection was that it was him and PC Tuck. PC Reddecop searched the driver’s side of the vehicle including under the seats, under the mats, under the sunshade and mirror, the centre console, the cupholder and storage compartment under the door handle. He located a bottle of steroids in the door compartment and a small amount of cash in the centre console. He recalled speaking to PC Tuck about the steroids at the time.

[15] PC Reddecop had been a police officer for less than one year at the time. He understood that his search of the Chevy Cruze was lawful because Mr. Ngong had been arrested at or near his vehicle. Given that, he believed that the search incident to arrest continued to the vehicle. He also stated that he was following PC Tuck’s lead by assisting in searching the vehicle. PC Reddecop understood that the power to search incident to arrest allowed him to search a car and the immediate area where an arrestee was regardless of what that person was arrested for. He was not sure what Mr. Ngong and Mr. Cep had been arrested for nor did he ask.

Discussions and decisions pertaining to searching the trunk of the car

[16] At 12:33 pm, PC Graham and PC Sibley discussed what they should do with the vehicle. They wondered whether they should tow it or whether they should search it. Feeling a little uncertain, they decided they needed some guidance and, at 12:35 pm, PC Sibley contacted Sgt Burrows. Given that Mr. Ngong had outstanding firearm related charges, PC Sibley was concerned about whether “there was a public safety issue if a firearm is located in the vehicle”. He was concerned that a firearm could be stolen or taken if the vehicle was left there and broken into. Other than searching the interior of the vehicle, no decision was made at that time. PC Tuck was directed to stay with the vehicle for continuity and public safety.

[17] Back at the station, PC Graham and PC Sibley discussed their public safety concerns with Sgt Burrows. Sgt Klingsphon was also made aware of these concerns and had concerns of his own. The following factors were identified by these officers as supporting their public safety concerns:

- The two men were from the Hamilton area;
- They were frequenting a motel currently housing homeless and drug addicted persons. The area was known for “drugs, prostitution and lawless public behaviour”;
- There was a stay-at-home order in effect as a result of the COVID-19 pandemic;
- The males had “extensive criminal history” which related to firearms, drugs and violent offences. They had outstanding charges which included drugs and firearm offences;
- They were bound by bail conditions to remain in their residence with specified exceptions;
- “large amounts of money” were seized from the vehicle and the males. Some of the money was in \$20 bills. It was clarified that Mr. Ngong had \$675.65 on him and not “close to a \$1000” as PC Graham had guessed it was. In addition, \$180 was found in the centre console;
- Steroid pills were found in the vehicle;
- Mr. Ngong had parked his vehicle across the street. PC Graham believed this was common practice for someone engaged in criminal activity trying to distance themselves from their vehicle;
- There had been drug overdose deaths in Midland; and
- Sgt Burrows stated that he was told of “in and out” activity by PC Sibley with Mr. Ngong making repeated trips back and forth from the motel to the car. None of the officers on scene had observed “in and out” activity by Mr. Ngong;

[18] These factors led the police to conclude that Mr. Ngong was in Midland for the purpose of dealing drugs. Sgt Klingsphon had 29 years of experience. He testified that persons involved in drug dealing “fairly frequently” had weapons with them for protection.

[19] In addition to these public safety factors, Sgt Burrows had been told that a wrong name had been provided and no ID had been located. He also stated, however, that the police were confident about the identities of the males once back at the police station. Despite not having any formal identification, all officers testified that they were satisfied they were dealing with Lual Ngong and Malek Cep either by the time they left the scene or when they arrived at the police station.

[20] Sgt Klingsphon stated it was the totality of the aforementioned factors that provided his lawful authority to search the trunk of the car. Outstanding charges or allegations alone would not have been enough. He agreed he never instructed any officer to ask the two males what they were doing at the hotel or in Midland. PC Graham never told him that Mr. Ngong had said he was in Midland to have sex with some women and that he was in a room where two women were located. He agreed that the money found could be from a legitimate source such as a government assistance cheque. Sgt Klingsphon did not ask whether officers had observed drug-related activity or evidence that either male was armed. When it was suggested that he had not done any investigation into whether these individuals were dealing drugs or were armed, Sgt Klingsphon disagreed stating that the background searches to determine their involvement with the criminal justice system was part of their investigation. Sgt Klingsphon agreed there was no observations connecting Mr. Ngong to drug activity or persons involved in the drug subculture on April 5.

[21] Sgt Klingsphon believed that “the totality of everything” supported a search incident to arrest and a search warrant was not needed. He believed that he could search a trunk of a vehicle when someone had been arrested for breaching their recognizance. He added that “part of the reason for the search incident to arrest is for searching evidence related to the offence. And again, due to both parties being in breach of release orders or release conditions that would have very clearly had some restrictions in relation to weapons, and in the case of the one male, definitely... drugs”. Sgt Klingsphon could not say whether he had reviewed Mr. Cep’s bail conditions or whether Mr. Cep was prohibited from possessing drugs. He simply inferred it. Sgt Klingsphon believed there was a reasonable prospect that drugs or weapons would be found and that it would afford evidence of further breaches.

[22] Sgt Burrows requested D/Sgt Bradford’s assistance because D/Sgt Bradford’s street crime unit was more familiar with drug dealings, executing warrants and seizing drugs. He advised him of the factors pertaining to public safety concerns and his belief that Mr. Ngong was in town to sell drugs and was likely to have a firearm in his possession. Sgt Burrows’ purpose to search the vehicle was to look for drugs and weapons, for public safety and any other evidence of the offences. He also indicated that a search might result in locating the males’ ID in any luggage found. Sgt Burrows did not entertain getting a search warrant because he was “still of the perspective that this was incident to arrest and the search following the arrest, and then with the heightened concerns, not only for the evidence incident to arrest but with the public safety concerns”. Sgt Burrows had 23

years of policing experience including some 10 years in the crime unit where he authored and executed warrants.

[23] D/Sgt Bradford has been a police officer for 21 years. He has been an investigator in organized crime since 2005 and has training in search warrants. Since 2014, he has acted in a supervisory capacity which includes supervising the drafting and submission of judicial authorizations. D/Sgt Bradford confirmed that Sgt Burrows told him that "...Lual Ngong and a second male were in custody regarding outstanding warrants, breach of court orders and... misleading the police by providing a false name". These arrests "had occurred after a vehicle stop leaving The Knights Inn on Yonge St". He subsequently indicated he could be mistaken about the motel. Sgt Burrows was seeking his opinion and guidance on searching the vehicle. D/Sgt Bradford told Sgt Burrows he would search the vehicle incident to arrest. He explained the search incident to arrest pertained to the fact that the identity of one male was not known and that this male had been arrested for providing a false name.

[24] D/Sgt Bradford also discussed public safety issues associated with the arrested parties including "that Mr. Ngong had recently been arrested with a loaded handgun in the recent past, he had a criminal record for violence, including drug trafficking, and that Mr. Ngong was on bail conditions to be in a Hamilton residence except with a surety and... this was during the onset of the pandemic". The two also discussed some violence that had occurred in the community in the recent past between local drug traffickers and out of town drug traffickers.

[25] D/Sgt Bradford and Sgt Burrows made the decision together that Sgt Burrows would direct the officers on scene to search the vehicle. D/Sgt Bradford stated the nexus for searching it incident to arrest was to search for documentary evidence confirming the identity of the individual arrested for providing a false name. In his view, it would be reasonable to search the interior and the trunk for luggage as these locations may contain evidence of someone's identity. This would be his primary focal point and justification for searching incident to arrest. A secondary concern related to the aforementioned factors associated to officer and public safety. This secondary purpose would be to search for weapons and firearms based on Mr. Ngong's past.

[26] D/Sgt Bradford stated there was no discussion about getting a search warrant. He did not think the statutory preconditions that would allow for a *Criminal Code* warrant existed at the time. Specifically, they were unable to satisfy the requirement that the evidence would be found at the location of the search such that a warrant could be issued. He also would not have gone that route because of his belief that legal authority existed to search incident to arrest.

[27] D/Sgt Bradford was not aware that Sgt Burrows was not on scene but was receiving his information from other officers. He did not realize that the arrested males were at the detachment. He did not know which male had been arrested for obstructing a peace officer. When it was suggested that one of the males gave a wrong name and immediately corrected it and that Niche had confirmed his identity, D/Sgt Bradford admitted that knowing this information would change his analysis. Specifically, he stated that, if he was on scene and knew the identity of both accused through Niche, photos and self-identification, his analysis would change because identity was no longer a concern.

He disagreed, however, that there would be no other justification given his secondary concern for public and officer safety.

Search of the Trunk of the Vehicle

[28] Following these discussions, Sgt Klingsphon arrived on scene and instructed PC Tuck to search the trunk. PC Reddecop was also present but did not search the trunk. PC Tuck located a satchel with the loaded handgun and drugs. PC Tuck had been an officer for approximately two years at the time. He stated that his authority to search the trunk was “just the authority from my supervisor” meaning Sgt Klingsphon. He was not about to question Sgt Klingsphon about the grounds to search the trunk. PC Tuck had never drafted an information to obtain a search warrant nor did he know what an ITO was. PC Reddecop was the most junior officer during the trunk search. He was not going to ask the senior officers whether they had a search warrant to search the trunk nor did he think there ought to be a search warrant. His involvement with search warrants has been very limited.

Position of the Parties

[29] The Crown submits that the search of the vehicle was reasonable given the totality of the circumstances. The police conducted a public safety search based on what they knew about the accused including their criminal history and the factors surrounding their attendance in Midland. The arrest was conducted in a respectful and safe manner for everyone. The police did not know who else may have access to the vehicle. It would have been unreasonable and unsafe to leave the car with a possible handgun and drugs in it. The decision to search was done in consultation with several officers and was not made hastily. The warrantless search was reasonable to ensure the safety of the public and to look for identification – both permissible reasons to search incident to arrest.

[30] The defence argues that racial profiling and lack of proper investigation undermines the objective prong of the grounds to arrest Mr. Ngong. I intend to deal with these issues in my s. 9 *Charter* analysis. If, objectively, there were no grounds to arrest Mr. Ngong, then both his arrest and the search of the vehicle incident to arrest were unlawful.

[31] Even if I find the arrest to be lawful, the defence argues that the offences for which Mr. Ngong was arrested could not have led the police to lawfully search the vehicle incident to arrest. Ms. Goldlist asks me to find that the officers deliberately created a situation of search incident to arrest by waiting approximately one hour for Mr. Ngong to return to his vehicle. This was not reasonable. The public safety factors articulated by the police did not amount to exigent circumstances or officer safety concerns. These concerns may have been valid but, if so, the police should have obtained a search warrant.

Legal Principles

[32] Given that the search of the vehicle was without a warrant, the search is *prima facie* unreasonable and the Crown bears the burden of showing, on a balance of probabilities, that the search was reasonable.

[33] “There are three recognized common law police powers of search without a warrant: (i) a search incident to arrest (*Cloutier v. Langlois*¹); (ii) a search incident to investigative detention (*R. v. Mann*²); and (iii) a safety search (*R. v. MacDonald*³)”.⁴

[34] “It seems beyond question that the common law as recognized and developed in Canada holds that the police have a power to search a lawfully arrested person and to seize anything in his or her immediate surrounding to guarantee the safety of the police and the accused, prevent the prisoner’s escape or provide evidence against him. The common thread in this line of authority is the objective of guaranteeing safety and applying the law effectively”.⁵

[35] “A warrantless search and seizure will be lawful if truly incidental to the arrest and conducted in a reasonable manner”.⁶

[36] “A search is properly characterized as an incident to arrest only if the search is conducted for a valid purpose connected to the arrest. As stated in *R. v. Caslake*:

“...This means that the police must be able to explain, within the purposes articulated in *Cloutier* (protecting the police, protecting the evidence, discovering the evidence) or by reference to some other valid purpose, why they searched. They do not need reasonable and probable grounds. However, they must have some reason related to the arrest for conducting the search at the time the search was carried out, and that reason must be objectively reasonable”.⁷

[37] “As *Caslake*, and the many cases that have applied *Caslake* instruct, a court, in deciding whether a particular search was a lawful incident to arrest, must determine:

- The purpose for which the officer conducted the search;
- Whether that purpose was a valid law enforcement purpose connected to the arrest; and
- Whether the purpose identified for the search was objectively reasonable in the circumstance.”⁸

Analysis and Findings

[38] I reject the defence submission that the officers deliberately created a search incident to arrest situation in order to be able to search the vehicle. I accept the evidence of PC Sibley and PC Graham that, based on their experience and given their concerns that Mr. Ngong may have access to a firearm, it was reasonable to arrest him in the manner that they did. I believe their stated intention of wanting to ensure the safety of all

¹ [1990] 1 SCR 158.

² 2004 SCC 52.

³ 2014 SCC 3.

⁴ *R. v. Smith*, 2019 SKCA 126, ¶ 15.

⁵ *Cloutier v. Langlois*, ¶ 49.

⁶ *R. v. Santana*, 2020 ONCA 365, ¶ 23 relying on *R. v. Fearon*, 2014 SCC 77, ¶ 20.

⁷ *Santana*, ¶ 25 citing *R. v. Caslake*, [1989] 1 SCR 51, ¶ 25.

⁸ *Santana*, ¶ 26.

parties involved including the public. There appeared to be no thought given at that time regarding establishing grounds to search the vehicle. Further, I find that such an approach was objectively reasonable in the circumstances.

[39] I also find that the manner in which Mr. Ngong was arrested was reasonable. Despite being arrested for non-violent offences, it was reasonable for the police to consider Mr. Ngong's criminal antecedence including having been arrested with a loaded firearm previously. I accept PC Graham's evidence that he commenced the arrest at gunpoint but holstered his gun when he saw Mr. Ngong's hands and how compliant he was. I reject PC Tuck's evidence that he saw Mr. Ngong laying face down on the ground. PC Graham was very detailed about his interaction with Mr. Ngong and was the officer primarily involved with him. PC Tuck's attention was divided. He dealt mostly with Mr. Cep on the other side of the vehicle. I find PC Tuck's recollection of the events as it pertains to the arrest of Mr. Ngong was not as clear or detailed as that of PC Graham.

[40] By the time the police commenced searching the interior of the vehicle, both parties had been secured in police custody. There were no safety concerns about the males accessing a weapon or escaping. Police had not observed the males committing any criminal activity on April 5 and were only arresting Mr. Ngong for the March 31 offences. PC Sibley testified that he searched the passenger side of the vehicle. PC Reddecop recalled seeing PC Tuck searching the vehicle and, "following his lead", commenced searching the driver's side. PC Tuck maintained he only searched the trunk later. Both PC Sibley and PC Reddecop had notes of searching the vehicle and finding items. Without deciding whether PC Tuck searched the interior of the vehicle, I accept that at least PC Reddecop and PC Sibley did. Both officers indicated that their authority to search the interior was "search incident to arrest". PC Sibley, a police officer since 2003, did not state whether he was searching incident to the arrest of Mr. Ngong, Mr. Cep or both. He did not know what Mr. Cep had been arrested for. He did not articulate a reason for searching the passenger side other than incident to arrest. Equally, PC Reddecop, the most junior officer on scene, seemed to think that search incident to arrest meant that police can search a vehicle when someone is arrested in or near their vehicle regardless of the offence they are arrested for. He also did not know what Mr. Ngong or Mr. Cep had been arrested for, nor did he ask. He explained that he was following PC Tuck's lead.

[41] Based on their evidence, I am unable to determine for what purpose PC Sibley and PC Reddecop were searching the interior of the vehicle. Neither officer articulated any of the reasons laid out in *Cloutier* such as protecting the police, protecting the evidence, discovering the evidence or some other valid purpose for searching the vehicle. Seeing that PC Sibley did not know what Mr. Cep was arrested for and PC Reddecop did not know what either were arrested for, neither officer were able to connect a reason to search the interior of the vehicle to the reasons for the arrest.

[42] PC Tuck could not articulate why he searched the trunk other than stating it was on the authority of Sgt Klingsphon. When assessing the evidence of the three most senior officers who ultimately decided that the trunk could be searched incident to arrest, it is clear that two reasons came to the forefront: (1) to search for evidence of identification; and (2) public safety concerns.

[43] Of all the officers, D/Sgt Bradford was the only one who could articulate his perceived authority to search the trunk incident to arrest and its nexus to a lawful purpose. The problem was that D/Sgt Bradford was given incomplete or inaccurate information when coming to his decision. For example, he was not aware that: Sgt Burrows had not been on scene himself; both males had already been taken to the station; the interior of the vehicle had already been searched, there had been no charge of obstruct police; Mr. Ngong providing the false name had been quickly rectified; and that the arresting officers had no concerns about identification once they arrived at the station. All this undermined D/Sgt Bradford's primary reason to search incident to arrest in order to establish identification. He believed that documents establishing ID could be in the vehicle or luggage in the vehicle. This would have been a valid law enforcement purpose connected to the arrest. However, none of the officers on scene articulated this as their reason to search the vehicle. And, given that the arresting officers were clearly satisfied of the identification of the two males, it would not have been objectively reasonable in the circumstances.

[44] The other purpose articulated by the police was public safety concerns. They believed Mr. Ngong and Mr. Cep were in Midland to deal drugs and that drug dealers often carried weapons. Police had no current information or observations that would support arresting Mr. Ngong or Mr. Cep for drug trafficking or possessing a weapon. Equally, D/Sgt Bradford conceded that the grounds they had were insufficient to obtain a *Criminal Code* search warrant for the vehicle. The officers involved in the arrest certainly did not feel there were exigent circumstances. Some testified to that effect. And some indicated that, given the nature of the charges Mr. Ngong was being arrested for, they would have abandoned arresting him if another call came in.

[45] The police search of the vehicle had nothing to do with the arrests of Mr. Ngong and Mr. Cep for breaching court orders. The police were not trying to gather evidence related to those offences but rather, to other offences they suspected the accused were involved in. As stated in *Santana*, the search for evidence connecting the accused to another possible offence is not a valid police purpose associated with searches incident to arrest.⁹

[46] I find there were no exigent circumstances in this case. The vehicle could have been towed or remained under the control of the police until they obtained proper authorization to search the vehicle. There appeared to be no efforts to continue the investigation in this regard. No further interviews were done or attempted with witnesses or the accused. The owner of the vehicle, Mr. Ngong's mother, was not contacted regarding her consent.

[47] The Crown has not shown, on a balance of probabilities, that the warrantless searches of the interior and the trunk of the vehicle were reasonable. The defence has established s. 8 *Charter* breaches in this regard.

⁹ See *Santana*, ¶ 28 relying on *Caslake*, ¶¶ 22-25.

Issue #2: Did the police breach Mr. Ngong s. 10(b) *Charter* rights by: (1) delaying in providing them and (2) failing to hold off questioning Mr. Ngong prior to him exercising his rights to counsel?

Pertinent Facts

[48] PC Sibley testified that he did not provide Mr. Ngong his rights to counsel (“RTC”) or caution after advising him of the reasons for his arrest. PC Sibley understood the law requires an arresting officer to immediately advise of rights to counsel. He was unable to explain why he did not immediately read RTC’s upon Mr. Ngong’s arrest. First, he stated that they were escorting Mr. Ngong to be searched and placed in the cruiser. Then he suggested that the defence ask PC Graham as “...maybe we had a conversation about that – me and PC Graham had a conversation that he was gonna read RTC’s and the caution. I don’t recall. I recall not reading them...”. PC Sibley understood the immediacy requirement of RTCs and agreed that this same immediacy requirement is what prompted him to advise Mr. Ngong of the reasons why he was under arrest. He stated that he hoped someone provided Mr. Ngong with his RTCs. In re-examination, PC Sibley knew that it was “not his job” to give RTCs to Mr. Ngong meaning that there must have been some conversation with PC Graham about who was going to read RTCs. He did not recall the conversation. If it had been his job, he would have read them.

[49] PC Graham read Mr. Ngong his rights to counsel at 12:25 pm as soon as they entered the police cruiser. He advised him again of his charges. Mr. Ngong asked “drive disqualified?” then said “you can’t do that I wasn’t driving. You’re not taking my car”. PC Graham asked Mr. Ngong to allow him to finish reading his RTCs and caution. When PC Graham finished, Mr. Ngong stopped responding and went completely quiet. He did not answer PC Graham’s questions about whether he understood his RTCs and whether he wanted to exercise them.

[50] As PC Graham started driving to the police station, Mr. Ngong said “you’d better not take my car”. PC Graham told Mr. Ngong that he was not going to speak to him until he understood his RTCs and caution. While driving, PC Graham re-read the RTCs and caution. Mr. Ngong responded “yes, okay, I have a lawyer”. PC Graham understood this response to mean that Mr. Ngong wanted to speak to a lawyer. Mr. Ngong did not provide the name of a lawyer at that time. Mr. Ngong then said “why are doing this to me? I’m a human being. Please don’t bail me. There’s COVID virus. I just came up to have sex with a couple of chicks”. PC Graham told him that the decision to hold him for bail had already been made. PC Graham asked him why he was so concerned about his vehicle stating that the car should be the least of his worries given he was being held for bail. PC Graham then asked Mr. Ngong what was inside the vehicle and if there was anything inside the police should be concerned about. Mr. Ngong responded “nothing”.

[51] PC Graham described this conversation as Mr. Ngong talking and engaging with him and PC Graham “...was simply engaging back”. He stated that to ignore him “would almost be neglect” on his part. He testified that he was taking Mr. Ngong back to the station to speak with his lawyer as no private call could be facilitated in the cruiser. PC Graham felt he had done his due diligence with RTCs and caution. He stated that if Mr. Ngong decided to speak to him prior to connecting to his lawyer he was going to engage in conversation if Mr. Ngong wanted to. PC Graham knew he should not ask investigative

or probing questions to incriminate Mr. Ngong prior to him speaking to a lawyer. He explained “there’s a difference between asking investigative questions and simply responding in conversation with what he’s saying to me”. He felt he was just engaging Mr. Ngong back.

[52] With a view to “public safety as opposed to investigative or probing questions”, PC Graham continued the discussion with Mr. Ngong. He said “you’ve been charged before with guns. It’s, it’s a small town, I’m concerned with safety of the public. Should I be worried about the car?”. Mr. Ngong responded “No. You have no right to treat me like this”. PC Graham asked if Mr. Ngong would be willing to sign a consent to search the vehicle. Mr. Ngong answered “of course not”. PC Graham’s public safety concerns were the possibility of someone having access to a vehicle that potentially contained narcotics or firearms. He was not aware as to how many keys there were for the vehicle and was concerned that there had been drug overdoses at these local hotels.

[53] Mr. Ngong was eventually connected to his counsel of choice, Ms. Goldlist. During the call, Mr. Ngong opened the door twice. The first time, he asked “what’s happening with my car, so my lawyer can make arrangements to get it?”. The second time he stated “my lawyer wants to know what’s happening with my car”. Both times, PC Graham advised that they were still investigating.

[54] At no time did PC Graham read the secondary caution to Mr. Ngong. He stated he did not feel the need to do so because he was the only person with continuity of Mr. Ngong and had been with him the entire time. He did not hear other officers engage Mr. Ngong in conversation.

Position of the Parties

[55] The defence argues that the police failed to provide Mr. Ngong with his rights to counsel immediately upon arrest and that they failed to hold off questioning him when he exercised his rights to counsel. After knowing that Mr. Ngong wanted to speak to counsel, PC Graham continued to ask questions about what Mr. Ngong was doing in Midland and what was in his car. These questions were not casual questions but were of an incriminating nature.

[56] The Crown argues that PC Graham read the rights to counsel in a timely fashion after dealing with Mr. Ngong lying about his name and searching him. Ms. Bhangu submits that the comments made by Mr. Ngong on the way to the station were made spontaneously and not elicited by PC Graham. PC Graham was mindful of finishing RTCs and ensuring Mr. Ngong understood even when Mr. Ngong was asking him questions. The questions asked after Mr. Ngong stated he had a lawyer were to address exigent circumstances. PC Graham was not asking incriminating questions.

Legal Principles

[57] The purpose of the section 10(b) *Charter* rights is to provide detainees with an opportunity to be informed of their rights and obligations under the law and, most importantly, to obtain advice on how to exercise those rights and fulfil their obligations.

Under s. 10(b), a detainee is entitled as of right to seek such legal advice “without delay” and upon request.¹⁰

[58] The *Bartle* requirements imposed on police when they arrest or detain individuals include: (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel; (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

[59] “The words ‘without delay’ mean ‘immediately’ for the purpose of s. 10(b). Subject to concerns for officer safety or public safety, and any other limitations prescribed and justified under s. 1 of the *Charter*, the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and a duty to facilitate that right immediately upon detention.¹¹

[60] “The burden is on the Crown to show that a given delay was reasonable in the circumstances. Whether a delay in facilitating access to counsel is reasonable is a factual inquiry” [citations omitted].¹²

[61] “Until the requested access to counsel is provided it is uncontroversial that there is an obligation on the police to refrain from taking further investigative steps to elicit evidence”.¹³

Analysis and Findings

[62] I agree there was a short delay between Mr. Ngong being arrested and read his rights to counsel and caution. PC Sibley was unable to explain why RTCs and cautions had not been read immediately. PC Graham’s evidence, however, was clearer. I accept that he is the officer who arrested Mr. Ngong. There was a delay in reading RTCs and cautions while he clarified Mr. Ngong’s name and conducted a pat down search. Thereafter, PC Graham took the necessary time to read RTCs and caution several times until Mr. Ngong indicated he understood. I find that the Crown has shown the delay in reading RTCs and caution was reasonable in the circumstances.

[63] However, I do not accept that PC Graham asking Mr. Ngong questions can simply be characterized as engaging Mr. Ngong because he had engaged the officer. There is no doubt that Mr. Ngong appeared concerned about what was going to happen with the car and asked PC Graham several questions about it. Once Mr. Ngong had indicated that he wanted to speak to counsel, PC Graham should have held off questioning him. He did not. He asked Mr. Ngong what was in his vehicle that he was so concerned about and whether the police or the public should be worried about the car. PC Graham suggested these were public safety questions rather than investigative or probing

¹⁰ *R. v. Bartle*, 92 C.C.C. (3d) 289 (S.C.C.).

¹¹ *R. v. Suberu*, 2009 SCC 33, ¶ 42.

¹² *R. v. Taylor*, 2014 SCC 50, ¶ 24.

¹³ *Taylor*, ¶ 26.

questions. I disagree that these questions were not investigative. They were meant to find out whether there was anything illegal in the car. This was clearly an investigative step designed to elicit evidence.

[64] On a balance of probabilities, I find that Mr. Ngong has established a breach of his s. 10(b) *Charter* rights.

Issue #3 - Section 9 *Charter* issues: (a) Were the grounds relied upon by the police to arrest Mr. Ngong objectively reasonable? (b) Did racial profiling play a part in the police investigation of Mr. Ngong? (c) Was the identification of Mr. Ngong tainted?

Pertinent Facts

[65] As result of observations and database searches made by the police on March 31, 2020, DC Prout formed grounds to arrest Mr. Ngong for failing to comply with his recognizance and prohibited driving. There was an initial belief that grounds also existed for breach of probation. That was later determined not to be the case and Mr. Ngong was not charged with this offence.

Investigations Leading up to March 31, 2020

[66] DC Prout has been a police officer since 2009. On March 20, 2020 DC Prout became involved in an investigation alleging a theft of jewelry in Tiny Township [“Tiny Township theft”]. Over the next several days, PC Prout amassed the following information:

- On March 20, the complainant advised that three Black men had taken the contents of her safe and that possibly a white car was involved. She identified one male as Black, tall, thin build with short dreadlocks. The second male was short, heavy set, Black, with black hair. DC Prout did not have a description of the third Black male. The complainant knew another individual or suspect involved as “Nick” from Penetang. DC Prout had previously investigated “Nick” whom he knew to be Chris Wheeler;
- On March 21, DC Prout located Chris Wheeler who advised him that he knew the males involved in the Tiny Township theft as Alex, Rio and S.N. He did not know their real names. He further advised that they were driving a white Acura and “possibly dropping off... dope (which DC Prout understood to be cocaine) to Mark Decourcy” at 1 Gignac Drive in Penetanguishene (“Penetang”). This address was a known drug house to police. Mr. Wheeler provided phone numbers for the three suspects. In cross-examination, he confirmed that he had also received a nickname of “Bloody” for S.N.;
- On March 22, Mr. Wheeler advised that he had received information that Mark DeCourcy had set up a \$5000 hit on him and “if they don’t get him, they’re going after his mother” (“the Wheeler threats”). He stated that Alex, Rio and S.K. (whom he previously identified as S.N.) were from “the City”. They were upset with Mr. Wheeler “for screwing around with them to get business up here to sell dope”. Mr.

Wheeler provided the name and phone number of the person who gave him this information. Mr. Wheeler was very concerned, especially for his mother's safety. In cross-examination, DC Prout confirmed that his notes stated the information "from the city" was in fact "three Black guys from Toronto". That same day, Mr. Wheeler told PC Prout that the 3 males were "using... a white Acura with cracked windshield" and "a scuff on the rear passenger" side;

- Mr. Wheeler's mother, Debbie, called police at 23:09 on March 22 to advise there was a silver car parked down the road and a pickup truck lingering in the area. Police attended but did not locate any silver car, pickup truck or white Acura. When they attended, Mr. Wheeler and his mother advised there was also a black pickup truck "believed to be a Ford" parked down the road for a short period of time; and
- At 2:13 am on March 23, Ms. Wheeler called DC Prout to advise they had received information "that the three Black guys from Toronto are coming to" 1 Gignac Drive. This information was provided by a male named "Adam". DC Prout spoke to Adam who advised that the three males left at 2:37 a.m. to come up to 1 Gignac Drive to pick up Tim Cole and then go to Chris Wheeler's house. The platoon was informed of this information and entrances into Penetang were covered by police.

[67] The CAD or ICAD police logs recorded pertinent information related to the Tiny Township theft. These were accessible to the officers at the time of and after the events. In fact, Sgt Inman was able to retrieve a copy of the CAD log during his examination at trial.

[68] DC Prout never investigated Mike DeCourcy regarding the alleged hit. He explained that he did not have enough information to proceed and there was no corroboration evidence. He never spoke to Mr. DeCourcy at all, stating "not at that time because we were investigating other things, as well". He did check the police databases for the nicknames Alex, Rio, S.K. and Bloody, and found no connection to Mr. Ngong.

[69] By March 22, DC Prout knew that the vehicle connected to the Tiny Township theft and Wheeler threats was a white Acura with a cracked windshield and a scuff on the passenger side. On March 30, DC Prout testified that he saw a silver Acura SUV with a cracked windshield and scuffed bumper parked in the driveway of 1 Gignac Drive. While the information provided by Mr. Wheeler was a car or sedan and not an SUV, DC Prout explained that given the specified damage, he thought that Mr. Wheeler may have "misinterpreted" whether it was an SUV. At 9:09 pm, he conducted a traffic stop of this vehicle as it was leaving 1 Gignac Drive. His sole purpose was to identify who was in the vehicle "as it could have related to this investigation with the threats". The lone female occupant was known to him. He issued her a ticket for not having her driver's licence with her. He noted the vehicle was registered to a male in Niagara Falls. The driver was never investigated for the Tiny Township theft or the Wheeler threats nor was she asked any questions regarding three Black males from Toronto. DC Prout made no mention of PC Finch being present during this stop.

Observations Made by PC Finch

[70] PC Finch is now retired after a 30-year policing career. At approximately 12:45 am on March 31, 2020, PC Finch was patrolling County Road 93 when he observed a silver Chevrolet Cruze at the Esso gas station in Midland. He parked his police cruiser facing the front of the Chevy Cruze some three car lengths away. The area was “well lit” and “extremely bright”. He noted the licence plate. He described seeing “a tall, thin Black male that had gotten out of the driver’s side” who “was very dark skinned, wearing a light grey top and light grey pants”. The male had “a dreadlock style haircut”. The “dreadlocks were short”, “just around the top of his head” and “came down just around his ears”. PC Finch testified that the male “had very full round lips”. In cross-examination, PC Finch agreed that the extent of the description of the male in his notes was “male, Black, tall, skinny, wearing light grey shirt and pants, was pumping gas” and “male had dreadlocks”. His testimony about the male having “full round lips” was not in his notes and came from his memory. PC Finch also observed a female passenger get out of the front passenger side. He described her as being “white, she had a long sleeve black t-shirt on, her hair was in a ponytail, and she had a smaller build”. PC Finch watched the male pump gas and stated “I’d say he was looking at me in a suspicious manner because he kept his eye on me”. Both parties went into the store for a “a minute or two” then came out. The male got back into the driver’s seat and drove away.

[71] When asked what drew his attention to the Chevy Cruze, PC Finch answered “...I’ll give you a bit of background information about Penetanguishene in that area on a basically a Sunday night, early Monday morning, it’s very quiet. There was next to no traffic on the road. It was a, sort of a cold, damp night, and this vehicle was parked with, I saw a Black male person standing beside the car, it looked like he had just gotten out. And I had been patrolling the area looking for a similar vehicle because of some information that had been provided to me”. He went on to explain that over the last two weeks, he had been told “about a number of occurrences that involved a vehicle of similar description”.

[72] I have summarized the reasons PC Finch gave to observe the vehicle as follows:

- “Tiny Township theft” – PC Finch was working the night of the theft but was not involved in the investigation. He was given information to patrol the area for “a small white car”, “possibly a small Acura” with “Black male occupants”. He did not remember details about how many occupants. PC Finch explained that the victim “didn’t have a good description of the car”. He was not given descriptions of the Black male occupants. He stated that his memory was “it was very difficult for the officers at the scene to get information from the victim” and “her memory of who was there and the vehicle they left in was very vague”;
- “Drug Delivery to 1 Gignac” – PC Finch advised that, prior to seeing the Chevy Cruze, DC Prout gave him information that “possibly a small white or silver car could be making a drug delivery to 1 Gignac Drive, Penetanguishene”. Specifically, DC Prout told him that “the vehicle was coming up from Toronto possibly being operated by some Black males that were going to make this delivery

to 1 Gignac Drive”. As his evidence went on, PC Finch began to describe the vehicle only as a silver car; and

- “General policing” – PC Finch also stated that “it was an extremely quiet night so I was actually looking for anything that could be affirmed in the area that’s of interest for police to investigate”. He then went on to state “you know, also looking for any vehicle that might match that description... of the information provided by PC Prout”.

[73] In cross-examination, PC Finch conceded the information pertaining to the “Drug Delivery to 1 Gignac” was vague. He agreed that he was not given details regarding the make or model of the silver sedan, the precise number of Black males (he believed at least two), and no descriptions or identifying features of the males. He was not asked to look for a cracked windshield or any damage on the vehicle. He was not told that there may be a white female in the car. He did not know where DC Prout had gotten the information. Most significantly, PC Finch had no notes of this meeting with DC Prout or the information provided. He was remembering all these details while testifying. DC Prout, who testified prior to PC Finch, was not asked about nor did he mention providing any of this information to PC Finch. When it was suggested to PC Finch that “basically you were on the lookout for any Black males arriving in the City of Penetang”, PC Finch agreed and added “driving that type of vehicle”.

[74] In cross-examination, counsel challenged PC Finch with respect to describing the target vehicle as a silver sedan only after he saw pictures of the Chevy Cruze while testifying in chief. PC Finch seemed to agree with that. When it was pointed out that he had initially identified the target vehicle as a small white car, he stated “well, the information I also spoke about was” the Tiny Township theft. He stated that he may have mixed the two and meant to say a silver car. PC Finch, when asked again what DC Prout conveyed to him, said “thinking back right now answering your question, is I remember him saying ‘silver car’”. When asked again why he had said a white car in chief, he stated “that’s how I remembered it yesterday” and that he could have mixed the details of the car with the Tiny Township theft car as “we were still looking for a small white car with Black male occupants from the theft”. PC Finch volunteered that other officers had advised that the car could be “just a light colour” as the victim of the Tiny Township theft had said ‘white’, but they were unsure of the exact colour and were very vague such that the description might be different.

[75] PC Finch was never advised that, within 24 hours, the car in the Tiny Township theft had been narrowed down to a white Acura with a cracked windshield and scuffed passenger side. As of March 31, he understood it to be a “small white car with Black occupants”. PC Finch again offered that it could have been a light-coloured car as the victim was not 100% sure. He continued to look for that car after the Tiny Township theft. When it was pointed out that, the day prior, he had testified that the car was possibly an Acura, PC Finch agreed that the car being an Acura was information he had received on the night of the theft. By the end of cross-examination, PC Finch seemed to be identifying the car from the Tiny Township theft as “small and white and possibly another light colour” due to the vagueness of the information provided by the victim. And with respect to the Drug Delivery to 1 Gignac, he agreed DC Prout told him it was a “small silver car” but

then indicated that “further conversation was, like, that doesn’t mean it’s necessarily a small silver car, it could be a small white car because the information, once again is vague”.

[76] PC Finch advised he had received the Drug Delivery to 1 Gignac information from DC Prout in a face-to-face meeting while each was sitting in their respective cruisers “sometime prior to 9:00 pm” on March 30. He stated that “it was probably when... we had observed a Dodge Journey that was parked in the driveway of 1 Gignac Drive”. PC Finch testified that, at 9:09 pm, DC Prout stopped the silver Dodge Journey van after following it from 1 Gignac Drive. PC Finch was present for the stop. He stated there were two female occupants. He had no contact with them nor did he know them. He simply walked to the rear of the van. DC Prout appeared to be familiar with the occupants and had a conversation with them prior to letting them go. DC Prout told him that he had no concerns. PC Finch admitted that his notes regarding this traffic stop were “very vague”. They simply contained the time and the entry “I assisted PC Prout at traffic stop on Main Street”. There were no descriptors or details at all. In cross-examination, PC Finch advised that it would be very surprising to him if DC Prout described this vehicle as a white Acura stating “it wasn’t a white Acura, it was a silver Dodge Journey”. Further, PC Finch advised that stopping this vehicle had nothing to do with the Tiny Township theft and nothing to do with a cracked windshield. He did not recall seeing a cracked windshield. PC Finch recalled the vehicle being stopped because it was leaving 1 Gignac Drive.

[77] Shortly after 12:45 a.m. on March 31, PC Finch decided to follow the Chevy Cruze as it left the Esso station because it turned left towards Penetang. PC Finch stated he wanted to see if “it goes anywhere near 1 Gignac”. He maintained that he would not have followed the vehicle if it turned right towards Midland. His view was that, based on the information provided by DC Prout, the Chevy Cruze matched the description of the car “with Black occupants coming from Toronto to possibly make a drug deal delivery to 1 Gignac”. He was looking to “intercept the vehicle if possible”.

[78] Upon arriving at the intersection of County Rd 93 and Thompson Rd in Penetang, PC Finch noted that the Chevy Cruze was behind a silver Dodge Journey. There was “virtually little to no traffic” and these two vehicles were the only cars on the road at the time. PC Finch kept an eye on the vehicles because the Chevy Cruze “matched” or was “similar” to the description provided by DC Prout and it was behind the Dodge Journey previously pulled over by DC Prout. PC Finch stated “so I was thinking, if that happens to be the same vehicle maybe that vehicle is, is taking him to 1 Gignac Drive”. PC Finch stated “maybe it’s just a coincidence but it was enough to cause me to be more suspicious about my reasons for following that Chevy Cruze”.

[79] PC Finch veered off the main road and tried to maintain observations of the vehicles from a parallel side street. He did not see these vehicles turn towards 1 Gignac Drive but did observe taillights of vehicles heading in that direction. When he arrived in the area of 1 Gignac Drive, he noticed the same two females from the silver Dodge Journey walking up the street and entering the side door of 1 Gignac Drive. He did not observe the Chevy Cruze at 1 Gignac Drive or anywhere else that night.

[80] By the end of cross-examination, PC Finch agreed that the initial description provided by DC Prout was exceptionally vague. He agreed that it was “just several Black males in a silver small car”. He agreed that seeing only one Black male and a white female in the Chevy Cruze differed from the information received and that the only commonality was the colour of the car and the skin colour of the male. Despite this, PC Finch maintained that the description was very “similar like”. It was a “Black male, silver sedan, pumping gas”. This raised his suspicion because of the time of night, the fact that there is nobody around and no other traffic. PC Finch got more suspicious when the male left the gas station and headed towards Penetang as opposed to Midland.

Investigation of the Chevy Cruze & its Driver on Mar 31, 2020

[81] After seeing the Chevy Cruze behind the Dodge Journey, PC Finch called DC Prout to tell him that a silver Chevy Cruze appeared to be following the vehicle DC Prout pulled over earlier. He testified “so it fit the description of the vehicle we were looking for, being operated by a Black male, and I provided him with a plate number for that vehicle”. DC Prout told him he would “check into it”. PC Finch had hoped that DC Prout was in the area so that they could pull over the Chevy Cruze. In cross-examination, PC Finch agreed that he never saw any interaction between the occupants of the two vehicles and that he never told DC Prout that he saw the Chevy Cruze “meeting” with the Dodge Journey. PC Finch agreed that the purpose in pulling the Chevy Cruze over would have been to conduct a criminal investigation. He had no HTA concerns.

[82] DC Prout received the phone call from PC Finch at 12:55 a.m. PC Finch told him he had observed a black male filling up a Chevy Cruze and followed it into Penetang where it met up with the vehicle that DC Prout had stopped leaving 1 Gignac Drive. PC Finch told DC Prout that he believed it could be related to the Tiny Township theft and Wheeler threats. PC Finch did not provide any description of the Black male.

[83] DC Prout agreed there was no reason to be suspicious of or criminally investigate a Chevy Cruze on March 30 as a Chevy Cruze had never been identified as the vehicle involved in the Tiny Township theft or Wheeler threats. He did not know who Lual Ngong was and agreed that his name had never been provided to him as a suspect nor had he ever seen him attend 1 Gignac Drive. The information regarding the three Black suspects was never connected to Hamilton. DC Prout agreed that the information he received on March 20-22 was that it would be three male Black suspects from Toronto, all travelling together in a white Acura with a cracked windshield and a scuff on the passenger side. When it was suggested that he had no reason to commence a criminal investigation into the Chevy Cruze or Mr. Ngong, DC Prout answered that the vehicle could have been involved because its driver “matched the description of one of the suspects” provided on March 20. When asked how the driver matched the description, DC Prout answered because the driver was Black and had dreadlocks and was heading into Penetang where he met a vehicle that had left 1 Gignac Drive. When it was suggested that anyone who is Black with dreadlocks who enters Penetang was at risk of being the target of a criminal investigation at that time, DC Prout answered “they are not targeted, not at all”.

[84] DC Prout was referred to his notes where he indicated at 12:55 am on March 30, he had received a call from PC Finch and he noted “there’s a Chevy Cruze, silver in colour that matched a description from an incident last week”. When it was suggested to him

that he had written that the Chevy Cruze matched, DC Prout stated “it was the male that was pumping the gas that matched the description of one of the males” from the Tiny Township Theft. When it was pointed out that the vehicle did not match, DC Prout stated “...that’s my writing mistake, the male matched the description not the vehicle”.

[85] DC Prout never asked PC Finch if the vehicle he was looking at was an Acura with a cracked windshield. He stated that he did not because PC Finch had already lost sight of the vehicle at the time and this “information had been provided to me a week prior and I totally forgot about the Acura with a cracked windshield”. When the defence confirmed that he was saying he forgot everything that could actually identify the suspect vehicle, DC Prout said “I forgot those specifics of the vehicle with the cracked windshield and the... scuffed bumper”. DC Prout never questioned PC Finch about the fact that the police were looking for three Black males in the vehicle and that PC Finch told him he only saw one Black male pumping gas.

[86] DC Prout started to investigate the Chevy Cruze. He wanted to find out who it was registered to in order to identify the driver. He initially said he did this “to see if it was in relation to the threats towards Christopher Wheeler”. After doing an MTO check, DC Prout became aware that the registered owner was Elizabeth Anai with a Hamilton address. DC Prout then conducted a Niche check regarding the Hamilton address “after learning the registered owner’s address and knowing it wasn’t a female driving”. He located a male as being “attached” to this address. This male was the accused Lual Ngong. DC Prout conducted a CPIC check on Mr. Ngong and found that he was bound by a recognizance of bail for firearm and driving related charges. One of his conditions required him to be in his residence at all times with certain exceptions including while in the presence of his surety.

[87] When it was pointed out that the vehicle was registered to a Hamilton address (not a Toronto address), DC Prout initially stated “correct, which is the City to me, as well”. When pressed, he agreed that the address was not Toronto where these three Black males involved in the Tiny Township theft/Wheeler threats were believed to be coming from. DC Prout then clarified that what led to the suspicion and running of the licence plate was PC Finch following the Chevy Cruze into Penetang and the Chevy Cruze meeting up with the SUV he had stopped leaving 1 Gignac Drive earlier. That was his reason for beginning an investigation by running the licence plate and doing the background checks to locate Lual Ngong. Later, in cross-examination, DC Prout advised that the reason he conducted Niche checks on the Chevy Cruze was to see “why this motor vehicle was in our area and why it possibly met up with a vehicle I stopped leaving 1 Gignac which has association to” the Wheeler threats/Tiny Township theft. When asked what crime he was investigating when running these checks, DC Prout said the threat allegations of why this motor vehicle met up with the other vehicle from 1 Gignac. He agreed the two vehicles meeting up was not a crime but stated the Chevy Cruze could have been a vehicle of interest.

[88] In addition, DC Prout advised that he could run a check on their system to see if the Chevy Cruze was stolen given that a male driver was driving a vehicle owned by a female. DC Prout agreed that the vehicle had never been reported stolen. When asked again what crime he was investigating, DC Prout tried to explain “we had a male driving

the vehicle and it was registered to a female party”. Following my ruling on an objection, DC Prout re-entered the courtroom and stated “there was no crime I was investigating. I was investigating whether the motor vehicle had been reported stolen or anything”. He agreed again he had no information that the vehicle was stolen. He stated he would always run a motor vehicle when it came back to a female registered owner and a male is driving it. He further agreed that he did not know if the Chevy Cruze was connected to the Tiny Township theft or not.

[89] DC Prout never called Ms. Anai to see who was driving her vehicle stating “not at that time, it was one o’clock in the morning”. He could not remember if he ever called Ms. Anai. He agreed that he never asked her who was driving her car on March 31 stating “if I remember correctly, she was very uncooperative”. DC Prout then agreed that she was likely uncooperative on April 5 after her son had been arrested.

[90] In cross-examination, counsel pointed out that the address that Mr. Ngong was required to live at was in Stoney Creek and not Ms. Anai’s Hamilton address. DC Prout stated he “did not fully look at the recognizance of bail at the time” but understood that Mr. Ngong was linked to the Hamilton address. This meant that Mr. Ngong had provided that address at some point when dealing with the police. DC Prout did not know the last time Mr. Ngong had provided that address to police. When asked if he had looked at the recognizance to see who the surety was, DC Prout stated “I would have, yes, but I didn’t note it”. DC Prout did note that the address where Mr. Ngong was supposed to be living at while on release was not Ms. Anai’s address. DC Prout never came across the names of any other males when doing his database searches. He stated that such names would not appear unless they had provided their information to police previously.

[91] In the end, DC Prout agreed that the investigation into the Tiny Township theft/Wheeler threats involved three Black males travelling in one vehicle from Toronto. The suspect vehicle was a white Acura, not a silver Chevy Cruze. The white Acura had a cracked windshield and scuffed rear passenger side. DC Prout was never made aware of any such damage to the silver Chevy Cruze.

Identification of the Black male at the Esso Gas Station as Lual Ngong

[92] Sgt Inman understood that DC Prout and PC Finch were trying to identify the driver of the Chevy Cruze because the licence plate was registered to a female and a male was driving the vehicle. Sgt Inman recalled PC Finch attending the police office to relay his observations of the Chevy Cruze. Sgt Inman has been a police officer since 1996 and his background has been “almost exclusively” traffic enforcement with many years as a collision reconstructionist. He assisted the officers by searching the MTO and Niche databases to help identify the driver.

[93] Sgt Inman also understood that PC Finch was looking at this vehicle in connection with the Tiny Township theft. His recollection was that the suspects (being two Black males and one white male) had fled the Tiny Township theft scene in a silver Sedan. His notes did not contain details about the vehicle. He recalled those details coming from dispatch and being in the CAD details. Upon reviewing the CAD report, he confirmed that the caller had stated “possibly a white car involved” and “possibly driving his mother’s vehicle”. It was also noted that the caller was “talking in circles”, “not listening” and “not

answering questions”. Sgt Inman offered that “it’s quite common that witnesses often get vehicle colours wrong especially during that time of the year” “because of salt applications to the road”. In cross-examination, Sgt Inman agreed that the CAD details made no mention of a silver sedan. He re-iterated, however, that his independent recollection was there was a mention of a silver sedan. He also agreed that the CAD notes reflected that the victim mentioned the male was driving his mother’s vehicle with a specified licence plate which was later determined to be a Toyota Yaris. Sgt Inman noted that it was safe to conclude that this was the suspect vehicle in the Tiny Township theft and that it did not match the Chevy Cruze in any way.

[94] Following his database searches, Sgt Inman located another vehicle associated to the registered owner of the Chevy Cruze licence plate. That led to the discovery of an occurrence in January where a male had been charged with several offences. Sgt Inman pulled up a photo of that male and showed it to PC Finch. The male was Black with short braided hair. The name attached to the photo was Lual Ngong with a particular date of birth. Sgt Inman showed the photo to PC Finch because PC Finch had observed the male gassing up the vehicle. According to Sgt Inman, this took place at the detachment with DC Prout being present. When asked if it could have been a different location, Sgt Inman stated “I’m not going to say no” but his recollection was that he was at the detachment doing administrative work that evening prior to going on patrol at 1:38 am. He agreed that he did not provide PC Finch with a photo lineup. Sgt Inman indicated that administering photo lineups was not part of his experience and that he did not know their protocols.

[95] When asked why he continued doing searches when there appeared to be no issues with the Chevy Cruze according to the MTO database, Sgt Inman responded “well, because we have a vehicle that’s being operated by somebody other than the registered owner” and that it was not uncommon for suspended drivers to drive somebody else’s vehicle. In this case, Sgt Inman stated there was further investigation because the vehicle was owned by a female and it had a male operator. He confirmed that he did not call the registered owner to see who was driving her car. Sgt Inman agreed that there were rules associated with accessing Niche and CPIC databases. Officers had to have a lawful purpose to access these databases. He agreed that this lawful purpose would be in furtherance of an investigation, not “always exclusively criminal” but also related to any other provincial statute.

[96] PC Finch testified that he ran into Sgt Inman at a gas station while he was looking for the Chevy Cruze. Sgt Inman showed him a picture of a Black male with short dreadlocks on a tablet in his car. PC Finch identified that person as the same Black male who was operating the Chevy Cruze. PC Finch advised that he looked at the picture a couple of times. He knew right away that it was the same male he saw filling up his car at the Esso gas station. He stated “you know, I had seen the male approximately 15 minutes earlier”. PC Finch testified that he had observed the male for approximately 5 minutes and “so it was funny that I was watching this male for approximately 5 minutes and then 15 minutes later he showed me a picture of the male and I’ve had no conversation with him about who he is or anything”. He added “I never had the opportunity to run the male and find out any information”. PC Finch agreed that he had never had prior dealings with this male.

[97] DC Prout also did not believe that Sgt Inman was at the office when DC Prout was doing his database searches. He believed that Sgt Inman called him to let him know that he had shown PC Finch a photo and that PC Finch had confirmed that it was the same male he saw at the Esso gas station. DC Prout had also seen the Niche photo of Mr. Ngong and identified that photo in court.

[98] At 2:45 a.m., DC Prout sent a CPIC message to the Hamilton Police requesting they do a bail compliance check on Mr. Ngong. The next morning, he was told that they were not conducting compliance checks because of COVID-19. At 3:40 am, he attended the Esso gas station to review video footage but was not able to until a manager came in. PC Walker reviewed the footage later that day and sent DC Prout still shots of the male in the video footage. After looking at the still photos, DC Prout formed the belief that it was Mr. Ngong at the Esso gas station. DC Prout testified that the full extent of the identification evidence he had when he sent out the email was the single photo shown to PC Finch and PC Finch's identification of the male, his own observations of the Niche photo and the still photos of the male in the Esso video. DC Prout did not see the video footage until "some weeks later". DC Prout is familiar with photo line-ups and did not feel the need to do a photo line-up for PC Finch in this investigation. He agreed that only one photo was shown to PC Finch. DC Prout was not familiar with concerns about cross-racial identification.

Position of the Parties

[99] Ms. Goldlist does not concede that Mr. Ngong was the male observed by PC Finch on March 31. Further, she argues there was no basis to commence an investigation of the male at the Esso station. Based on what the officers knew regarding any outstanding investigations at the time, the driver should not have become the subject of a criminal investigation. The defence argues that the actions of the officers were nothing more than racial profiling, perhaps on a subconscious level. The defence concedes that the s. 9 *Charter* case law often involves a simultaneous detention of a suspect with evidence of racial profiling which did not occur here. Ms. Goldlist argues that the fact that racial profiling was a factor in the database searches on March 31 which later resulted in the arrest of Mr. Ngong on April 5 offends s. 9 of the *Charter*. In addition, she submits that the identification of Mr. Ngong as the driver by PC Finch and DC Prout was tainted. Only one photograph was shown to PC Finch making the identification highly suspect. The defence urges me to find that the email sent by DC Prout was based on a sloppy or negligent investigation, many aspects of which were not noted by officers or were inconsistent. It was also based on racial bias. The email should not have been sent until further investigation was made to ascertain that it was Mr. Ngong driving and, if it was, whether he was breaching his release order.

[100] The Crown urges me to find that the investigation of Mr. Ngong occurred in the context of the Tiny Township theft/Wheeler threats. PC Finch was honing in on a male whose suspect selection was reasonable given the details of those investigations. Ms. Bhangu argues there was no racial profiling. As stated in *R. v. Lomilo*¹⁴, just because Mr. Ngong is a visible minority does not mean that he was the target of racial profiling. The Crown submits the officers were not randomly going after Black males. Mr. Ngong was

¹⁴ 2019 ONSC 6826. ¶ 117.

a Black male in a particular motor vehicle. There was a factual foundation and reasonable suspicion for the steps the police took. It is Mr. Ngong's bad fortune that the police stumbled upon him during this investigation which led to the discovery of him breaching his court orders. The Crown argues that DC Prout had an articulable constellation of factors to investigate Mr. Ngong and, further, it would have been a dereliction of duty not to do so.

Legal Principles

Reasonable and Probable Grounds for Arrest

[101] Where the Crown seeks to rebut the presumption that a warrantless search is reasonable because it was lawfully conducted incident to arrest, the Crown must show that the arrest was lawful.¹⁵

[102] Section 495 of the *Criminal Code* "requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a prima facie case for conviction before making the arrest".¹⁶

[103] "Although a police officer is entitled to follow instructions from another officer to arrest someone where the arresting officer personally lacks the objective grounds to do so, the arrest will only be lawful if the instructing officer had reasonable and probable grounds".¹⁷

Identification evidence

[104] Eyewitness identification evidence has inherent frailties. These need to be identified on a case by case basis. There are greater concerns when dealing with stranger identification. The circumstances surrounding the opportunity to observe a suspect are important. Generic descriptions of a suspect are of little assistance. A trial judge must use caution when dealing with cross-racial identification.¹⁸

[105] The Ontario Court of Appeal has held that "it is dangerous and improper to present a potential identification witness with a single photograph of a suspect. The danger is that the witness may have the photo image stamped on his or her mind, rather than the true perpetrator. Presenting a single photograph is highly suggestible and contaminates the identification process in a manner that prejudices the accused person".¹⁹

¹⁵ *R. v. Gerson-Foster*, 2019 ONCA 405, ¶ 75 relying on *R. v. Fearon*, 2014 SCC 77, ¶ 87.

¹⁶ *R. v. Storrey*, [1990] SCJ No 12, ¶ 17.

¹⁷ *Gerson-Foster*, ¶ 84.

¹⁸ *R. v. Bao*, ¶¶ 19 - 23

¹⁹ *Bao*, ¶ 27 citing *R. v. Goldhar & Smokler*, (1941) 76 CCC 270 (ONCA), *R. v. Smerciak*, (1946) 87 CCC 175 (ONCA).

Racial profiling

[106] I adopt the analysis of racial profiling recently set out by Miller, J.A. in his dissent in *R. v. Sitladeen*²⁰. This analysis was not the subject of any disagreement with the majority decision. The dissent and the majority simply differed on whether the trial judge had applied the doctrine of racial profiling correctly. Miller, J.A. analyzed racial profiling as follows:

[77] Racial profiling is an injustice rooted in a failure of practical reasoning. The inquiry into whether racial profiling occurred is focused entirely on the chain of reasoning that led a police officer to investigate, detain, or arrest a particular suspect: *R. v. Le*, 2019 SCC 34, 434 D.L.R. (4th) 631, at paras. 76-78. As this court explained in *Peart v. Peel Regional Police Services Board* (2006), 43 C.R. (6th) 175 (Ont. C.A.) at para. 90, leave to appeal refused, [2007] S.C.C.A. No. 10, racial profiling occurs where:

a police officer ... uses race (consciously or subconsciously) as an indicator of potential unlawful conduct based not on any personalized suspicion, but on negative stereotyping that attributes propensity for unlawful conduct to individuals because of race...

[78] Racial profiling is an act of decision-making – a reasoning process leading to a decision. It is not a general disposition or attitude. Racial profiling may result from conscious or unconscious bias that diverts a decision-maker from proper individualized reasoning: *Peart*, at para. 93. Accordingly, the inquiry into whether a police officer racially profiled someone is not resolved by determining whether that officer in general holds conscious or unconscious racist attitudes. It is possible for the reasoning of someone who is otherwise scrupulously and self-consciously egalitarian to be misshapen by unconscious bias in making a particular decision. The focus is on evaluating the particular “internal mental process” that led to the specific police action under investigation: *Le*, at para. 78.

[79] If a police officer employs a negative racial stereotype as a premise in a chain of reasoning culminating in a decision to investigate, detain, or arrest someone, that faulty decision-making cannot be cured by the fact that there were other, legitimate grounds the officer could have relied on to come to the same conclusion: *Peart*, at para. 91. The focus is on how this particular officer *actually* reasoned on this particular occasion. It is therefore a factual question: *Peart*, at paras. 6, 104, 131. How an officer reasoned at the relevant time cannot, however, be impacted by things the officer did not know or believe, even if that information might have impermissibly influenced the officer’s decision-making had it been known.

[80] Racial profiling is seldom established by direct evidence. More commonly, “it must be inferred from the circumstances surrounding the police action that is said to be the product of racial profiling”: *Peart*, at para. 95. That is, a judge must determine whether it can be inferred from all the evidence that one of the premises in the police officer’s chain of reasoning was that, because of the suspect’s racial characteristics, the suspect is more likely to have engaged in criminal activity. The burden of proof is on the accused.

[81] Inferences drawn from circumstantial evidence can assist a judge in assessing the credibility and reliability of direct evidence offered as proof of the same factual issue: *Peart*, at para. 131.

[82] Additionally, if a police officer’s explanation of his or her reasoning seems unbelievable, this can support an inference that the officer’s actual reasoning employed negative racial stereotyping: *R. v. Dudhi*, 2019 ONCA 665, 147 O.R. (3d) 546, at paras. 80-81. The inference may be especially powerful if the trial judge concludes that the officer was deliberately lying: *Brown*, at para. 45; *R. v.*

²⁰ 2021 ONCA 303.

Safarzadeh-Markhali, 2014 ONCA 627, 122 O.R. (3d) 97, at para. 20, aff'd on other grounds, 2016 SCC 14, [2016] 1 S.C.R. 180.

[107] Feldman, J.A., writing for the majority in *Sitladeen*, summarized the law and the role of the trial judge as follows:

[54] To summarize, the case law from *Brown* onward recognizes that in cases where an officer had objective grounds to detain a person or stop a vehicle but was also subjectively motivated by racial stereotypes, the officer is unlikely to admit his bias. The matter becomes more complicated when the officer is unaware that he was influenced by race because of unconscious bias. The officer may not be consciously lying about his motivation, but that does not mean he did not unconsciously engage in racial profiling. It is the role of the trial judge in such cases to consider all the circumstances that led to an accused's detention and/or arrest and to determine whether they correspond to the phenomenon of racial profiling, as understood in the social science literature, the reports of inquiries into race relations with police, and the case law. The trial judge can then decide whether those corresponding circumstances form a basis to infer that the record is capable of supporting a finding that the stop was based on racial profiling, contrary to the evidence of the officer. Ultimately, to reach a conclusion about racial profiling, the trial judge is not required to find that a police officer who testifies that race played no role in the decision to detain or arrest was lying.

Analysis and Findings

Identification Evidence

[108] I recognize that there are several concerns with the way PC Finch identified Mr. Ngong as the driver. He was shown only one photo. These parties did not know each other. Cross-racial identification was a factor as PC Finch is white and the driver was Black. There was no simultaneous comparison between the photo and the suspect.

[109] I accept PC Finch's evidence that he had a good opportunity to view the driver of the Chevy Cruze. The area was well-lit, he was three car lengths away and watched him for approximately five minutes. PC Finch made notes of the driver's appearance including his skin colour, body type, hair and clothing. I accept PC Finch's evidence that the driver was staring at him which would have given PC Finch a longer opportunity to look at his face. Within fifteen minutes of seeing the driver, PC Finch was looking at the Niche photo. He testified that he knew right away it was the same male.

[110] Despite the noted identification concerns, I am satisfied PC Finch had sufficient time to view the driver and properly identified him as Mr. Ngong via the Niche photo. In addition to PC Finch's identification, DC Prout compared the Niche photo of Mr. Ngong to stills of the male observed in the video footage of the Esso station. He, too, determined that it was Mr. Ngong. While it is arguable that this identification evidence may not have made out a case for conviction, it was sufficient to establish reasonable and probable grounds, both subjectively and objectively, that Mr. Ngong was the driver.

Reasonable and Probable Grounds to Arrest

[111] Mr. Ngong was not detained on March 31. One could argue that the only reason he was not is because the police lost sight of him. PC Finch was looking for the vehicle

in the hopes of intercepting it in order to learn the identity of the driver. The database searches conducted as result of PC Finch's investigation of Mr. Ngong led to the discovery that Mr. Ngong was bound by several court orders. Once the police became aware of the driving prohibition, they had reasonable and probable grounds, both subjectively and objectively, to arrest Mr. Ngong for breaching his driving prohibition as PC Finch saw him driving.

[112] With respect to whether Mr. Ngong was breaching his recognizance, I find that the police failed to consider that Mr. Ngong was accompanied by a female who could have been his surety on Mar 31. Mr. Ngong was permitted to be out of his residence with his surety. Without further investigating this issue, DC Prout did not have reasonable and probable grounds to arrest Mr. Ngong for breaching the house arrest term of his recognizance.

Racial Profiling

[113] There were significant inconsistencies in the evidence of PC Finch and other officers. PC Finch and DC Prout provided different evidence regarding the details of the vehicle stopped by DC Prout - whether PC Finch was present, what occurred, how many occupants were in the vehicle, and the purpose of the stop. DC Prout never testified that he provided any information regarding a Drug Delivery to 1 Gignac to PC Finch on March 30 or at any time. Sgt Inman recalled showing the photo of Mr. Ngong to PC Finch at the office, while PC Finch said it was at a local gas station. PC Finch did not see the suspect vehicle meet up or interact with the vehicle pulled over by DC Prout, yet DC Prout claimed that PC Finch told him they met up.

[114] Also problematic was PC Finch's lack of notes regarding key matters. He had no notes whatsoever regarding the Drug Delivery to 1 Gignac. Despite having no notes, PC Finch relayed specific details regarding the information, where it was provided and when. He had no notes that this was one of the reasons he followed the Chevy Cruze into Penetang. He also had minimal notes about DC Prout pulling over the vehicle. He had no notes of the make, model, colour of the vehicle or a licence plate.

[115] Other aspects of PC Finch's testimony were equally unreliable. He initially described the colour of the vehicle he was looking for regarding the Drug Delivery to 1 Gignac as white, then said silver as his testimony went on. He seemed to agree that he described it as silver after he saw a picture of the silver Chevy Cruze. He tried to explain that he may have confused it with the colour of the Tiny Township theft vehicle which he was also looking for. Then, later, he said he remembered it was white when he testified the day before but was now remembering that DC Prout told him it was a silver car. He also agreed that he added to or enhanced his description of the Black male during his testimony after he saw the Niche photo of Mr. Ngong.

[116] During their testimony, the officers began offering explanations for the discrepancy in the colour of the vehicles and the reason why they were looking for a "light-coloured" car as opposed to a white or silver car. These included: (a) the Tiny Township theft victim said white but she was unsure and vague about it; (b) a recollection that the Tiny Township theft car had been described as "small and white and possibly another light

colour” and (c) it was quite common for witnesses to get the colour wrong especially during that time of year “because of salt applications to the road”.

[117] PC Finch struggled to provide a cogent reason why his attention was drawn to the Chevy Cruze and its driver. The information he had pertaining to the Tiny Township theft and the Drug Delivery to 1 Gignac was vague. He had virtually no identifying details regarding the Black men or the car involved. Further, PC Finch ignored some of the specifics provided when he connected the Chevy Cruze and its driver to these incidents. Multiple Black men were expected to be attending in one vehicle. There was no information that a female would be present in the vehicle. This did not align with what he was seeing at the Esso station. Despite this, PC Finch insisted the car and the Black male “matched” or were “similar” to the information he had been given by DC Prout.

[118] By March 22, DC Prout had narrowed the suspect vehicle in the Tiny Township theft/Wheeler threats to a white Acura car with a cracked windshield and scuffed rear passenger side. While PC Finch knew the car had been described as a white Acura, he was never made aware of any damage. DC Prout never questioned PC Finch about whether there was damage to the car when PC Finch asked for it to be checked to determine the identity of the driver. DC Prout stated he did not do this because, at the time, PC Finch had lost sight of the vehicle and DC Prout had “forgotten” about the damage. I find DC Prout’s assertion that he had “forgotten” these details completely unbelievable. On his evidence, just some 3-4 hours earlier, DC Prout had stopped a silver Acura SUV in order to investigate it because it had the same type of damage.

[119] DC Prout also had difficulties articulating why he commenced investigating the Chevy Cruze and its driver. At first, he testified the driver “matched” the description of one the suspects in the Tiny Township theft because he was Black and had dreadlocks. DC Prout denied that this meant that any Black male with dreadlocks who entered Penetang was a potential target. His notes, however, stated that it was the silver Chevy Cruze and not the Black male that “matched” a description. DC Prout explained this was a writing error. He agreed that no silver Chevy Cruze had been connected to these investigations. A second reason offered by DC Prout was to determine who the driver was when he discovered the vehicle was owned by a female and a male was driving it. He wondered if the vehicle might be stolen but conceded that he had no information that it was. Lastly, DC Prout stated that he was running a check on this vehicle to see why it was in the area and why it had met up with a vehicle that had left 1 Gignac Drive.

[120] I do not accept that DC Prout provided PC Finch with the information regarding the Drug Delivery to 1 Gignac on March 30. DC Prout appeared to have received similar information on March 21. It is possible that PC Finch was simply confused. Given these reliability concerns and the absence of any police notes made at the time, I am unable to rely on PC Finch’s memory that this information was provided to him on March 30 or his memory regarding the details of the information. I further reject that PC Finch relied on this information to commence following and investigating the Chevy Cruze and its driver.

[121] There are some factual indicators which support the inference that the decision of the police to commence investigating Mr. Ngong on March 31 was racially motivated, including:

- PC Finch pulled into the Esso gas station when he saw a Black male pumping gas. He then sat and watched Mr. Ngong for five minutes. PC Finch did not review or update himself regarding any details of the Tiny Township theft/ Wheeler threats – either by accessing ICAD or speaking to officers involved. He did not question Mr. Ngong regarding these investigations. He was not checking into any possible HTA infractions. I suspect that PC Finch’s actions of pulling in and watching Mr. Ngong probably resulted from a conscious or subconscious belief that Mr. Ngong, a Black man, appeared to be out of place at that time of night in Midland during the pandemic and he wanted to see what Mr. Ngong was up to;
- I find that the police used Mr. Ngong’s race to “match” him to outstanding investigations involving Black male suspects. Given the vagueness of the description of the Black male suspects and their connection to a specific car with specific damage, this was unreasonable. I find that DC Prout and PC Finch went to great lengths to find a connection between the silver Chevy Cruze and its driver, a Black male with dreadlocks, to ongoing criminal investigations when no such connection could be made based on the information they had; and
- The police subjected Mr. Ngong to heightened scrutiny by doing extensive Niche/CPIC database searches. In my view, these were done not only to determine Mr. Ngong’s identity but also his involvement, if any, in the criminal justice system. The police offered several other reasons for conducting these searches. I find that neither Mr. Ngong nor the Chevy Cruze could reasonably be connected to the Tiny Township theft/Wheeler threats. Further, there are many legitimate reasons why a male driver may be driving a female-owned vehicle. The vehicle had not been reported stolen. If this was the police’s true concern, they would have called the owner of the vehicle.

[122] I infer from these circumstances that PC Finch and DC Prout, either consciously or subconsciously, at different times during the investigation (PC Finch when he commenced it and DC Prout when he conducted the searches), used Mr. Ngong’s race as “an indicator of potential unlawful conduct based not on any personalized suspicion”. As such, they used negative racial stereotyping when they made the decision to investigate Mr. Ngong. And, as stated in *Dudhi*, “[w]here race or racial stereotypes are used to any degree in suspect selection or subject treatment, there will be no reasonable suspicion or reasonable grounds. The decision will amount to racial profiling”.²¹

[123] To be clear, there are many instances where police do not require reasonable and probable grounds or reasonable suspicion of criminal activity to conduct these types of database searches. They simply need a lawful purpose. In this case, the lawful purposes articulated by the police for making these database searches were not reasonable or believable.

[124] The purpose of s. 9 of the *Charter* “is to protect individual liberty from unjustified state interference”.²² The defence has established, on a balance of probabilities, that Mr. Ngong’s s. 9 *Charter* rights were breached.

²¹ *Dudhi*, ¶ 63.

²² *R. v. Le*, 2019 SCC 34, ¶ 152, citing *R. v. Grant*, [2009] 2 S.C.R. 353, ¶ 20.

ISSUE #4: Having found that Mr. Ngong’s ss. 8, 9 and 10(b) *Charter* rights were breached, should the evidence be excluded under s. 24(2) of the *Charter*?

Legal Principles

[125] Section 24(2) of the *Charter* directs that, where evidence is obtained in a manner that infringes a right guaranteed by the *Charter*, that evidence shall be excluded if, in all the circumstances, its admission would bring the administration of justice into disrepute.

[126] Courts must assess: (a) the seriousness of the *Charter*-infringing state conduct; (b) the impact of the breach on the *Charter*-protected interests of the accused; and (c) society’s interest in an adjudication on the merits.²³

Seriousness of Police Conduct

[127] When assessing police conduct, it can fall on a spectrum with one end being inadvertent or minor violations of the *Charter* and the other end being wilful or reckless disregard of the *Charter*.²⁴

[128] Put another way, one can use a “metaphor of a spectrum as used in *R. v. Kitaitchik* (2002), 166 C.C.C. (3d) 14 (Ont. C.A.), *per* Doherty J.A.,...: ‘Police conduct can run the gamut from blameless conduct, through negligent conduct, to conduct demonstrating a blatant disregard for *Charter* rights... What is important is the proper placement of the police conduct along that fault line, not the legal label attached to the conduct’ [Citation omitted]”.²⁵

[129] “At this stage the court considers the nature of the police conduct that infringed the *Charter* and led to the discovery of the evidence. Did it involve misconduct from which the court should be concerned to dissociate itself? This will be the case where the departure from *Charter* standards was major in degree, or where the police knew (or should have known) that their conduct was not *Charter*-compliant. On the other hand, where the breach was of a merely technical nature or the result of an understandable mistake, dissociation is much less of a concern”.²⁶

[130] Racial profiling is an aggravating factor that elevates the seriousness of the breach.²⁷

[131] “Systemic or institutional abuse of constitutional rights may be an aggravating factor rendering police misconduct more serious. The absence of systemic non-compliance with *Charter* requirements by the police is not a mitigating factor. The police are expected to comply with the law, especially the *Charter*”.²⁸

²³ *Grant*, ¶¶ 67-128.

²⁴ *Grant*, ¶ 74.

²⁵ *R. v. Harrison*, [2009] S.C.J. No. 34, ¶ 23.

²⁶ *Harrison*, ¶ 22.

²⁷ *Dudhi*, ¶ 88 relying on *R. v. Le*, ¶ 78.

²⁸ *Harrison*, ¶ 25; *R. v. McGuffie*, 2016 ONCA 365, ¶ 67

Impact on Accused's Rights

[132] “This factor looks at the seriousness of the infringement from the perspective of the accused. Did the breach seriously compromise the interests underlying the right(s) infringed? Or was the breach merely transient or trivial in its impact?”.²⁹

[133] A person’s expectation of privacy in their vehicle is less than in their residence.³⁰

Society’s Interest to Adjudicate on the Merits

[134] “Society generally expects that a criminal allegation will be adjudicated on its merits... a judge should consider not only the negative impact of the admission of the evidence on the repute of the administration of justice, but the impact of *failing to admit* the evidence”.³¹

[135] “At this stage, the court considers factors such as the reliability of the evidence and its importance to the Crown's case”.³²

[136] “Gun violence and gun possession are matters of serious concern in our society”.³³ Society has a substantial interest in gun-related crimes being prosecuted on their merits.³⁴

[137] “As a general rule, however, it can be ventured that where reliable evidence is discovered as a result of a good faith infringement that did not greatly undermine the accused’s protected interests, the trial judge may conclude that it should be admitted under s. 24(2). On the other hand, deliberate and egregious police conduct that severely impacted the accused’s protected interests may result in exclusion, notwithstanding that the evidence may be reliable”.³⁵

Position of the Parties

[138] The defence submits that the evidence should be excluded for the following reasons:

(1) on the first *Grant* branch - the police misconduct falls on the serious end of the spectrum. There were multiple *Charter* violations. Some of these breaches arose in the context of well-settled law. Despite this, numerous officers disregarded the well-settled law or were unaware of the state of the law. An absence of bad faith does not equate to good faith. All of this plus the fact that racial profiling formed part of the investigation favours exclusion;

²⁹ *Harrison*, ¶ 28.

³⁰ *Grant*, ¶ 113; *Harrison*, ¶ 30; *R. v. Wright*, 2013 ONCA 778, ¶16.

³¹ *Grant*, ¶ 79.

³² *Harrison*, ¶ 33; *Grant*, ¶ 83.

³³ *Wright*, ¶ 17.

³⁴ *R. v. Boucher-Savard*, 2019 ONCJ 400, ¶ 61 citing *R. v. Williams*, [2018] O.J. No. 3217 (SCJ), ¶ 280.

³⁵ *Grant*, ¶ 127.

(2) on the second *Grant* branch – the police conduct impacted on Mr. Ngong’s right to silence and right to freedom of movement without being racially profiled. Racial profiling has a profound impact on marginalized persons. Further the warrantless search of his vehicle seriously intruded on his privacy interests. He was arrested at gunpoint; and

(3) on the third *Grant* branch – the defence concedes that this case involves real and reliable evidence including a loaded firearm and significant amounts of dangerous drugs. The exclusion of the evidence leaves the Crowns with no case. However, given the multiple and significant violations of the accused’s *Charter* rights, this is a case where the court ought to distance itself from the police conduct.

[139] The Crown argues that the evidence ought to be admitted for the following reasons:

(1) on the first *Grant* branch - the officers acted in good faith. Mr. Ngong was treated fairly by the police. He was not randomly stopped. The police conduct amounted to background searches leading to reasonable grounds to arrest him. Some of the breaches, such as the s. 10(b) breach, lean more towards the inadvertent end of the spectrum. PC Grant took care to read Mr. Ngong his RTCs until he understood them. The decision to search the vehicle was not made hastily but in consultation with senior officers. It was measured and thoughtful;

(2) on the second *Grant* branch - none of the breaches had a profound impact on Mr. Ngong; and

(3) on the last *Grant* branch - the evidence is reliable and essential to the Crown’s case. Society has an interest in the matter being tried given the seriousness of gun possession, gun violence and trafficking of drugs during a pandemic and opioid crisis in society. The admission of the evidence would not bring the administration of justice into disrepute. The impact of failing to admit the evidence would be shocking to the community.

Analysis and Findings

[140] The police conduct was very serious. There were multiple *Charter* breaches. The s. 10(b) breach was, perhaps, the least serious of these breaches. Nonetheless, it involved PC Grant questioning Mr. Ngong when he knew he had a duty to hold off questioning him. I agree with the Crown that, in other respects, PC Grant took extra care to ensure that RTCs were complied with. The s. 9 breaches involved racial profiling which elevates the seriousness of the police conduct. There were no grounds to arrest Mr. Ngong for breaching his recognizance. The officers ignored or were not aware of the well-established parameters regarding the common law power to search incident to arrest. The law in this area is not new or novel. This led to an unreasonable search of the vehicle. Most of the officers involved in the arrest and search had between 9 to 25 years worth of experience. And, as acknowledged by PC Sibley, search incident to arrest would be common for them. Despite this, these officers were unable to articulate a lawful reason for searching the vehicle. The police interaction with Mr. Cep also showed a

disregard for the law. They did not immediately advise Mr. Cep if he was arrested or detained (and for what). They did not read him RTCs yet questioned him. The overall police conduct was not inadvertent, nor a minor violation of the accused's *Charter* rights. In my view, on the spectrum, their conduct falls more towards wilful or reckless conduct (at the higher end). I conclude that the police conduct was very serious and requires the court to distance itself from this behaviour. This factor strongly favours exclusion.

[141] Secondly, I find that the impact on Mr. Ngong's *Charter* rights was significant. He was subject to racial profiling which is an affront to human dignity. He was arrested at gunpoint, handcuffed and physically searched. His vehicle was subjected to an unlawful search. While Mr. Ngong has a lower privacy interest in a vehicle than his body or his home, the vehicle search impacted his privacy interest. His right to silence was ignored. This factor also favours exclusion.

[142] The evidence of the loaded handgun and the drugs found as a result of the *Charter* breaches are highly reliable and critical to the Crowns' case. Furthermore, these are serious offences involving a loaded firearm and a significant quantity of highly addictive drugs which were admitted as being for the purpose of trafficking. These items have the potential to cause untold harm to individuals and are a growing problem in our communities. On the other hand, it is equally important for police investigating these serious offences to respect the *Charter* rights of the parties they are investigating. Courts should not condone unlawful or improper police conduct.

[143] On balance, I am satisfied that the administration of justice, particularly its long-term interests, requires the evidence to be excluded in this case. The breaches were serious. Racial profiling formed part of the investigation. The impact on the accused was significant. Excluding the evidence means that these very serious offences will not be tried on their merits. However, as in *McGuffie*, I find that dissociating the justice system from the police conduct in this case "reinforces the community's commitment to individual rights protected by the *Charter*".

Conclusion

[144] The s. 24(2) *Charter* application is granted. The evidence obtained by police is excluded. This means that Mr. Ngong must be acquitted on all remaining CDSA counts on Information 20-38102604 and all *Criminal Code* counts except Count #9 on Information 20-38102603. Count #9 is an allegation that Mr. Ngong was breaching the house arrest term of his recognizance on April 5, 2020. There is an argument to be made that this charge is not dependent on the evidence obtained by police. However, in this instance, but for the racial profiling, Mr. Ngong would never have been identified to the police or become the subject of DC Prout's email. Without this, it is unlikely that Mr. Ngong and his bail conditions would have come to the attention of the police on April 5. Given these circumstances, and following what was done in *McGuffie*, Mr. Ngong will be found not guilty on that count as well.