

**IN THE SUPREME COURT OF CANADA**  
(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

**YASIN MAHAD ALI**

**APPELLANT**  
(Appellant)

and

**HER MAJESTY THE QUEEN**

**RESPONDENT**  
(Respondent)

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**FACTUM OF THE RESPONDENT,  
HER MAJESTY THE QUEEN**

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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## PART I – OVERVIEW AND STATEMENT OF FACTS

### Overview

1. Shortly before midnight, Lethbridge police executed a search warrant at an apartment suite where the appellant was staying. Reliable source information described a skinny black man with “Sideshow Bob” hair dealing drugs with a large amount of cocaine in his pockets. The appellant matched that description. When police entered the suite, the appellant initially refused to comply with police direction and made movements towards his buttocks. A subsequent strip search located 65 grams of crack cocaine in that area.
2. The appellant concedes that his arrest and the pat-down search incident to arrest were lawful and that the strip search was conducted in a reasonable manner. The only issue raised by this appeal as of right is whether police had reasonable grounds to believe that a strip search was justified in accordance with *R v Golden*, 2001 SCC 83.
3. Cst. Darroch reasonably believed that the appellant was concealing cocaine on his person and that belief was supported by a series of objectively discernable factors. The reliable source information that the appellant was in possession of cocaine was corroborated in part by the seizure of a cell phone, cash, and a scale – clear indicia of the drug trade. These indicia, coupled with the appellant’s failure to comply with police direction and him reaching towards his buttocks, objectively support Cst. Darroch’s belief that a strip search was necessary.
4. The trial judge and the majority of the Alberta Court of Appeal applied the *Golden* test and found that the police had reasonable grounds to justify a strip search. There is no reason for this Court to disturb that finding. The appeal should be dismissed.

**Statement of facts**

5. In April of 2014, Cst. Darroch, an 11-year veteran with the Lethbridge Police Service, received firsthand source information from two confidential informants about drug trafficking in Lethbridge.<sup>1</sup>

6. Cst. Darroch was familiar with both informants. He had used information provided by Confidential Informant A thirty-one times previously on numerous investigations<sup>2</sup> and information from Confidential Informant B twenty-six times leading to the recovery of drugs and weapons.<sup>3</sup> The informants were well known and reliable.

7. Both informants provided highly specific, detailed information of a similar nature on several instances throughout the month of April.

8. The information generally described two black males engaged in drug trafficking in Lethbridge: “Primo” a large black man weighing three to four hundred pounds and “Rick” a skinny black man with a “large Sideshow Bob” hairstyle.<sup>4</sup> While the two men were occasionally referred to by different names, Cst. Darroch believed the information referred to the same two people as the physical descriptors were consistent. The use of different “street names” is a normal practice in the drug subculture.<sup>5</sup>

9. Cst. Darroch was able to corroborate two significant pieces of source information. On April 23 and 24, Cst. Darroch received the following information from Informant B:

- 1) Rick is rolling around with \$7,800 in cash in his left pocket that is split up into stacks of 1,000 and just under 2 ounces of crack in his right pocket. Rick is going to do -- to the TD Bank in a cab to drop off money in an account for Primo;<sup>6</sup>

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<sup>1</sup> Trial Transcript, March 28, 2019 at p 5, ll 5-14, p 34, l 39 – p 35, l 1, p 42, l 13 [Appellant’s Record (“AR”), Tab 8A, pp 83,112-113, 120].

<sup>2</sup> Trial Transcript, March 28, 2019 at p 12, ll 18-24 [AR, Tab 8A, p 90].

<sup>3</sup> Trial Transcript, March 28, 2019 at p 12, l 37 – p 13, l 4 [AR, Tab 8A, pp 90-91].

<sup>4</sup> Trial Transcript, March 28, 2019 at p 7, ll 8-14 [AR, Tab 8A, p 85].

<sup>5</sup> Trial Transcript, March 28, 2019 at p 35, ll 3-15 and p 43, l 13-21 [AR, Tab 8A, pp 113, 121].

<sup>6</sup> Trial Transcript, March 28, 2019 at p 17, ll 24-27 [AR, Tab 8A, p 95].

- 2) Primo and his guys are selling crack from the apartments at 413 – 12<sup>th</sup> Street South. It might be on the ground floor, and they meet people in the hallway and stairway.<sup>7</sup>

10. On April 24, police surveillance observed a black male exit 413 – 12<sup>th</sup> Street South and take a taxicab to the TD Bank in downtown Lethbridge. The taxicab did several “heat checks,” which Cst. Darroch described as a driving technique to defeat police surveillance, on the way to the bank. After attending at the bank, the same male re-entered the taxicab and came straight back to 413 – 12<sup>th</sup> Street South. Based on these observations, Cst. Darroch believed the male was “Rick”.

11. That same day, Cst. Darroch spoke to Terry Crowe, the manager of the apartments at 413 – 12<sup>th</sup> Street South. Crowe referenced several recent complaints from tenants about drug activity in the building. The complainants indicated that a large and a smaller black male were seen coming and going from apartment 103. The two males were engaged in quick meetings with people in the buildings and money was observed to change hands.<sup>8</sup>

12. On April 27, the day before the search warrant was executed, Cst. Darroch received new information from both informants.

13. The information from Confidential Informant A was as follows:

- 1) Rick is back in Lethbridge selling from an apartment on the south side and has a bunch of crack with him;
- 2) Rick is staying in apartment number 103 at 12<sup>th</sup> Street South; and
- 3) Rick has 6 ounces of crack he is selling that should last him until Wednesday.<sup>9</sup>

14. The information from Confidential Informant B was as follows:

- 1) Rick got back to Lethbridge today with a new load of crack cocaine
- 2) Rick got back with 4 or 5 ounces of crack cocaine and will be selling it for a few days from the apartment

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<sup>7</sup> Trial Transcript, March 28, 2019 at p 16, ll 35-37 [AR, Tab 8A, p 94].

<sup>8</sup> Trial Transcript, March 28, 2019 at p 15, ll 33-40 [AR, Tab 8A, p 93].

<sup>9</sup> Trial Transcript, March 28, 2019 at p 18, ll 27-37 [AR, Tab 8A, p 96].

- 3) Rick is staying in 103 at 413-12<sup>th</sup> Street South and will not be going out much. He is meeting people in the building or in the apartment to sell them crack. Rick keeps most of the crack on him in his pockets.<sup>10</sup>

15. On April 28, Cst. Darroch spoke with the building manager again who confirmed that he was receiving further complaints about a single black male coming and going from apartment number 103.<sup>11</sup>

16. Cst. Darroch obtained and executed a CDSA search warrant at apartment 103, 413 – 12<sup>th</sup> Street South later that evening. Police entered the suite at 10 minutes before midnight using a key obtained from the building manager.<sup>12</sup> Entry into the apartment was highly dynamic<sup>13</sup> – officers entered with handguns ready and people were directed to the ground. Cst. Darroch described “a lot of yelling. It’s chaos.”<sup>14</sup>

17. The suite was a small two-bedroom apartment.<sup>15</sup> As they entered, Cst. Darroch went to the right while Cst. Odoski went to the left.<sup>16</sup>

18. Four people were located inside. A “skinny black male with large hair,”<sup>17</sup> later identified as the appellant, was in the corner of the living room. There were three other occupants: Julia Medwid, who was in the hallway near the bedrooms; Richard Schmidt, who was in the middle bedroom; and Alan Batty, who was in the kitchen area.<sup>18</sup> Cst. Darroch was familiar with Schmidt as a frequent crack cocaine user.

19. Cst. Odorski arrested the appellant and conducted a pat-down search. He located money, a ringing cell phone, and a small bag of marihuana in the appellant’s pants pocket. A small scale was located on the table in front of the appellant. Additional money was found in the basketball

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<sup>10</sup> Trial Transcript, March 28, 2019 at p 19, ll 1-14 [AR, Tab 8A, p 97].

<sup>11</sup> Trial Transcript, March 28, 2019 at p 19, ll 16-19 [AR, Tab 8A, p 97].

<sup>12</sup> Trial Transcript, March 28, 2019 at p 8, ll 14-15 [AR, Tab 8A, p 86].

<sup>13</sup> Trial Transcript, March 28, 2019 at p 23, l 31 [AR, Tab 8A, p 101].

<sup>14</sup> Trial Transcript, March 28, 2019 at p 9, ll 1-2 [AR, Tab 8A, p 87].

<sup>15</sup> Trial Transcript, March 28, 2019 at p 25, l 28 [AR, Tab 8A, p 103].

<sup>16</sup> Trial Transcript, March 28, 2019 at p 8, ll 16-19 [AR, Tab 8A, p 86].

<sup>17</sup> Trial Transcript, March 28, 2019 at p 8, ll 34-36 [AR, Tab 8A, p 86].

<sup>18</sup> Trial Transcript, March 28, 2019 at p 49, l 34 – p 50, l 2 [AR, Tab 8A, pp 127-128].

shorts the appellant was wearing underneath his jeans. A total of \$6500 was seized from the appellant.

20. The appellant was subsequently strip searched by another officer at the police station and 65 grams of crack cocaine was located in his “butt crack.”<sup>19</sup>

#### **A. Proceedings in Provincial Court**

21. The appellant was charged with possession of cocaine for the purpose of trafficking, possession of marihuana, possession of proceeds of crime, and obstruction of a peace officer. The trial proceeded by way of a blended *voir dire* where the appellant challenged the issuance of the search warrant, the subsequent strip search and alleged a delay in access to counsel.

##### *a) Evidence of Cst. Darroch*

22. Cst. Darroch was the first officer to testify. He stated that the warrant entry was dynamic and chaotic.<sup>20</sup> He initially arrested Ms. Medwid while Cst. Odorski, arrested the appellant.

23. During his testimony, Cst. Darroch stated that the appellant was “originally directed to the ground and then was handcuffed and was kind of reaching back in his nether region.”<sup>21</sup> Defence counsel objected to this evidence on the basis that Cst. Darroch was in the bedroom, and could not have made these observations personally.

24. Cst. Darroch clarified that he had brought Ms. Medwid into the kitchen area and the appellant was visible from that location. He stated:

At times, I did see him. He was still laying on the ground, pants were down, and he was making some motions like that. I did not see him reaching into his underwear or anything like that specifically, and my role was simply to make sure he's safe and quarterback putting together all the other found ins within the apartment and come to the conclusion of who was coming with us back to the police station and who was not. My information of what I saw there was very, very limited of seeing his interactions, of his physical actions, of what he was reaching for or anything

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<sup>19</sup> Trial Transcript, March 28, 2019 at p 66, ll 26-30 [AR, Tab 8A, pp 144].

<sup>20</sup> Trial Transcript, March 28, 2019 at p 8, l 39 and p 23, l 31 [AR, Tab 8A, pp 86, 101].

<sup>21</sup> Trial Transcript, March 28, 2019 at p 25, ll 11-12 [AR, Tab 8A, pp 103].

like that. I did not see him reaching into his underwear or pants or anything like that.<sup>22</sup>

25. Cst. Darroch testified that he had a conversation with Cst. Odorski, who had arrested the appellant, at the scene "...and that's where he provided me the information about, you know, the - the pants being down and him not listening to great verbal direction that was given..."<sup>23</sup>

26. Cst. Darroch later provided further details of the conversation with Cst. Odorski:

my conversation with Constable Odorski of [the appellant] being handcuffed and kind of reaching around the nether region, the back of his pants. His pants were halfway down on the ground -- or halfway down. I requested that a search warrant -- or sorry, a -- I requested that a strip search be done of Mr. Ali. There was no other sizable amounts of crack cocaine located around him in the area where he was arrested.<sup>24</sup>

27. Cst. Darroch believed that the appellant had drugs concealed on his person.<sup>25</sup> The appellant was found in possession of a large amount of money, a cell phone and a scale, "all things that were consistent with drug trafficking from [Cst. Darroch's] experience".<sup>26</sup>

28. Cst. Darroch testified that the appellant would not have trusted the drug users that he was staying with and would have kept the drugs on his person.<sup>27</sup> As the warrant execution was very quick, the appellant would have had "extremely minimal time" to otherwise hide the evidence as he was within the police line of sight from the door.<sup>28</sup> Cst. Darroch felt that the appellant's "clear adjustments kind of on his back end towards his – his buttocks area lead [him] to believe that he may be concealing evidence in that area"<sup>29</sup> particularly given that the appellant's pants were already "halfway down."<sup>30</sup>

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<sup>22</sup> Trial Transcript, March 28, 2019 at p 25, ll 31-39 [AR, Tab 8A, p 103].

<sup>23</sup> Trial Transcript, March 28, 2019 at p 26, ll 3-6 [AR, Tab 8A, p 104].

<sup>24</sup> Trial Transcript, March 28, 2019 at p 9, ll 22-27 [AR, Tab 8A, p 87].

<sup>25</sup> Trial Transcript, March 28, 2019 at p 9, ll 31-32 [AR, Tab 8A, p 87].

<sup>26</sup> Trial Transcript, March 28, 2019 at p 25, ll 9-10 [AR, Tab 8A, p 103].

<sup>27</sup> Trial Transcript, March 28, 2019 at p 46, l 36 – p 47, l 3 and p 21, ll 11-24 [AR, Tab 8A, pp 124-125, 99].

<sup>28</sup> Trial Transcript, March 28, 2019 at p 9, ll 29-31 [AR, Tab 8A, p 87].

<sup>29</sup> Trial Transcript, March 28, 2019 at p 9, ll 35-37 [AR, Tab 8A, p 87].

<sup>30</sup> Trial Transcript, March 28, 2019 at p 9, ll 23-27 [AR, Tab 8A, p 87].



29. Cst. Darroch was additionally concerned that no crack cocaine was located despite the source information and the other indicia of drug trafficking:<sup>31</sup>

I took that information, given the fact we had money, we had scales, we had a phone that was ringing, we had evidence to support drug trafficking, that along with confidential informant information that I had been receiving that they don't trust people around them and that they keep all their drugs on their person lead me to believe that he likely had it concealed in his person in a nether region, and I made that phone call to Staff Sergeant Sanderson letting him know, Hey, just so you know, this person's coming into cells, and I would like a strip search done. I explained my grounds to him, and Staff Sergeant Sanderson agreed to that.<sup>32</sup>

30. Cst. Darroch was also apprehensive that the appellant may have hidden the cocaine in his anus which could potentially lead to a risk of drug overdose or death.<sup>33</sup>

b) *Evidence of Cst. Odorski*

31. Cst. Odorski was the second officer to testify after Cst. Darroch. He stated that he arrested the appellant and “after a few commands”<sup>34</sup> he got onto the ground as directed. He placed the appellant in handcuffs and conducted a pat-down search. He noted that the appellant’s pants were half down and he was wearing basketball shorts underneath.

32. In his testimony, Cst. Odorski did not indicate whether he observed the appellant reaching toward his “nether region” and this evidence was not put to him. Neither Crown counsel nor counsel for the appellant inquired as to any conversation Cst. Odorski had with Cst. Darroch.

**B. Decision of the Provincial Court**

33. The appellant and the Crown agreed that the test articulated in *R v Golden* applied to the strip search. The appellant acknowledged that the Crown’s burden was met in relation to much of the test, and specifically conceded the following:

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<sup>31</sup> Trial Transcript, March 28, 2019 at p 9, ll 25-27 [AR, Tab 8A, p 87].

<sup>32</sup> Trial Transcript, March 28, 2019 at p 26, ll 8-15 [AR, Tab 8A, p 104].

<sup>33</sup> Trial Transcript, March 28, 2019 at p 9, ll 38-41 [AR, Tab 8A, p 87].

<sup>34</sup> Trial Transcript, March 28, 2019 at p 54, ll 7-8 [AR, Tab 8A, p 132].

- 1) There were reasonable grounds to arrest and conduct a pat-down or frisk search of the appellant incident to that arrest;
- 2) The strip search was conducted incidental to the appellant's arrest; and
- 3) The strip search was conducted in a reasonable manner at the police station.

34. The only issue was whether there were reasonable grounds to justify the strip search.

35. The appellant argued that Cst. Darroch could not rely on what he had been told by Cst. Odorski, because that was inadmissible hearsay, and on that basis, there were not sufficient grounds to support the strip search.

36. The trial judge declined to find a *Charter* breach and determined that the strip search was lawful. She also rejected the other arguments concerning the validity of the search warrant and delay in access to counsel.

37. Following the *voir dire*, the evidence was applied to the trial proper. The Crown did not proceed on the possession of marihuana and proceeds charges and the appellant previously resolved the obstruction charge.<sup>35</sup> On that basis, the appellant invited a finding of guilt in relation to the single count of possession of cocaine for the purpose of trafficking.<sup>36</sup>

### **C. Decision of the Alberta Court of Appeal**

38. The appellant raised only two grounds on appeal: whether the trial judge applied the correct legal test for the justification of a strip search and whether the information Cst. Darroch received from Cst. Odorski was inadmissible hearsay that could not be used to justify the strip search.

39. The majority of the Alberta Court of Appeal upheld the conviction with Justice Velduis dissenting.

40. The majority found that the information received from Cst. Odorski was not "hearsay" as it was not being adduced for the truth of its contents. Rather, the Court held that Cst. Darroch was entitled to rely on this information as it was sufficiently credible. The majority also recognized

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<sup>35</sup> Trial Transcript, August 1, 2019 at p 3, l 29 – p 4, l 6 [AR, Tab 8F, pp 233-234].

<sup>36</sup> Trial Transcript, August 1, 2019 at p 5, ll 18-20 [AR, Tab 8F, p 235].

that while the trial judge's decision could have been more comprehensive, she applied the correct legal test and there were sufficient reasons to permit appellate review. The majority found there were sufficient grounds to justify the strip search.

41. In dissent, Justice Veldhuis found that the trial judge did not turn her mind to the legal test for a strip search and that there were insufficient grounds to justify such an invasive search. She agreed with the majority's analysis concerning the admissibility of "hearsay," but she found that the evidence of Cst. Odorski was not sufficiently reliable to be considered as part of Cst. Darroch's grounds. Justice Veldhuis also found there was no evidence that the appellant was "resisting arrest" as found by the trial judge. Given that the appellant had already served his sentence, Justice Veldhuis declined to engage in a s. 24(2) analysis and would have entered an acquittal.<sup>37</sup>

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<sup>37</sup> *R v Ali*, 2020 ABCA 344 at para 63 [AR, Tab 4, p 67].

**PART II – ISSUES**

42. The respondent would redefine the issues on appeal as follows:

**Did the Court of Appeal err in concluding that the police had reasonable and probable grounds to believe that cocaine would be found during the strip search of the appellant?**

No. The majority of the Court of Appeal correctly determined that the trial judge properly interpreted and applied the law. Cst. Darroch had reasonable grounds to believe that the appellant was concealing drugs on his person. The strip search was lawful.

**If the strip search was unjustified, should the evidence be excluded under s. 24(2)?**

No, the evidence should be admitted. Although the appellant's *Charter* protected interests would be impacted, Cst. Darroch acted in good faith and had subjective grounds to believe that the appellant was concealing drugs on his person. The exclusion of reliable evidence would deprive society of a trial on the merits.

### PART III – ARGUMENT

#### A. The requirements from *R v Golden* were met, the strip search was justified

43. In *R v Golden*, this Court gave specific direction as to the proper standard at law for a strip search “in light of the serious infringement of privacy and personal dignity that is an inevitable consequence of a strip search.”<sup>38</sup>

44. Strip searches are constitutionally valid at common law where:

- 1) They are conducted as an incident to lawful arrest and for the purpose of discovering weapons or evidence related to the reasons for arrest;
- 2) The police establish reasonable grounds justifying the strip search in addition to reasonable grounds justifying the arrest; and
- 3) The search is conducted in a reasonable manner.<sup>39</sup>

45. The appellant concedes the first and third requirements, and thus the only issue on appeal is whether Cst. Darroch had reasonable grounds to justify the strip search.

##### a) *The trial judge applied the correct legal test*

46. The majority of the Court of Appeal correctly noted that the trial judge’s reasons on this issue are brief, but sufficient.<sup>40</sup> This Court, in *R v REM* endorsed a “functional, substantive approach to sufficiency of reasons, reading them as a whole, in the context of the evidence, the arguments and the trial, with an appreciation of the purposes or functions for which they are delivered.”<sup>41</sup> Judges are presumed to know the law and reasons need not expound on matters that are well settled or accepted by the parties.<sup>42</sup>

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<sup>38</sup> *R v Golden*, 2001 SCC 83 at para 99.

<sup>39</sup> *R v Golden*, 2001 SCC 83 at para 99.

<sup>40</sup> *R v Ali*, 2020 ABCA 344 at para 18 [AR, Tab 4, p 57].

<sup>41</sup> *R v REM*, 2008 SCC 51 at para 35.

<sup>42</sup> *R v REM*, 2008 SCC 51 at para 19.

47. During the trial, both counsel submitted *R v Golden* as the relevant authority on this issue and a physical copy of the decision was provided to the trial judge. During oral argument, both counsel repeatedly referenced the case with counsel for the appellant reading the relevant test into the record. The trial judge acknowledged the case in her subsequent decision.<sup>43</sup>

48. As mentioned by the majority of the Court of Appeal, while the trial judge could have been more focused on the second part of the test in her reasons, it is apparent that she turned her mind to the proper test. The trial judge stated:

And I find that is the case here. There were both subjective and objective . . . reasons for the police to believe that they could find evidence by way of a strip search given the totality of circumstances, the facts outlined in the search warrant, and the accused's actions at the scene of the arrest [emphasis added].<sup>44</sup>

49. The Court of Appeal's finding that the trial judge relied on the entire context of the evidence, including the source information and the appellant's actions, was an accurate reflection of the record.

50. In dissent, Justice Veldhuis found that the trial judge was mostly focused on an assessment of whether the strip search was properly incident to arrest rather than whether it was actually justified in this case. However, this criticism does not consider the decision as a whole. The trial judge enumerated a number of factors in support of the strip search, including the appellant reaching towards his buttocks and his initial failure to comply, that speak specifically to the second part of the test in *Golden* – reasonable grounds to believe that the appellant was concealing drugs on his person.

51. In finding that there were reasonable grounds for a strip search, neither the trial judge nor the Court of Appeal applied a lower threshold than directed by this Court. Rather, in a contextual reading of the decision, it is apparent that the trial judge applied the correct legal test and properly found that Cst. Darroch had reasonable grounds to conduct a strip search of the appellant.

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<sup>43</sup> Trial Transcript, March 28, 2019 at p 73, ll 17-19 [AR, Tab 8A, p 151]; Trial Transcript, March 29, 2019 at p 13, l 40 – p 14, l 15 [AR, Tab 8B, pp 170-171]; Trial Transcript, June 19, 2019 at p 7, l 33 and p 11, ll 12-16 [AR, Tab 8D, pp 212, 216].

<sup>44</sup> Trial Transcript, June 19, 2019 at p 9, ll 17-20 [AR, Tab 8D, p 214]; *R v Ali*, 2020 ABCA 344 paras 17-18 [AR, Tab 4, pp 56-57].

- b) *There were reasonable grounds to believe that the appellant was concealing drugs on his person*

52. Cst. Darroch testified that he believed that the appellant was concealing drugs on his person in the “nether region”<sup>45</sup> and therefore a strip search was subjectively justifiable. He based this belief on a series of objectively discernable factors:

- 1) Confidential source information from a well-known and reliable informant that the appellant would be in possession of a sizeable amount of crack cocaine;<sup>46</sup>
- 2) Confidential source information that the appellant kept his drugs on his person, a factor that was consistent with Cst. Darroch’s own experience particularly where drug dealers are in the presence of users;<sup>47</sup>
- 3) Police entry into the residence was very quick and the appellant would have had “extremely minimal time to place anything around him or hide things” because he was within line of sight;<sup>48</sup>
- 4) When he was arrested, the appellant was directed to the ground and he initially did not comply;<sup>49</sup>
- 5) The appellant’s pants were already partially down;<sup>50</sup>
- 6) The appellant was “kind of reaching back in his nether region”<sup>51</sup> and “the back of his pants;”<sup>52</sup>

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<sup>45</sup> Trial Transcript, March 28, 2019 at p 26, ll 8-15 [AR, Tab 8A, p 104].

<sup>46</sup> Trial Transcript, March 28, 2019 at p 9, ll 25-27 [AR, Tab 8A, p 87].

<sup>47</sup> Trial Transcript, March 28, 2019 at p 21, ll 11-18 [AR, Tab 8A, p 99].

<sup>48</sup> Trial Transcript, March 28, 2019 at p 9, ll 29-31 [AR, Tab 8A, p 87].

<sup>49</sup> Trial Transcript, March 28, 2019 at p 26, ll 3-6 [AR, Tab 8A, p 104].

<sup>50</sup> Trial Transcript, March 28, 2019 at p 26, ll 3-6 and p 9, ll 20-27 [AR, Tab 8A, pp 104, 87].

<sup>51</sup> Trial Transcript, March 28, 2019 at p 25, ll 10-12 [AR, Tab 8A, p 103].

<sup>52</sup> Trial Transcript, March 28, 2019 at p 9, ll 20-23 [AR, Tab 8A, p 87].

- 7) Police located other indicia of drug trafficking in a search of the appellant including a large amount of cash, a scale, and a ringing cell phone but not the drugs that police expected to find.

53. Based on these observations, Cst. Darroch subjectively believed that the appellant was concealing drugs in the area of his buttocks.<sup>53</sup> Both the trial judge and the majority of the Court of Appeal held that this belief was objectively reasonable.

54. The Court of Appeal found that “[t]he observed behavior was consistent with an inference that the drugs usually kept in his pocket were being relocated because of the police search. That may not have been the only available inference, but it was certainly an objectively reasonable inference that the police were entitled to rely on.”<sup>54</sup>

55. This analysis is consistent with that of the Ontario Court of Appeal in *R v Muller*.<sup>55</sup> In *Muller*, the accused was a suspected drug dealer who was arrested leaving an apartment building where the police were executing a warrant. He was found in possession of a scale, cell phone, and cash. The trial judge upheld the subsequent strip search and found that there was a sufficient basis to justify such a search where “there is cogent evidence that the person is selling drugs, that he is carrying the tools of the trade on his person, that he has tried to dispose of or conceal other material evidence, and no drugs are found during a pat-down search.”<sup>56</sup> The Ontario Court of Appeal subsequently upheld the trial judge’s analysis on that issue.<sup>57</sup>

56. As in *Muller*, Cst. Darroch had a solid foundation of reliable source information to believe that the appellant was in possession of a large quantity of cocaine. This belief was buoyed by the finding of a cell phone, cash, and a scale – clear indicia of the drug trade – even if the drugs were not immediately locatable.

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<sup>53</sup> Trial Transcript, March 28, 2019 at p 9, ll 35-38 [AR, Tab 8A, p 87].

<sup>54</sup> *R v Ali*, 2020 ABCA 344 at para 21 [AR, Tab 4, p 58].

<sup>55</sup> *R v Muller*, 2014 ONCA 780.

<sup>56</sup> *R v Muller*, 2014 ONCA 780 at para 50.

<sup>57</sup> Although the Court of Appeal found that the authority for the strip search was established, it found that the strip search was conducted in an unreasonable manner and allowed the appeal.



57. This information, taken together with the appellant's failure to comply with police direction and his actions in reaching towards his buttocks, invites an obvious inference. Cst. Darroch's belief, that the appellant was surprised by the police's dynamic entry and concealed his stash of cocaine somewhere on his person, is objectively reasonable.

58. The majority of the Court of Appeal properly concluded that Cst. Darroch had reasonable grounds to believe that the appellant was concealing drugs on his person. The strip search was lawful.

c) *The evidence in support of the strip search was reliable*

59. Cst. Darroch was entitled to rely on information received from Cst. Odorski as part of his grounds to strip search the appellant. While Cst. Odorski did not recount the details of these observations or his conversation with Cst. Darroch in his own testimony, there is nothing to suggest that Cst. Darroch's recollection is in any way unreliable. The appellant chose not to confront the witnesses with the content of this exchange and the trial judge accepted the evidence of Cst. Darroch on this issue.

60. In forming reasonable grounds, police have considerable leeway to consider a variety of factors based on their own observations and experience.<sup>58</sup> They are additionally entitled to rely on information received from third parties including complainants, witnesses, experts, analysts and other police officers. Even information supplied by an unknown confidential informant may provide reasonable and probable grounds where some degree of credibility can be established.<sup>59</sup>

61. However, information received from other police officers is not subject to the same scrutiny as information received from confidential informants or civilians.<sup>60</sup> Cst. Darroch was entitled to rely on the information he received from Cst. Odorski – a trained police officer who dealt directly with the appellant and was therefore well placed to report on his behavior from only moments ago. Cst. Odorski's information was credible and reliable.

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<sup>58</sup> *R v Paterson*, 2017 SCC 15 at paras 19-20.

<sup>59</sup> *R v Debot* (1986), 30 CCC (3d) 207 (Ont CA) at para 17, aff'd [1989] 2 SCR 1140.

<sup>60</sup> *R v Ha*, 2018 ABCA 233 at para 79. See also: *R v Cornell*, 2010 SCC 31 at para 37.

62. Cst. Darroch's evidence that Cst. Odorski had spoken to him about the appellate reaching towards his "nether region or the back of his pants" during the arrest was unchallenged. Cst. Darroch referenced the conversation multiple times in his evidence and was consistent in relaying the information that he received to the court. He also relayed this information to Staff Sergeant Sanderson who authorized the strip search.

63. The appellant and the dissenting Justice both challenge the credibility of this evidence on the basis that Cst. Odorski did not testify to either the observations alleged or the conversation with Cst. Darroch. However, Cst. Odorski's evidence was very brief and neither that specific observation nor his conversation with Cst. Darroch were put to him during cross-examination. It was not that he denied making the observations or could not remember the conversation, but rather, the record is simply silent on this issue. Absent any evidence to suggest otherwise, Cst. Odorski's information could be confidently relied upon.

64. While it would have been preferable for the trial judge to have addressed this issue in her decision, it is apparent that she accepted the testimony of Cst. Darroch – a reasonable approach given the lack of contradictory evidence.

65. The appellant's complaints concerning this alleged inconsistency must be viewed in the context of his decision not to put this supposed contradiction to either Cst. Darroch or Cst. Odorski. There is simply no basis to conclude that the evidence received from Cst. Odorski was not credible or that Cst. Darroch's memory of the conversation occurring was faulty.<sup>61</sup> Cst. Darroch's evidence of his conversation with Cst. Odorski is sufficiently reliable to form part of his grounds in support of the strip search.

d) *The trial judge did not mischaracterize the evidence*

66. Both the appellant and the dissenting Justice take issue with the trial judge's characterization of the appellant's initial interaction with Cst. Odorski as "resisting arrest." However, this finding is properly borne out by the record.

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<sup>61</sup> Trial Transcript, March 28, 2019 at p 25, ll 28-39 [AR, Tab 8A, p 103].

67. Cst. Odorski testified that upon entry into the suite he gave the appellant “commands to get down on the ground. After a few commands, they got on the ground.”<sup>62</sup> He later described the interaction as “I told him to get to the ground. Took him several attempts for him to get on the ground.”<sup>63</sup> The record is clear that the appellant initially did not comply with Cst. Odorski’s directions.

68. The issue of whether refusing to comply with police direction is equivalent to “resisting” is a question of semantics perhaps best answered by the Court of Appeal’s finding that the trial judge was simply using the word “resist” as an informal synonym for “delayed compliance”.<sup>64</sup>

69. Both Justice Veldhuis and the appellant propose that the “delayed compliance” may have been the result of the appellant’s lowered pants rather than a willful resistance. This is merely speculation. There is no evidence to suggest that the appellant was somehow unable to comply because of his lowered pants. This explanation was never put to Cst. Odorski and the appellant did not testify. Further, even if there was potentially an innocent explanation for the appellant’s failure to comply, this does not preclude the officer to draw his own inference provided it is a reasonable one.<sup>65</sup>

70. In the absence of other evidence, the trial judge was entitled to find that the appellant was “resisting” in that he simply refused to comply with police direction. This is a finding of fact available on this record and must be accorded considerable deference.

71. Regardless, the appellant’s delayed compliance was just one of the many factors that Cst. Darroch relied on to support his grounds and only in the sense that “the delayed compliance... confirmed an opportunity for the appellant to conceal drugs, for example by possibly moving them from his pockets to the back of his pants.”<sup>66</sup> The trial judge’s characterization of this behavior as “resisting” does not undermine Cst. Darroch’s grounds.

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<sup>62</sup> Trial Transcript, March 28, 2019 at p 54, ll 5-8 [AR, Tab 8A, p 132].

<sup>63</sup> Trial Transcript, March 28, 2019 at p 55, ll 1-3 [AR, Tab 8A, p 133].

<sup>64</sup> *R v Ali*, 2020 ABCA 344 at para 23 [AR, Tab 4, pp 58-59].

<sup>65</sup> *R v Chehil*, 2013 SCC 49 at para 34; *R v Ha*, 2018 ABCA 233 at para 85.

<sup>66</sup> *R v Ali*, 2020 ABCA 344 at para 23 [AR, Tab 4, pp 58-59].

- e) *The appellant's position on the use of hearsay exceeds the scope of this appeal and is wrong in law*

72. The appellant erroneously argues that the Court of Appeal erred in its assessment of Cst. Darroch's grounds in that they focused on Constable Darroch's beliefs as opposed to the factual circumstances determined at trial.<sup>67</sup> The appellant contends that such an analysis must be determined based on the facts properly proven at trial rather than the belief of the officer directing the search.<sup>68</sup> On that basis, the appellant concludes that Cst. Odorski's "hearsay" statement cannot form part of Cst. Darroch's grounds as it was not proven as a fact at trial.

73. First, this issue exceeds the scope of this appeal. Justice Veldhuis agreed with the majority that an officer can rely upon out-of-court statements and other information to formulate reasonable grounds. Her dissent was limited to an assessment of the reliability of that evidence in this case.<sup>69</sup> Hence, this issue is not properly before this Court.

74. Second, the base proposition that an officer cannot rely on hearsay to support his grounds is clearly contrary to this Court's decisions on reasonable grounds.<sup>70</sup> Police are entitled to rely on information obtained from third parties in furtherance of their subjective belief provided it is sufficiently reliable. The ultimate issue in assessing the grounds relied upon by police is not the truth of the information,<sup>71</sup> but whether it could reasonably be believed. Even if the information relied on was ultimately proven to be wrong, that does not retroactively invalidate what was otherwise a reasonable belief.<sup>72</sup>

**B. If the strip search was unjustified, the evidence should not be excluded under s. 24(2)**

75. In the event that a breach of s. 8 of the *Charter* is found, this Court should conduct an analysis under s. 24(2). While this is a different position than the respondent took during oral

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<sup>67</sup> Factum of the appellant at para 95.

<sup>68</sup> Factum of the appellant at para 99.

<sup>69</sup> *R v Ali*, 2020 ABCA 344 at para 54 [AR, Tab 4, p 65].

<sup>70</sup> See *R v Storrey*, [1990] 1 SCR 241 at 249-251; *R v Chehil*, 2013 SCC 49 at paras 27-35; *R v Mackenzie*, 2013 SCC 50 at paras 55-65.

<sup>71</sup> *R v Paterson*, 2017 SCC 15 at para 20.

<sup>72</sup> *R v Pires and Lising*, 2005 SCC 66 at para 41; *R v Crevier*, 2015 ONCA 619 at para 65.

arguments before the Court of Appeal, it does not prejudice the appellant or affect trial fairness.<sup>73</sup> As the entire case was called within the *voir dire*, there is a sufficient record to engage in this analysis and sending the matter back to the trial court for determination would be an unnecessary step.

76. While the dissenting Justice dispensed entirely with the s. 24(2) analysis and entered an acquittal, the respondent cautions against such an approach.<sup>74</sup> Unlike *Golden*, the facts in this case are not so egregious as to render the s. 24(2) analysis a “mere theoretical exercise”<sup>75</sup> or to deprive the Crown of a conviction. The appellant was in possession of significantly more cocaine than the accused in *Golden* and he conceded that the strip search was conducted reasonably and properly incident to the arrest.

77. Nor does the appellant having served the jail portion of his sentence render the analysis moot. The appellant remains bound by a 10-year firearms prohibition, a lifetime prohibition for prohibited weapons and is subject to a DNA order. Those prohibitions relate to a recognized sentencing goal of protecting the public and “in particular, the protection of police officers engaged in the enforcement of drug offences.”<sup>76</sup>

78. The proper application of s. 24(2) “is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns” and involves consideration of the following three factors:

- 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 adjudication of the case on its merits.<sup>77</sup>

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<sup>73</sup> *R v Nixon*, 2011 SCC 34 at para 36.

<sup>74</sup> *R v Ali*, 2020 ABCA 344 at para 63 [AR, Tab 4, p 67].

<sup>75</sup> *R v Golden*, 2001 SCC 83 at para 118.

<sup>76</sup> *R v Wiles*, 2005 SCC 84 at para 9.

<sup>77</sup> *R v Grant*, 2009 SCC 32 at paras 70-71.

79. The consideration of these factors to the facts of this case demonstrates that the appellant has failed to meet this burden<sup>78</sup> and that the evidence should not be excluded.

a) *The Charter-infringing state conduct was not serious*

80. This factor favours the admission of the evidence. In determining the seriousness of the breach, the court must consider the nature of the state conduct that led to the breach of the *Charter* rights. Where the breach is a “wilful or reckless disregard of *Charter* rights”<sup>79</sup> the court may seek to disassociate itself to maintain public confidence in the rule of law. However, where the breach is minor or technical in nature or “the result of an understandable mistake,”<sup>80</sup> public confidence may not be undermined.

81. Cst. Darroch acted honestly and reasonably based on the information he had gathered during the investigation. He subjectively believed that he had sufficient grounds to strip search the appellant. A Provincial Court judge and a majority of the Court of Appeal agreed, finding that his subjective beliefs were objectively reasonable. On that basis, it can hardly be said that Cst. Darroch should have known better.

82. The actions of Cst. Darroch in relation to what he reasonably believed was lawful authority to conduct a strip search demonstrates good faith and respect for *Charter* limits. He turned his mind to the additional requirements and articulated the grounds to justify the strip search. Cst. Darroch also relayed the basis for his grounds to the Staff Sergeant and requested approval for the strip search in compliance with *Golden*.<sup>81</sup> This search was not done as a matter of routine police policy. It cannot be said that his conduct was part of a pattern of abuse or indifference, systemic or otherwise, towards *Charter* rights.

b) *The impact on the Charter-protected interests was mitigated*

83. As is often the case, this factor favours exclusion because a breach relating to an unjustified strip search “is demeaning to the suspect’s human dignity and will be viewed as extremely serious

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<sup>78</sup> *R v Fearon*, 2014 SCC 77 at para 89.

<sup>79</sup> *R v Grant*, 2009 SCC 32 at para 74.

<sup>80</sup> *R v Harrison*, 2009 SCC 34 at para 22.

<sup>81</sup> *R v Golden*, 2001 SCC 83 at para 101.

on that account.”<sup>82</sup> However, not all strip searches are equal in impact. This case may be contrasted with the way strip searches were conducted in *Golden*. Here, the impact of the breach was mitigated by the professional and respectful manner in which the search was carried out, consistent with the guidelines in *Golden*.

c) *Society’s interest in having this case adjudicated on its merits is high*

84. This factor favours admission. At this stage the court must consider the reliability of the evidence and society’s interest in having a case adjudicated on its merits. The real evidence relating to this serious and dangerous drug is critical to the Crown’s case. Crack cocaine is highly addictive and a scourge in the community. Possession for the purpose of trafficking of 65 grams of crack cocaine is a serious crime. There is a strong societal interest for this evidence to be admitted at trial for an adjudication on the merits.

85. Balancing all three factors, the evidence should be admitted. Although the appellant’s *Charter* protected interests would be impacted, the police conduct falls at the less serious end of the spectrum, and the exclusion of reliable evidence would deprive society of a trial on the merits in a serious case.

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<sup>82</sup> *R v Grant*, 2009 SCC 32 at para 114.

**PART IV – COSTS**

86. In accordance with the usual practice in criminal cases, no costs should be ordered.

**PART V – ORDER REQUESTED**

87. This Court should dismiss the appeal, without costs.

**PART VI – SUBMISSIONS ON CASE SENSITIVITY**

88. There is no sealing or confidentiality order, publication ban, classification of information in the file that is confidential under legislation, or restriction on public access to information in this file that could have an impact on the Court's reasons in the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at Ottawa, Ontario, the 7<sup>th</sup> day of July 2021

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Monique Dion  
Counsel for the Respondent

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Éric Marcoux  
Counsel for the Respondent



## PART VII – TABLE OF AUTHORITIES

<b><u>Jurisprudence</u></b>	<b>Paragraphs</b>
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