

R. v. Shallow

Ontario Judgments

Ontario Superior Court of Justice

N.J. Spies J.

Heard: June 4-8, 2018.

Judgment: June 11, 2018.

Released: June 21, 2018.

Court File No.: CR/17/900005/180000

[2018] O.J. No. 3318 | 2018 ONSC 3616

RE: Her Majesty the Queen, and Letrae Paul Shallow

(107 paras.)

Counsel

Chris Leafloor, for the Crown.

Geary Tomlinson, for Letrae Paul Shallow.

RULING ON DEFENCE *CHARTER*
APPLICATION TO EXCLUDE UTTERANCES AND
EVIDENCE

N.J. SPIES J.

Introduction

1 The defendant, Letrae Paul Shallow, was arrested on August 19, 2016, and charged with

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possession of cocaine for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act*, [S.C. 1996, c. 19](#) (CDSA). He re-elected trial before me without a jury.

2 At the outset of the trial, Mr. Shallow brought an application alleging violations of his rights under ss. 8, 9 and 10 (a) and (b) of the *Canadian Charter of Rights and Freedoms*. He seeks an order excluding as evidence from this trial an utterance that he purportedly made to police and all of the evidence, and in particular the cocaine seized by the police, pursuant to s. 24(2) of the *Charter*.

3 The Crown brought an application to admit two statements alleged to have been made by Mr. Shallow to the arresting officer. For reasons I will come to, the voluntariness of only one statement was in issue, but it was also the basis for a Defence argument that the arresting officer had breached Mr. Shallow's s. 10 *Charter* rights.

4 The evidence with respect to this application was heard in a *voir dire*, blended with the trial. The Crown called the two police officers from Toronto Police Services (TPS) involved in the arrest of Mr. Shallow and the Scenes of Crime officer, PC Brayman. The Defence made a number of admissions and Mr. Shallow and his mother, Serena Landell, testified on the *voir dire*. It was agreed that their evidence would apply to the *voir dire* only. It was also agreed that I would provide my ruling on the application before Mr. Shallow was put to his election.

Issues

5 The relevant law is not in dispute. The main issues on this application are my assessment of the credibility of PC Best, who stopped Mr. Shallow while he was driving his car, and PC Brouwer, who assisted in the arrest, and the credibility of Mr. Shallow. The evidence of PC Best and Mr. Shallow of what happened after he was stopped is diametrically opposed. The key factual issue is whether or not PC Best had reasonable and probable grounds to arrest Mr. Shallow for possession of marihuana. After that arrest, various searches were done and 21.79 grams of crack cocaine was found in a black bag. It is admitted by the Defence that Mr. Shallow was in possession of this quantity of crack cocaine for the purpose of trafficking. Mr. Shallow also had about four grams of fresh marihuana in a Ziploc bag inside the black bag. There are factual disputes as to whether or not the Ziploc bag was folded inside the black bag and whether

or not PC Best could have seen that the Ziploc bag contained marihuana and whether or not the Ziploc bag was sealed and whether or not PC Best smelled an odour of fresh marihuana coming from the car.

The Evidence and Preliminary Findings of Fact

6 On August 19, 2016, PC Best and PC Brouwer were detailed to be in uniform in marked scout cars, enforcing the *Highway Traffic Act* (HTA). They were each working on their own. As it happened, PC Best made the decision to attend at the intersection of Kennedy and Ellesmere and target the southbound traffic and PC Brouwer did the same and was located near the same intersection. At around noon on that day, PC Best parked his scout car in the parking lot of a nearby strip mall, out of sight, and he positioned himself about 100 feet north of the intersection, on the west side. He was on foot making observations of the southbound traffic, concealing himself behind the signage along the boulevard.

7 Mr. Shallow was 18 years old at the time of his arrest. His father gave him the Honda Accord that he was driving when he obtained his G2 licence in March 2016. He has no criminal record. Mr. Shallow testified that he had purchased the marihuana found in his possession from a friend in Pickering about 20 minutes before PC Best stopped him. He testified that it came from a dispensary that he did not have access to. For reasons I will come to, I do not accept that evidence as the Ziploc bag had clearly been used before and was not in a condition consistent with just being purchased from a dispensary nor was it labeled in accordance with its contents.

8 In his evidence-in-chief Mr. Shallow testified that the Ziploc bag was sealed and that he was not able to smell marihuana from the bag. According to Mr. Shallow, fresh marihuana has a very distinct, strong odour that would "stink up" his car and he would smell it. He had not asked his friend to weigh the marihuana in front of him because he trusted him. Mr. Shallow testified that in order to be "more discreet" he folded the Ziploc bag with the clear portion, where the marihuana could be seen, on the inside and put it in the bottom of the black bag with the crease at the top. He recalled that he zipped up the black bag because that is what he always did. In cross-examination he added that he never left the black bag un-zipped and that he did remember it being zippered closed at the time.

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9 In cross-examination, Mr. Shallow admitted that he could not recall if the Ziploc bag was open at the top, as it appeared in court it now is, saying that he only had it in his hands for a few seconds before he folded it and put it in his black bag. When it was put to him that the Ziploc bag could have been open, Mr. Shallow said that was doubtful although he admitted that he did not inspect the Ziploc bag. He testified that if the Ziploc bag was open that he would have seen that and closed it before putting it in the black bag. He added later that if the Ziploc bag was open that he would have seen marihuana falling out of the bag, but given the size of the Ziploc bag and the fact that the marihuana took up less than half the bag, I do not believe that would have occurred.

10 Mr. Shallow also testified that although he smoked marihuana every day he had not smoked marihuana on the day of his arrest and that no one else had smoked marihuana in his car that day either. He also said that there were no marihuana ashes in his ashtray and that he did not recall seeing any marihuana crumbs or "shake" in the car console.

11 August 19, 2016 was a very bright, sunny day and the roads were dry. It was really hot and PC Best said he was sweating in his uniform. He was wearing sunglasses on and off during the course of the day. He could not say at what points they were on or off but I do not believe that they would have affected his ability to make the observations that he alleges that he made. Mr. Shallow testified that it was a hot sunny day and he was driving with his car windows up, his sunroof closed, probably with the inside cover closed as well, and the air conditioning was on.

12 PC Best testified that at about 12:10 p.m., he made a visual observation of a four-door Honda Accord, which was later identified to be Mr. Shallow's car, travelling southbound in the centre lane. He testified that his attention to the vehicle was drawn because as it was slowing down, it was "dipping down" as the brakes were being applied. He said that by this he meant that the brakes were not being applied smoothly and it was a "jerky stop" and not a smooth stop. PC Best testified that he observed this "dipping down" more than once and said it was quite significant as compared to the other vehicles going southbound. PC Best denied that the movement of Mr. Shallow's vehicle was just consistent with someone coming to a stop at a red light. He testified that it was more like "sudden jolts" and was consistent with someone using a

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cell phone while driving and coming to a stop. PC Best said that when he first saw Mr. Shallow's vehicle, he had a "clear and unobstructed view", as there were no other cars in front of him.

13 Mr. Shallow testified that as he approached the intersection of Kennedy and Ellesmere the light turned red and so he was braking normally. He did not recall that he was braking erratically, and in cross-examination denied that he was. He testified that there was nothing unusual about his braking. However, he also said that he did not have much recollection of how he was braking. On this point I prefer the evidence of PC Best. There is no doubt that something drew his attention to Mr. Shallow's vehicle. As I will come to, Mr. Shallow was preoccupied - he was talking on his cell phone, through the car speakers, to his girlfriend who had called him. I find that it is quite likely that he was braking erratically as PC Best testified he did.

14 PC Best testified that after he made his observations of Mr. Shallow's vehicle that he then looked at the driver of the vehicle and saw behaviour consistent with someone using a cell phone while driving. He said that his first observation of Mr. Shallow was through the front windshield as the car approached and then as it passed him it was through the front passenger window. He had no notes or recollection as to whether the passenger window was up or down, but testified that he had a clear view of the driver.

15 PC Best testified that he observed Mr. Shallow's head facing straight ahead and then bobbing up and down repeatedly. He also observed that Mr. Shallow was holding what appeared to be a white cell phone in his right hand at mid-chest height in front of him, with his left hand on the steering wheel. At this point, PC Best testified that he formed the belief that the driver was operating his cell phone while driving.

16 Mr. Shallow admitted that he had a white iPhone in his right hand at about chest level, hooked up to an auxiliary cord and plugged into the centre console of his car. However, he testified that with his phone in that position, PC Best would not have been able to see this. Given that on this point Mr. Shallow admitted that he was holding a white iPhone, and talking to his girlfriend, I accept that PC Best was able to see this. There was no other reason for him to stop Mr. Shallow.

17 PC Best testified that he walked out into the roadway in order to investigate further and

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signaled Mr. Shallow to stop. As he passed in front of Mr. Shallow's car he had a clear view into the car and saw that Mr. Shallow was still holding the same cell phone. He went to the driver's side of the car and advised Mr. Shallow that the reason for the stop was that he was using a cell phone while driving. PC Best testified he saw a second blue cell phone sitting on Mr. Shallow's left side, close to Mr. Shallow's crotch, which I took to mean the upper left leg area.

18 There is no dispute that PC Best's sole reason for pulling Mr. Shallow over was that he was using a cell phone while driving. PC Best admitted that he made no observation that Mr. Shallow was speeding and/or not wearing a seatbelt. He had no concerns about his sobriety.

19 There is no dispute that once PC Best was at the driver's side of the car that Mr. Shallow's driver's side window was only partially down. I heard evidence from Mr. Shallow and his mother that it could only go down about five to six inches and I accept that evidence. PC Best said that the window was rolled down enough and he did not have to ask Mr. Shallow to lower his window any further. He had a clear, unobstructed view of the inside of the vehicle and was able to make eye contact with Mr. Shallow and see what was inside the car. He could see that Mr. Shallow was still holding the white cell phone in his right hand, which is admitted by Mr. Shallow.

20 PC Best testified that he observed that Mr. Shallow was very flustered, which he said was not unusual in his experience when stopping a vehicle. PC Best testified that Mr. Shallow's car darted forward again and that had to order him to stop a number of times.

21 PC Best demanded Mr. Shallow's driver's licence, ownership and insurance. There is no dispute that Mr. Shallow only produced his Ontario G2 Class driver's licence to PC Best at first. PC Best was satisfied with Mr. Shallow's identification based on the driver's licence. It is also admitted that Mr. Shallow did not immediately produce his ownership and insurance. Since Mr. Shallow's vehicle was in a live lane of traffic, PC Best asked him to pull into the driveway of 1892 Kennedy Road, which is a strip mall on the northwest corner of the intersection, for his safety and the safety of others on the roadway.

22 After Mr. Shallow moved his car, PC Best approached the driver's side again. He testified that at this point, he detected a "mild odour" of marihuana coming from the car. PC Best testified that he said to Mr. Shallow that he could smell fresh marihuana from the car. Mr. Shallow did not

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remember PC Best saying this. It is his position that the marihuana that he had in his car was in a closed Ziploc bag, inside the black bag, which was zippered and that there was no smell of marihuana in his car.

23 PC Best made a second demand for the ownership and insurance, which had not yet been surrendered. PC Best testified that Mr. Shallow was very flustered and repeating over and over again that he was having such a bad day and saying something about a girlfriend that he could not make out. Mr. Shallow testified that his girlfriend had called him and was "pestering him" about it taking too long for him to get to her house. He said that when PC Best signaled him to stop he told her that he was getting pulled over, "thanks a lot" and he hung up on her. He admitted that she annoyed him because he did not want to be on the phone with her, especially since she was the reason that he was pulled over. However, Mr. Shallow denied that he was flustered and denied saying anything in the presence of PC Best about having a bad day or referring to his girlfriend. On this point I accept the evidence of PC Best as he would have had no other way of knowing that Mr. Shallow was annoyed with his girlfriend.

24 According to PC Best, Mr. Shallow was in a very agitated state, "tearing through the console" in that he was opening and closing the console, pulling things out and grabbing at different things and moving them around. Although I do not believe that PC Best specifically said that Mr. Shallow also looked in the glove compartment, he was not asked any questions about specifically where he saw Mr. Shallow looking for the documentation. Mr. Shallow denied all of this evidence. He testified that he knew that his ownership and insurance slip were in a cardholder case in the glove compartment of his car. According to Mr. Shallow, although his mother arranged the insurance, she gave him the insurance slip and made sure that he put it in the glove compartment. He and his mother also admitted, however, that it was possible that she put these documents into the glove compartment of his car.

25 According to Mr. Shallow he found his ownership and insurance documentation in the glove compartment of his car within five minutes of being stopped, which he revised to two to five minutes in cross-examination, and that he produced these documents to PC Best. He admitted that he had to take things out of his glove compartment to find the documents but said that there was not that much stuff in it. He was not sure if PC Best was present when he did this. According to Mr. Shallow, he never kept these documents in the centre console of his car or in

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his black bag and he denied thinking that these documents might be in one of those locations or looking for them there. Mr. Shallow also denied becoming panicky because he could not find the documents. He admitted that he had never needed to retrieve these documents before as he had not been pulled over before, either in this car or when he had his G1 licence. What is significant is that even on Mr. Shallow's evidence it took some time for him to find his ownership and insurance documents.

26 PC Best testified that he said to Mr. Shallow, a second time, that he could smell fresh marihuana from the car. He testified that Mr. Shallow then ripped out an ashtray, like one that sits in a cup holder, that had ashes in it and he waved it at PC Best and said that PC Best should look at it and he would see there was nothing there. Mr. Shallow testified that none of this happened.

27 PC Best testified that he decided to give Mr. Shallow more time to get his documents and asked him to shut his car off. PC Best then went to his scout car and made some checks of Mr. Shallow's driver's licence and the licence plate of his vehicle on his in-car computer and he confirmed that Mr. Shallow was a licensed driver and the registered owner of the vehicle.

28 According to PC Best, he returned to Mr. Shallow's vehicle and made a third demand for the ownership and insurance. He said that Mr. Shallow was still mumbling about it being a bad day and something about his girlfriend. Again, Mr. Shallow denies this. He testified that he gave PC Best his insurance and ownership documents and PC Best testified that he did not. According to Mr. Shallow, after he gave his ownership and insurance documents to PC Best, the officer went back to his scout car a second time to "run it", which I presume meant that he believed PC Best was going to check these documents on his in-car computer.

29 PC Best testified that now that the vehicle was not running, he noticed a much stronger smell of fresh marihuana and that he said out loud how strong the smell was. Mr. Shallow was still rummaging around, looking for the paperwork as he had before. PC Best testified that he was watching his hands and looking at the centre console and that he noticed some marihuana shake around that area. It is agreed that shake can result when a joint is rolled or some marihuana is cut. PC Best testified that the shake was very visible against the dark interior colour of the car. PC Best did not make a note, nor did he tell Mr. Shallow or PC Brouwer that

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he had seen marihuana "shake" in the car. PC Brouwer testified that he did not recall seeing shake in the car.

30 Although Mr. Shallow admitted that he smoked marihuana every day and that he smoked it in his car before, he said that he kept his car clean and he denied that there was any marihuana shake in the car. His mother, who drove the car briefly that morning in order to get it out of the driveway so she could get her car out, also testified that she did not see any marihuana shake in the car.

31 PC Best also testified that as Mr. Shallow was rummaging for his papers he grabbed a black bag that was beside him and when he moved it, PC Best caught a "glimpse" of the top two or three inches of a Ziploc bag inside that the black bag. This Ziploc bag was clear on one side, which allowed the contents to be seen and it could also be seen through that clear side that the other side of the bag was a reflective material, with writing in black and green within the top two to three inches of the black bag. It appeared to him to be consistent with how he saw marihuana packaged that was sold by dispensaries in Scarborough. PC Best volunteered that the reflective back of the Ziploc bag is in fact carbon, which is supposed to decrease the smell of the marihuana. PC Best denied the suggestion that the Ziploc bag of marihuana was folded inside the black bag as alleged by Mr. Shallow. He also denied that he smelled fresh marihuana coming from a sealed Ziploc bag. He testified that the smell was coming from the car and that he did not try to smell Mr. Shallow.

32 PC Best admitted that the moment he saw this Ziploc bag that he called it out and said, "What was that in the bag?" He testified that it was just a reaction to what he saw. According to PC Best, at this point, Mr. Shallow pulled the black bag towards him and opened and closed it quickly, with the open top facing towards PC Best. PC Best also described this as Mr. Shallow "flashing" the bag at him. Although Mr. Shallow did not say anything, PC Best understood this motion to be an attempt to prove to him that there was nothing in the black bag. PC Best testified that at this point, he could clearly see buds consistent with the appearance of marihuana in the bottom of the Ziploc bag and he told Mr. Shallow that he could "see the weed". According to PC Best, Mr. Shallow then went straight to the Ziploc bag and took it out of the black bag and said, "Here, it's just weed. Take it." This is the statement that the Crown seeks to introduce into evidence at trial.

33 PC Best testified that he told Mr. Shallow to stop and that he put his hand out to make it clear he would not take the Ziploc bag of marihuana from him. At this point, PC Best signaled to PC Brouwer to come and assist him. I find this to be reasonable as he did not want to arrest Mr. Shallow without PC Brouwer's assistance. He told PC Brouwer that he had seen marihuana in plain sight. PC Brouwer confirmed that PC Best flagged him over and told him that he was going to arrest Mr. Shallow because he had observed marihuana in the vehicle. There is no dispute that PC Best did not tell PC Brouwer that he had observed marihuana shake in the car or that he had smelled an odour of fresh marihuana in the car. I will come back to the significance of this.

34 At this point PC Best testified that he asked Mr. Shallow to set the Ziploc bag down on the seat and exit the vehicle. He testified that he now had reasonable and probable grounds to place Mr. Shallow under arrest for possession of marihuana, a Schedule II substance, which he did. PC Best admitted that he never told Mr. Shallow that he was investigating him for the possession of marihuana prior to his arrest. He handcuffed Mr. Shallow to the rear and asked PC Brouwer to watch the bag of marihuana.

35 PC Best testified that he brought Mr. Shallow to the side of his scout car and performed a search of his person incident to arrest. He located the blue cell phone that he had seen earlier in Mr. Shallow's front right pocket. No other evidence was located during the search of Mr. Shallow's person.

36 Mr. Shallow denied all of the details of PC Best's version of what happened and he testified to a very different version of the events. He said that after he gave his ownership and insurance to PC Best that PC Best went to his scout car a second time, that when he returned to Mr. Shallow, PC Best asked him what was in "that bag", referring to the black bag. Mr. Shallow said "nothing" to which he alleged PC Best asked him why he had an empty bag. Mr. Shallow disregarded this question and then PC Best told him to give him the bag to which Mr. Shallow said "no". According to Mr. Shallow, PC Best then told him to get out of the car, and when he asked why, PC Best told him to do so a second time at which point he got out of the car. PC Best then opened the black bag and told Mr. Shallow that he was under arrest for possession of marihuana and he handcuffed Mr. Shallow.

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37 PC Best testified that he placed Mr. Shallow in the rear of his scout car and he activated the in-car video (video). PC Best then read to Mr. Shallow his rights to counsel (RTC) and cautioned him which can be heard on the video. The time of arrest was 12:15 p.m. At this time Mr. Shallow admitted that he understood his rights and that he did not want a lawyer. At trial Mr. Shallow testified that PC Best was speaking quickly and that he did not understand the RTC. He did not ask to speak to a lawyer because he thought he was just going to get a ticket because he was using his cell phone while driving. He also testified that he did not think he needed a lawyer for three grams of marihuana and that that was not that serious. I can understand Mr. Shallow's confusion although he did not tell PC Best that he was confused, because when PC Best gave him his RTC in the scout car he stated that he was under arrest for possession of marihuana but that did not mean that he was being charged. This was the part that confused Mr. Shallow. In any event, I find that Mr. Shallow was properly given his RTC and was cautioned by PC Best.

38 PC Best testified that he asked Mr. Shallow if there was anything he was going to locate when searching the vehicle that could cause him harm and this can be heard on the video. Mr. Shallow said there was nothing like that in the car.

39 PC Best testified that he activated the air conditioning in his car "full blast" and this can be heard on the video. Mr. Shallow complained that the car was really hot and that the air conditioning was not working in the backseat area of the car and he can be heard complaining a couple of times about how hot it was while he was in the back of the scout car. Mr. Tomlinson submitted that this evidence would be relevant to a s. 24(2) *Charter* analysis.

40 PC Best can be seen on the video returning to PC Brouwer who was searching Mr. Shallow's vehicle. PC Brouwer told PC Best that he had found a quantity of crack cocaine in the black bag. This was a puck shaped lump of crack cocaine, wrapped in cellophane, and was inside the only inside zippered pouch in the black bag.

41 At this point, at about 12:23 p.m., PC Best returned to the scout car and told Mr. Shallow that he was also under arrest for possession of a Schedule I substance (*i.e.*, crack cocaine). PC Best read Mr. Shallow his RTC and caution a second time. All of this can be heard on the video.

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This time, Mr. Shallow said he wanted to speak to a lawyer because he knew crack cocaine was more serious. He gave PC Best the name of Mr. Tomlinson.

42 PC Best testified that he and PC Brouwer searched Mr. Shallow's vehicle for further evidence of the offence, which he described as a "search incident to arrest". PC Brouwer seized all of the items save for the blue cell phone. He testified that he located the Ziploc bag of marihuana in a cup holder in the centre console area. PC Brouwer could not recall if the Ziploc bag was folded or not. In addition to the cocaine, PC Brouwer found a silver digital scale with the residue of what Mr. Shallow admitted appeared to be cocaine and marihuana, inside the main pouch of the black bag. As well, a lighter and lip balm were found in the main pouch of the black bag. Mr. Shallow denied using the scale at any time to weigh marihuana including that day. PC Brouwer testified that he found the ownership and registration in the car and he did not recall that it was difficult to find but he could not recall where it was located. PC Best also did not recall where Mr. Shallow's ownership and insurance were located inside the car. PC Brouwer also seized Mr. Shallow's wallet, which was on the front seat and a flip knife that was in a separate compartment on the outside of the black bag.

43 PC Brouwer did not make a note of smelling marihuana in Mr. Shallow's vehicle but when this was pointed out to him in cross-examination, he testified that he recalled smelling fresh marihuana when he was dealing with the Ziploc bag. He admitted that this was a very important observation and that it was a "pretty glaring omission" not to note this. At the preliminary inquiry, PC Brouwer did not mention the fact that he smelled fresh marihuana when he stated he had no note of detecting an odour of marihuana. Although he certainly could have added this to his answer, he was not asked a follow up question as to what he smelled as opposed to what he noted in his notes and so there is no inconsistency in his evidence in my view.

44 The officers waited for a tow truck to move Mr. Shallow's vehicle as it was impeding traffic and they then proceeded to take him to 41 Division at 12:45 p.m. They arrived at 12:53 p.m. There was a bit of a delay getting into the sally port and then once again in the sally port. Mr. Shallow was paraded before Staff Sergeant Giczi at 1:05 p.m. PC Best testified that he made a request to be able to conduct a Level 3 search for the purpose of locating more drugs and to ensure that Mr. Shallow could not harm himself or anyone else. Staff Sergeant Giczi approved the request and both PC Best and PC Brouwer brought Mr. Shallow to a private room where

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they conducted a Level 3 search in the usual manner. No further drugs, weapons or means of escape were located during the course of that search.

45 PC Brouwer was the officer who brought Mr. Shallow to an interview room at 1:18 p.m. and arranged the calls to his mother, to get Mr. Tomlinson's phone number and then to Mr. Tomlinson. In my view this was all done without delay particularly as Mr. Shallow's mother did not answer when he called her and PC Brouwer needed Mr. Tomlinson's number from her.

Analysis and Findings of Fact

Assessment of Credibility and Reliability

46 As both counsel submitted, this application turns largely on my assessment of the credibility of Officers Best and Brouwer on the one hand and Mr. Shallow on the other. Mr. Tomlinson took the position that I should reject the evidence of PC Best for a number of reasons and Mr. Leafloor took the position that Mr. Shallow was not credible.

47 My impression of PC Best as he was testifying was that he was a very fair, credible and reliable witness. His demeanour did not change in cross-examination. He was responsive to all questions asked of him and he fairly admitted many suggestions that were put to him by Mr. Tomlinson and at no time did he try to resist those suggestions. For example, when he was asked a number of questions about whether or not the Ziploc bag appeared to be sealed in the photographs taken by PC Brayman, given that the top of the bag had not been torn off at the place marked on the bag to tear it so it would open, he readily conceded that it appeared to be sealed.

48 The major issue with the credibility of PC Best, as submitted by Mr. Tomlinson, is that when he gave evidence under oath in Traffic Court on June 9, 2017, he clearly testified that Mr. Shallow's ownership and insurance documents were surrendered to him. This of course appears to directly contradict his evidence at trial that those documents were never given to him by Mr. Shallow. However, as Mr. Leafloor pointed out, PC Best did not say that Mr. Shallow surrendered these documents to him. Mr. Shallow did not defend himself at that trial and therefore, PC Best was not cross-examined then.

49 When this evidence from Traffic Court was put to PC Best, he explained why he gave the evidence that he did. He testified that at the time, he was trying to explain the fact that ultimately they received these documents without making reference to the fact that Mr. Shallow had been charged criminally. He testified that he was trying not to divulge the fact that there was a drug arrest after a HTA stop. He said he was a junior officer at the time and was "dancing around" trying to avoid divulging how he received the documents and he felt some pressure and was self-conscious of the fact that he had received these documents after he had arrested Mr. Shallow on the criminal charges. At trial, at no time did PC Best show any aggression or frustration with the questions from Mr. Tomlinson about his earlier evidence even though was asked a lot of questions about it. I believed his evidence as he gave it. Although I did note that right after this evidence in Traffic Court that PC Best did volunteer that the driver of this vehicle was subsequently arrested on a criminal matter, which seems to contradict his evidence somewhat, PC Best was not asked about that part of the transcript. In any event, given that PC Best did not actually say from whom he received these documents and given his explanation, I do not conclude that his evidence at Traffic Court undermines his credibility at trial as submitted by Mr. Tomlinson.

50 PC Best also testified that in his mind it was not a detention after Mr. Shallow produced his driver's licence, and that Mr. Shallow could have driven away before providing his insurance and ownership, but he admitted that he did not tell Mr. Shallow that. He said that did not want to issue a ticket to Mr. Shallow unnecessarily. I took from that, that he was prepared to wait for Mr. Shallow to produce his ownership and insurance because having failed to do so; he could have given Mr. Shallow a ticket for that. Mr. Tomlinson submitted that in this evidence PC Best was trying not to admit that he had detained Mr. Shallow. I did not get that impression. It seemed to me that he was just setting out his views on when a HTA stop ceases to be a detention. The legality of this position was not argued. I did not find that this evidence undermined PC Best's credibility.

51 Mr. Tomlinson also argued that PC Best overemphasized that he had a "clear and unobstructed view" of the inside of Mr. Shallow's vehicle as he used that phrase repeatedly. I do not agree. It simply seemed to me that this was his short form for explaining that fact.

52 There was one more issue that I considered with respect to PC Best's credibility that was not raised by Mr. Tomlinson. PC Best testified that he and PC Brouwer are acquaintances. PC Brouwer testified that they are friends and that this was more so now. PC Brouwer was not asked to explain that comment but he testified that he has been with the Durham Police Service since March 2018. PC Best was not challenged on his description of their relationship. I noticed that PC Best was wearing a Durham Police uniform on the second day of his evidence and so they are now working for the same police service again. Neither counsel asked either officer about this. I considered whether or not PC Best was minimizing his relationship with PC Brouwer but given the lack of questions on this subject of either officer I determined that I could not conclude this.

53 As for PC Brouwer, I found him to be a fair and credible witness. The best example is his admission that his failure to make a note that he smelled fresh marihuana when he was handling the Ziploc bag was a "glaring omission". I would not have thought this to be the case since he had already seen the contents of the Ziploc bag and it is clear that it contained marihuana buds. Furthermore, he was there doing a search and was not the arresting officer. His admission to my mind was an overstatement that favoured the Defence position.

54 As for Mr. Shallow, Mr. Leafloor submitted that there were some internal inconsistencies in his evidence but those were all reasonably minor in my view. Mr. Shallow did give some evidence that I do not accept; for example that he actually remembered that the black bag was zippered closed. Although I accept that he believed he zipped it because that was his practice, he would have had no reason to have a specific recollection about this now. More significantly, as I will explain, I find that Mr. Shallow was testifying that his car was a bright "cherry red" when it was not in fact that colour, in order to establish the accuracy of two photographs of the car that suggest that the windows were heavily tinted. I also believe that Mr. Shallow tried to minimize his concern, at the time of the stop, about the fact he had crack cocaine in his possession. He denied that he was concerned about this when he was stopped by PC Best and testified that he was only concerned about this once he was asked to get out of his car and he was arrested for possession of marihuana. As I will come to, I do not accept that evidence either.

55 On the whole, despite these concerns about Mr. Shallow's evidence, I am not able to

positively conclude that he was lying about everything that he said occurred. The Crown, however, is only required to prove that PC Best had reasonable and probable grounds to arrest Mr. Shallow for possession of marihuana on a balance of probability. In terms of what in fact occurred, I find that on balance I prefer the evidence of PC Best, which I find is corroborated to some extent by PC Brouwer. I will explain this as I make my findings of fact and in the course of doing so, set out the legal conclusions that follow from those findings.

Findings of Fact and Conclusions

56 Mr. Tomlinson conceded that Mr. Shallow was lawfully detained pursuant to s. 216(1) of the HTA. Section 216(1) of the HTA authorizes a police officer to stop vehicles for highway regulation and safety purposes, even where the stops are random; see *R. v. Gonzales*, [2017 ONCA 543](#) at paras. 54 and 55.

57 Having accepted the evidence of PC Best that his attention was drawn to Mr. Shallow's car because he was braking erratically and that he was able to see head movements consistent with someone on a cell phone, I have no difficulty in concluding that the sole reason PC Best had for stopping Mr. Shallow was because of a reasonable belief that Mr. Shallow was driving while operating a cell phone. In light of this finding it does not matter if PC Best could actually see the cell phone in Mr. Shallow's hand before he moved around the front of the car and looked through the front windshield. That said, given the amount of evidence given on the issue of whether or not the tinting of Mr. Shallow's vehicle would have prevented this observation, I will make a few comments as this issue is something I considered in assessing the credibility of PC Best.

58 Both PC Best and PC Brouwer admitted that they made no note that the windows of Mr. Shallow's vehicle were tinted. Neither officer recalled that it was and testified that had it been tinted excessively, or as PC Best said, had the tint impeded his view of the driver and in particular the face and gender of the driver and whether or not the driver was wearing a seatbelt or glasses and what the driver was holding in his/her hands, he would have issued a ticket for excessive tinting.

59 The photographs of Mr. Shallow's Honda that I have already referred to were taken by

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someone when his father still owned it and they suggest that the windows were heavily tinted. In fact that is why these photographs were introduced into evidence by the Defence. Mr. Shallow presented these photographs as showing what his car looked like at the time of his arrest. He testified that the only difference was that after he assumed ownership that he damaged the front left bumper.

60 The purpose of these photographs was so that I could consider the level of tinting of the windows and consider whether or not PC Best was truthful about what he said he could see from where he was standing on the roadway. The photographs show that the very top of the front windshield of the car has a band of tint that looks quite dark, although the rest of the front windshield does not appear to be heavily tinted. The photograph showing the car from a side view shows that the side windows, particularly the back, look quite tinted. Compared to an SUV that is in a driveway one house over, the tint seems darker than that vehicle as the interior of that car is more visible. That said, the angles are different and so it may be that the lighting is different, and I note it does not appear that these photographs were taken on a sunny day.

61 I find, however, that these photographs do not in fact accurately depict the colour of the car and, therefore, do not necessarily accurately show the level of tinting of the windows. The photographs of the Honda show the colour of the car to be a bright red, something Mr. Shallow described as a "cherry red". He testified that this was what he considered to be the colour of the car. Mr. Leafloor, however, obtained a registration document for the Honda filed with the Ministry of Transportation, which listed the colour of the car as maroon and Ms. Landell testified that the car was a burgundy red or maroon, not a bright red. It seems to me that Mr. Shallow must have known that the colour of his car was not a bright red as shown in these photographs and that he fabricated his evidence that he considered that the colour of his car was a "cherry red" to make the actual appearance of his car, including the tinting of the windows, consistent with its appearance in these photographs.

62 The further evidence I have of the colour of Mr. Shallow's car and the degree of tinting of the windows comes from the video, which shows Mr. Shallow's car being towed away. As it passes by the in-car camera, you can see that it is not a bright red in colour and you can see through the front windows of the car to the cars on its passenger side parked in the parking lot. Although the driver's side window is still partially down, the passenger side window was presumably still

up. This suggests that given the lighting conditions on the day of Mr. Shallow's arrest, the tinting would not necessarily have prevented PC Best from being able to view inside the car as suggested by Mr. Tomlinson. For these reasons I find that Mr. Shallow was trying to misrepresent the colour of his car in order to suggest that the car windows were heavily tinted when that was not the case.

63 I, therefore, find that it was quite possible for PC Best to make the observations of Mr. Shallow that he testified to, before he approached the driver's door. In addition, there is the fact that Mr. Shallow admitted the accuracy of what PC Best testified that he observed. For these reasons, I accept the evidence of PC Best as to what he observed when he first decided to stop Mr. Shallow and what he saw when he approached his vehicle.

64 Having found that the stop of Mr. Shallow was lawful, as conceded by Mr. Tomlinson, PC Best was entitled to require Mr. Shallow to produce the documents drivers are legally required to have with them and to check those documents against information contained in databases accessible through the on-board computer terminal in his police vehicle. PC Best was entitled to detain Mr. Shallow while he did so, but this detention was circumscribed by its purpose. It had to be limited to the roadside and had to be brief, unless further grounds were established that permitted a further detention; see *Gonzales, supra* at para. 55.

65 I accept PC Best's evidence that Mr. Shallow was panicked and that he was having difficulty in finding the ownership and insurance papers. As I have already stated, in my view Mr. Shallow downplayed his reaction to being stopped in his evidence. First of all, he was only 18 and this was the first time that he had been pulled over by police as a driver. It is well known that even just a ticket for using a cell phone while driving is a hefty fine. Secondly, and very significantly, he knew that he had not only marihuana in his possession but also a significant quantity of cocaine. He did not strike me as a unwise young man-he must have been extremely worried that this would be discovered. This is apparent from the video as he was clearly watching what PC Brouwer was doing when he was searching his car.

66 Since both Mr. Shallow and his mother admitted that she may have put the ownership and insurance documents in the glove compartment of his car, and since Mr. Shallow had not had to retrieve these documents before, it is also possible that he was not able to find these documents

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right away and that he looked in the console area of his car and in the black bag. As time passed, his level of agitation would naturally have increased, all of which is what PC Best testified to.

67 Mr. Shallow's evidence is that he did produce the ownership and insurance documents to PC Best and that each time PC Best went to his scout car to check them. PC Best denied receiving these documents from Mr. Shallow. I thought that PC Best, in cross-examination admitted that he went to his scout car twice but when I listened to that part of his evidence again, while I was deliberating, I realized that although Mr. Tomlinson suggested this, PC Best only admitted going to his scout car to check the status of Mr. Shallow's driver's licence and his licence plate. He did not admit going to his scout car twice for the purpose of checking Mr. Shallow's documents. I also note that there would be no point to PC Best lying about this at trial particularly when it meant he would be cross-examined on his evidence given at Traffic Court. His version of events only depends on Mr. Shallow having some issue in locating his documents. Furthermore, these documents were still in the car when Mr. Shallow was arrested. For all of these reasons, I accept PC Best's evidence that the ownership and insurance were not produced to him by Mr. Shallow.

68 In addition to requiring production of various documents associated with the operation of a motor vehicle, PC Best was entitled to make a visual examination of the interior of Mr. Shallow's car to ensure his own safety during this detention; *Gonzales, supra* at para. 56.

69 In this case PC Best testified that further grounds arose which led to him arresting Mr. Shallow for possession of marihuana. As Mr. Leafloor submitted, this is not a case where the Crown must justify an arrest based on the smell of marihuana only. However, since PC Best's evidence that he smelled fresh marihuana is what started the chain of events that he testified to, it is important to consider whether or not that evidence is credible.

70 Both PC Best and PC Brouwer were junior officers at the time; PC Brouwer started with the TPS in December 2013 and PC Best started in September 2014. Neither officer had ever been on a drug enforcement team before Mr. Shallow's arrest. PC Best gave no evidence about any training or experience that he may have had at the time with respect to how fresh marihuana smelled. He was not asked any questions in that regard by either counsel, nor was his ability to

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know what fresh marihuana smelled like challenged by Mr. Tomlinson. The sole issue was whether or not there was in fact such an odour coming from the car. PC Brouwer testified that he had part of one day of training at Police College where he was exposed to fresh and burnt marihuana inside a garage. Ms. Landell also testified that based on being around her son, she could distinguish between fresh and burnt marihuana.

71 It is well settled that the smell of marihuana, alone, can provide reasonable and probable grounds for arrest; *R. v. Cousins*, [2014 ONSC 5837](#) at para. 26. While previous cases have cautioned against placing undue reliance upon "smell" evidence, there is no legal barrier to the use of such evidence; *R. v. Morris*, [2013 ONCA 223](#) at para. 8.

72 No bright line rule prohibits the presence of the smell of marihuana as the source of reasonable grounds for an arrest. However, what is dispositive are the circumstances under which the olfactory observation was made; *Gonzales, supra* at para. 97.

73 The presence of odour alone may not provide reasonable grounds to believe that the occupant was committing an offence. The sense of smell is highly subjective and to authorize an arrest solely on that basis puts an unreviewable discretion in the hands of the officer. By their nature, smells are transitory, and thus largely incapable of objective verification; *R. v. Polashek*, [\[1999\] O.J. No. 968](#) (C.A.), at p. 5 [Emphasis added].

74 Sometimes, police officers can convince a trial judge that their training and experience is sufficient to yield a reliable opinion of present possession. As with any item of evidence, it is for the trial judge to determine the value and effect of the evidence; *Gonzales, supra* at para. 97.

75 In light of this case law Mr. Tomlinson submitted that the onus was on the Crown to establish that PC Best had some training and/or experience to be able to reliably detect the smell of fresh marihuana and that since I heard no evidence about this I should find that he lacked such training.

76 As Mr. Leafloor pointed out, PC Best did not rely only or even primarily on the smell of marihuana in concluding that he had reasonable and probable grounds to arrest Mr. Shallow for possession of marihuana. I agree that had that been the case that Mr. Tomlinson's argument would have merit. However, since PC Best did not rely on this to arrest Mr. Shallow, the only

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relevance this issue has, in my view, is whether or not I should find that PC Best was lying about this. I do not accept that he was and his evidence was corroborated by PC Brouwer who testified that he smelled fresh marihuana when he was dealing with the Ziploc bag.

77 The real factual issue in my view is whether the Ziploc bag was sealed closed, as Mr. Shallow believed it to be, or not. If the bag was sealed closed, then as I found in *R. v. Graham, 2014 ONSC 6880*, at para. 117, I would not be satisfied that the Ziploc bag of marihuana could have been smelled by the arresting officers. There is no evidence of any marihuana elsewhere in Mr. Shallow's vehicle or on his person.

78 The Ziploc bag in question measures eight inches long by five inches across. The tear line where one would tear the top off to open the bag is still intact. The bag, however, can be opened from the very top and sealed closed with the Ziploc. On the logo side of the bag, the writing is black and the logo is green. On the other side of the bag, there is some green printing and writing in a black marker that states a net weight ("net wt.") of "1", of "Red Haze". This suggests that when the dispensary sold the bag, it contained one gram of "Red Haze" which I presume is a strain of marihuana. This undercuts the evidence of Mr. Shallow that the bag came from the dispensary. It also means that the Ziploc bag had to have been opened at some point before Mr. Shallow obtained it since there is no dispute that it contained four grams of marihuana. As well, the photographs of the bag, which were taken right after seizure, do suggest the bag was somewhat crumpled. PC Best testified that now the bag looks like it has been used a lot as it is really beat up and has dimples like other things prodded the bag.

79 Both PC Best and PC Brayman testified that they did not cut open the Ziploc bag from the top. I find that all of the evidence is consistent with the fact that originally this Ziploc bag was sold by a dispensary containing other product and that this was before the Ziploc bag came into Mr. Shallow's possession. I also find that before it came into his possession it had been cut open at the top.

80 Mr. Shallow believed that the Ziploc bag was sealed closed but I find that he could not be sure about this since he admitted that he did not inspect the bag. In his evidence-in-chief, when PC Best was asked if he could recall if the Ziploc bag was open or closed or sealed shut and never opened, he testified that he believed that the bag was initially closed and that he opened it

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to see the contents and closed it again. He must have been confused, however, and was in fact talking about the black bag as he went on to say that he would usually open something like this and take a look and that he seemed to recall that the bag was open although he could be mistaken. In any event his evidence on this point was not clear. PC Best went on to say that the bag was not vacuum packed and that he did not recall it being a sealed unit when he received it and that he recalled that the bag had already been opened and maybe used to some degree and was not brand new. That evidence was clearly a reference to the Ziploc bag. I have found all of these observations to be true. In other words, my finding that PC Best was telling the truth when he testified to smelling what he believed was fresh marihuana is not an impossibility.

81 For these reasons although the tear strip of the Ziploc bag is still intact, I conclude that it is possible that the Ziploc bag was open at the time PC Best stopped Mr. Shallow and that PC Best was able to smell fresh marihuana coming from the car as a result and that in fact he did smell this. I am not troubled by his failure to make a note of this as this was not the reason he decided to arrest Mr. Shallow. His decision to arrest Mr. Shallow was based on his observation of marihuana in plain view.

82 The next factual issue is whether or not PC Best observed marihuana shake. I accept his evidence that he did. I also accept his evidence that it was not something he would decide to seize and given the evidence that Mr. Shallow was moving things around, even if it was just limited to the glove compartment as Mr. Shallow said, something like shake could easily have fallen onto the floor of the vehicle and not been seen by PC Brouwer. I find that it is also something that Mr. Shallow's mother could have missed when she was in his car briefly just to move it on the driveway.

83 The more important factual issue is whether or not PC Best glimpsed the Ziploc bag and was able to determine that it was a bag from a dispensary. This turns on whether or not the Ziploc bag was folded and put in the black bag, as Mr. Shallow testified, or whether it was put in flat. I have looked at the video very carefully a number of times, at the point where PC Brouwer brings over the TPS property bag containing the items that he seized. It is very difficult to see, but I agree with Mr. Tomlinson that it appears that the Ziploc bag was folded, with the clear side inside and the name of the dispensary on the outside when PC Brouwer pulled it out of the

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property bag. I have come to this conclusion by comparing the size of what I believe is the Ziploc bag to the size of the digital scale, while they are both inside the TPS property bag.

84 I do not agree with Mr. Tomlinson however, that this means the Ziploc bag was folded inside the black bag, as suggested by Mr. Shallow. PC Brouwer testified that he found the Ziploc bag inside a cup holder and it could well have been folded by Mr. Shallow and put there after he offered the bag to PC Best and was told to put the bag down. Furthermore, this is the only explanation on the evidence as to how the Ziploc bag got into the cup holder. It was not suggested to PC Best that he took it out of the black bag and then put it in the cup holder.

85 In addition, given the dimensions of the inside of the black bag and the dimensions of the Ziploc bag, if it was put flat, inside the black bag, the top of the Ziploc bag would have come to about two to three inches from the top of the inside of the black bag, which is exactly how PC Best described he saw it. I accept that he would have been able to see that it was a dispensary bag and that when the black bag was then "flashed" at him he would have been able to see the marihuana buds. For these reasons, again I find that PC Best's evidence which I accept is not an impossibility.

86 Mr. Tomlinson submitted that PC Best's version of events was simply not believable, as it makes no sense that Mr. Shallow would admit that he was in possession of marihuana and actually show it to PC Best. I disagree. It is plausible when I consider the fact that Mr. Shallow was in possession of crack cocaine for the purpose of trafficking. As Mr. Shallow himself said, he did not believe possession of this quantity of marihuana was serious or that he needed a lawyer but he knew that the police finding the cocaine would be serious; serious enough to need a lawyer. The cocaine was inside the inside zippered pouch of the black bag so it would not have been visible to PC Best even if Mr. Shallow opened the black bag as described by PC Best. The black bag is about ten inches deep and nine inches across. When opened in the manner suggested by PC Best, it has an opening of about eight inches.

87 In my view Mr. Shallow's conduct, as described by PC Best, is consistent with a decision to give up the marihuana in the hope that the officer would not care about that and hopefully get away with only a traffic ticket. Had PC Best decided not to arrest Mr. Shallow for possession of marihuana, this strategy might have worked.

88 I have also considered the plausibility of the Defence theory that PC Best acted in the manner suggested by Mr. Shallow. I have, unfortunately, on occasion, found that one or more police officers who have testified before me have not been truthful. That, however, is not this case. I found PC Best to be credible. There is no evidence that PC Best stopped Mr. Shallow for any improper purpose, and in particular no suggestion that Mr. Shallow was stopped because he was young and his skin is brown. When PC Best conducted a search of Mr. Shallow's driver's licence everything checked out and there was no evidence of any driving or criminal convictions. In other words, there was no reason for PC Best to want to single Mr. Shallow out for an improper search of his black bag.

89 Furthermore, whatever the nature of the relationship between PC Best and PC Brouwer is, I would not expect PC Brouwer to support PC Best by giving false evidence in these circumstances, particularly as he did not need to justify the arrest. Finally, the evidence PC Best gave as to how he came to see marihuana in plain sight was fairly elaborate. If he was prepared to lie, why would he not simply say that he saw the Ziploc bag directly on the seat of the car or sticking out of the black bag? All of these factors lead me to conclude that although what Mr. Shallow testified to could be plausible, it seems unlikely.

90 Possession of marihuana can be either an indictable or a summary conviction offence depending, in part, on the quantity of the drug; *R. v. Janvier*, [2007 SKCA 147](#) at para. 13. Mr. *Tomlinson* pointed out that possession of marihuana is only an indictable offence where the amount in a person's possession exceeds 30 grams, based on the totality of the circumstances, including but not limited to the smell of marihuana in the vehicle; *Gonzales, supra* at para. 96. That is because marihuana is a substance included in Schedule II, but the quantity established in Schedule VIII is 30 grams. Thus, in relation to the simple possession of marihuana, s. 4(5) of the CDSA applies in this case to dictate summary conviction proceedings as Mr. Shallow had less than 30 grams of marihuana in his possession; *Janvier, supra* at para. 13. For a police officer to arrest someone under s. 495(1)(b) of the *Criminal Code*, the officer must find the person to be "committing" the offence; *Janvier, supra* at para. 27.

91 In my view possession of marihuana is a continuing offence in the circumstances of this

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case and so while the marihuana was in his possession, Mr. Shallow was "committing" the offence.

92 For these reasons I find that the Ziploc bag of marihuana was in plain sight and that PC Best had reasonable and probable grounds to arrest Mr. Shallow for possession of marihuana. I find there was no breach of s. 9 of the *Charter*. Mr. Tomlinson conceded that if I came to this conclusion that he took no issue with the search of Mr. Shallow's black bag, his car, the pat down after he was arrested or the Level 3 search once at the station. Accordingly, I find there are no s. 8 *Charter* concerns with respect to those searches.

93 There is, however, one issue that I must address and that is the question PC Best asked of Mr. Shallow when he caught a glimpse of the Ziploc bag. Everyone has the right on arrest or detention to be informed promptly of the reasons therefor, pursuant to s. 10(a) of the *Charter*. I do not fault PC Best for failing to advise Mr. Shallow that he was now investigating him for possession of marihuana, given how quickly this series of events must have unfolded. I do not find a s. 10(a) *Charter* breach. However, PC Best clearly asked a question of Mr. Shallow: "what's that" or "what's in the bag" and he was not entitled to as he had not told Mr. Shallow that he was investigating him for possession of marihuana or given him his RTC and cautioned him. The decision of *Gonzales, supra* at para. 56, makes it clear that s. 216(1) of the HTA does not authorize inquiries of any occupant of subjects not relevant to highway safety concerns. I, therefore, find that PC Best did violate Mr. Shallow's s. 10(b) *Charter* rights when he commenced his investigation by asking questions about the existence of marihuana in the car; *Cousins, supra* at para. 22. In addition, the question asked by PC Best could be considered a search and one that was unreasonable in contravention of s. 8 of *Charter, Cousins, supra* at para. 23. I find that this question was also a s. 8 breach of the *Charter*, in the circumstances.

94 Once PC Best saw the marihuana buds and told Mr. Shallow that: "I see the weed," the Crown seeks to rely on Mr. Shallow's response: "here, it's just weed, take it." Given this statement was made at a point where Mr. Shallow was being investigated for possession of marihuana, and PC Best had not told Mr. Shallow this nor given him his RTC and cautioned him, I find that the Crown has not satisfied me beyond a reasonable doubt that this statement that Mr. Shallow made was voluntary. The failure of PC Best to tell Mr. Shallow that anything he said could be used in evidence in a prosecution is an important factor because Mr. Shallow would not

understand that anything he said could be used against him. Thus, he was unable to fully assess his jeopardy and to make a free and meaningful choice whether or not to speak to the police.

Should the Evidence be Excluded Pursuant to s. 24(2) of the *Charter*?

95 Having found a breach of ss. 8 and 10(b) of the *Charter* with respect to the question asked of Mr. Shallow by PC Best, a s. 24(2) analysis is necessary. I must now consider whether or not to exclude the cocaine from the evidence at trial. I am guided by the decision of the Supreme Court of Canada in *R. v. Grant*, [2009 SCC 32](#), which sets out the factors I must consider and balance in order to make this determination.

96 In *Grant*, the Court held that on an application to exclude evidence under s. 24(2) of the *Charter*, a court "must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3) society's interest in the adjudication of the case on its merits"; *Cousins*, *supra* at para. 55.

97 Mr. Leafloor conceded that if I made adverse credibility findings with respect to either or both officers and I found that either or both officers were not truthful, and that they attempted to persuade the Court that their actions were all lawful, knowing that they had no grounds to arrest and search Mr. Shallow's black bag and his car, that this would constitute a very serious breach not only of Mr. Shallow's *Charter* rights at the time but also each officer's oath to tell the truth. This serious and deliberate breach and bad faith conduct would strongly favour, if not compel, exclusion of the evidence; *Graham*, *supra* at paras. 7 and 134.

98 I have not come to that conclusion however. The only breach I have found is that PC Best violated Mr. Shallow's ss. 8, 10(a) and 10(b) *Charter* rights when he asked him a question before giving him his RTC and caution.

99 The first *Grant* factor requires the court to assess whether the admission of the evidence would bring the administration of justice into disrepute by sending a message to the public that the courts effectively condone deviation from the rule of law: *Grant* at para. 72. This analysis

involves a consideration of whether or not the *Charter* breach was, on the one hand inadvertent or minor or, on the other hand, showed "willful or reckless disregard for *Charter* rights": *Grant* at para. 74. The court must also consider whether there were "extenuating circumstances such as the need to prevent the disappearance of evidence" and whether the police acted in good faith: *Grant* at para. 75.

100 I have found that the officers who testified before me were credible and there is no evidence to suggest that they acted in bad faith. Mr. Shallow was not arrested by PC Best for any improper purpose. There was no suggestion that Mr. Shallow was the target of racial profiling or other discriminatory police practices. In terms of the seriousness of the breach, I accept PC Best's evidence that his question was a reaction to what he thought he saw. In my view it was not a deliberate attempt to interrogate Mr. Shallow.

101 The second factor in *Grant*, which to some extent overlaps the first, requires a consideration of the impact of the breach on the defendant. When considering the impact of the breach on a defendant's *Charter*-protected interests, it is necessary to evaluate the extent to which the breach actually undermined the interests protected by the right infringed. A court should consider whether the impact of the breach was "fleeting and technical" or "profoundly intrusive" and consider the effect of the breach on the defendant's human dignity: *Grant*, paras. 76, 78. The more serious the impact on the defendant's protected interests, the greater the risk that admission of the evidence may signal to the public that *Charter* rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute: *Grant* at para. 76.

102 I have found that Mr. Shallow was lawfully arrested and searched. In my view had PC Best stated again that he saw marihuana, rather than ask Mr. Shallow the question that he did, Mr. Shallow would likely have reacted the same way in his attempt to persuade PC Best that there was nothing in the black bag and then to persuade him that there was only marihuana in the bag. In other words, in my view there was no adverse impact on Mr. Shallow as a result of PC Best asking him the question that he did.

103 Given I have found all of these events moved quickly and that PC Best did not have time to advise Mr. Shallow that he was being detained to investigate him for possession of marihuana,

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give him his RTC and caution with respect to that detention, and given I accept that PC Best simply reacted to what he saw, I find that the one question he put to Mr. Shallow was a minor breach of Mr. Shallow's ss. 8 and 10(b) *Charter* rights.

104 Finally, considering the third *Grant* factor, the cocaine is reliable evidence and the Crown's case depends upon it. Without this evidence the Crown has no case. Furthermore, as I have said, it is likely that Mr. Shallow would have acted the same way and PC Best would have seen that he had marihuana in his possession. This is a strong factor favouring inclusion of the evidence. This, however, has the potential to "cut both ways" in that the reasons for both exclusion and admission of the evidence are heightened when the stakes are high: *Grant* at para. 84.

105 The Supreme Court in *Grant* made it clear that reliable evidence is not automatically admissible. The Court held that the view that reliable evidence is admissible regardless of how it was obtained is inconsistent with the *Charter's* affirmation of rights: *Grant* at para. 80. However, the Court went on to say that "exclusion of relevant and reliable evidence may undermine the truth seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute": at para. 81.

106 At this stage of the analysis I am required to weigh the various factors, understanding that there is no overarching rule governing how the balance should be struck: *Grant, supra* at para. 86. In balancing all of these factors as required by *Grant*, I conclude that the admission of the drug evidence, particularly given that it is cocaine, would, viewed in the long term, not bring the administration of justice into disrepute.

Disposition

107 For these reasons, Mr. Shallow's application for an order excluding the cocaine as evidence from this trial as a result of alleged breaches of his rights under ss. 8, 9, 10(a) and 10(b) of the *Charter* is dismissed. The cocaine seized from Mr. Shallow's black bag shall be considered as part of the evidence at trial.

N.J. SPIES J.

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- 1 For the most part PC Best testified that he said: "What was that?" although he also testified that he said: "What was that in the bag?" I did not find this discrepancy significant.

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