Case Name:
R. v. Fitl

Between
Her Majesty The Queen, and
Christopher Shane Fitl, Accused

[2015] A.J. No. 985

Action No.: 130198765Q1

E-File No.: ECQ15FITLC

Alberta Court of Queen's Bench

M.T. Moreau J.

May 1, 2015.

(70 paras.)

Criminal law -- Constitutional issues -- Canadian Charter of Rights and Freedoms -- Legal rights -- Procedural rights -- Right to be informed of the specific offence -- Protection against arbitrary detention or imprisonment -- Protection against unreasonable search and seizure -- Remedies for denial of rights -- Specific remedies -- Exclusion of evidence -- Where administration of justice brought into disrepute -- Voir dire to determine if evidence should be excluded -- Fitl was charged with drug-related offences -- While at a rave, Fitl was detained by security staff for allegedly passing drugs to his girlfriend -- When a police officer arrived, he asked for Fitl's identification and arrested him for a traffic warrant -- The officer also searched Fitl and found baggies which appeared to contain drugs -- The security officers' actions constituted an unlawful and arbitrary arrest, and the searches were unreasonable -- The number of the Charter violations aggravated their seriousness -- The seized evidence was excluded -- Canadian Charter of Rights and Freedoms, 1982, ss. 8, 9, 10(a), 24(2).

Voir dire to determine if evidence should be excluded. Fitl was charged with possession of ketamine and methamphetamine for the purpose of trafficking, and possession of proceeds of crime. Fitl was at a rave with his girlfriend when he was detained by security staff, who stated they believed they had seen him pass drugs to his girlfriend. When a police officer arrived, he asked for Fitl's identification and arrested him for a traffic warrant. While conducting a pat down search of Fitl, the officer found a cell phone and a soft pouch

holding multiple baggies appearing to contain methamphetamine and cocaine. Fitl took the position that his section 8, 9 and 10(a) Charter rights were violated.

HELD: The seized evidence was excluded. Although the security officers were not acting as state agents, their actions constituted an unlawful and arbitrary arrest of Fitl. The police officer's request for Fitl's identification was an unreasonable search or seizure, as was the officer's search of the pouch extracted from Fitl's pocket. While the evidence seized was reliable and important to the Crown's case, the number of the Charter violations aggravated the seriousness of the breaches.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 8, s. 9, s. 10(a), s. 24(2)

Criminal Code, s. 492(2)(b), s. 494

Counsel:

D.N. MacCannell, for the Crown.

Y.R. Ziv, for the Accused.

Ruling - Sections 8, 9 and 10(a)

1 M.T. MOREAU J.:-- Mr. Fitl is charged with possession of ketamine for the purpose of trafficking and possession of methamphetamine for the purpose of trafficking, along with possession of proceeds of crime arising out of the events of February 18th, 2013 at a rave held at the Shaw Centre in Edmonton. He alleges that his ss. 8, 9 and 10(a) *Charter* rights were violated by private security officers employed by Shaw Centre and police when he was forcibly removed from the dance floor, arrested and searched. Crown counsel maintains that the removal of Mr. Fitl from the dance floor and his detention prior to the police becoming involved did not attract *Charter* protection, that the police did not arbitrarily detain him prior to his first arrest, and that his second arrest and the search of his person conducted as an incident to that arrest were lawful. While two separate *voir dires* were conducted, first in relation to the alleged ss. 9 and 10(a) violation and the second in relation to the alleged s. 8 violation as Mr. Fitl elected to testify only on the s. 9 *voir dire*, I will summarize the evidence from both *voir dires*, bearing in mind the onus in relation to alleged s. 9 violations is on the accused on a balance of probabilities, and I should add to that the s. 10(a), and in relation to a warrantless search is upon the Crown on the same standard.

2 Constable McNeil was working as a police officer on contract with Shaw Centre at a rave being held there on the evening of February 18th, 2013. He testified that Shaw Centre

also employed private security personnel as security concerns related to the outbreak of fights in a large group and individuals bringing in drugs. Private security personnel conducted initial searches of individuals on entry for contraband. If illegal items were discovered, the individual would be turned over to the police officers present. Constable McNeil did not provide any instructions to the private security personnel. He did not recall having any formal meetings with private security personnel that evening.

3 Constable McNeil testified that he was approached by security staff who stated that they believed they saw Mr. Fitl pass what they believed to be drugs to his girlfriend. At the time, Mr. Fitl was detained by security staff in the coat check area, to the officer's recollection with two security guards, and he was sober. Constable McNeil walked over to Mr. Fitl and asked him for his identification. He willingly provided his driver's license while denying that he passed anything to his girlfriend. On checking by telephone for warrants, Constable McNeil testified that he had "multiple warrants" so he placed him under arrest. Under cross-examination, he acknowledged that there was only one warrant relating to driving without insurance. He could not recall if he knew or inquired at the time what kind of warrant it was. After arresting him, Constable McNeil performed a pat down search of Mr. Fitl "for weapons and means of escape". He felt something hard in his hoodie pocket and on searching the pocket, found a cell phone along with a closed soft pouch which he opened and discovered multiple baggies appearing to contain methamphetamine and cocaine. He could not recall where the other cell phone was that he turned over to Constable Meyer at headquarters and could not be one hundred percent sure that it was found in the course of his search of Mr. Fitl. He did not have a phone belonging to another person at the start of his shift and believed the phone was found in the course of his dealings with Mr. Fitl. He acknowledged under cross-examination that he could not recall if the phone was next to his person while next to the officer. He arrested Mr. Fitl for possession for the purpose of trafficking, read him his *Charter* rights and caution and brought him to police headquarters. He turned Mr. Fitl and the items seized over to Constable Meyer and also told him that he had come upon random text messages in the cell phone relating to trafficking. He stated that approximately 15 minutes elapsed from the time he was first brought to Mr. Fitl to the time of of Mr. Fitl's arrest.

4 When asked under cross-examination if he asked Mr. Fitl for his identification because he wanted to investigate the allegations made by security personnel, Constable McNeil stated that he was just asking him for his identification, that he did not at that point have any grounds to search him or to enter into an investigation. Mr. Fitl was being detained by someone else, not by him, and he acknowledged that he did not have enough grounds for an investigative detention. He stated that at the point when he was asking Mr. Fitl for his identification he was still being held or detained by security guards. He stated that he did not always search people if arrested on a traffic warrant. He denied he was searching Mr. Fitl for a purpose related to the information he had received from the security guards to the effect that he was earlier observed exchanging drugs.

5 While recalling having been to meetings with private security personnel at prior raves to assign tasks, and that it was possible he had such a meeting that evening, Constable McNeil could not remember having actually had one. He stated that usually a supervisor

from EPS would carry one of the private security detail radios.

6 Constable Meyer took control of Mr. Fitl at headquarters following his arrest. He received the drugs and two cell phones from Constable McNeil. He also received information from Constable McNeil that Mr. Fitl was attempting to delete messages from his cell phone. He looked at messages from a cell phone that appeared to be in drug dealing language. He used a machine that is able to download SMS messages and printed that information. He could not download information from the other cell phone seized. He could not recall which phone he downloaded. He believed it was the LG cell phone, having referred in his notes to the "other Blackberry cellphone". In his mind, the phone search was incident to the arrest of Mr. Fitl for possession for the purpose of trafficking charges to afford evidence in relation to those charges. It did not cross his mind to obtain a search warrant as at the time his understanding was that one was not required. He did not perform a trace to determine the owner of the cell phone.

7 Constable Meyer had worked raves previously, and security guards would alert police if they suspected someone was involved in illegal activity. To his knowledge, security guards' radios were not on police frequency. He could not recall having had meetings with security personnel at raves, just one-on-one contact, although there might have been some coordination between security personnel and police. He had not seen security personnel arrest individuals; rather they would detain them and bring them to the police. Under re-cross-examination, he acknowledged his understanding of an investigative detention was a situation where no physical force was applied.

8 Mr. Fitl testified on the s. 9 *Charter voir dire*. He recalled attending the rave and meeting his former girlfriend while there. While dancing with her on the dance floor, at least two security staff came up behind him and he was grabbed and his arm pinned behind his back in what he described as a "power move". He stated that they had complete control of him and directed him, holding his arm behind his back, out to the coat check area, a distance of roughly 50 yards. On the way, he was released for a second when another security guard took over, again holding his arm behind his back. When he asked the security guards "why are you arm-barring me?" he was told that he was being detained because they saw him hand off drugs. He was in the armhold position roughly 3 to 5 minutes until a police officer arrived, then his arm was released. To his knowledge, he was in the officer's custody, in his words "it felt like that". The officer asked him for his identification and he gave it to him. He was never told he did not have to provide his ID, nor why the officer was asking for his ID. The officer told him he had an outstanding traffic warrant for a traffic violation.

9 Defence counsel argues in relation firstly to s. 9 that the security guards were acting as state agents when they took physical control of Mr. Fitl, as there was cooperation between the security guards and the police in performing security duties at the Shaw Centre.

10 In the alternative, he argued that if not state agents, the security guards conducted a citizen's arrest, a governmental activity to which *Charter* protections apply, having regard to the physical and forceful manner in which the security guards took control of Mr. Fitl. In

doing so, there is no evidence before the Court, the security officers not having testified, that they found Mr. Fitl committing an offence, a requirement of a lawful citizen's arrest under s. 494 of the *Criminal Code*. The arrest was therefore unlawful and arbitrary and in violation of Mr. Fitl's s. 9 *Charter* rights.

11 Defence counsel also submitted that Constable McNeil detained Mr. Fitl, a psychological detention, having regard to Mr. Fitl's testimony that he felt like he was in the officer's custody. Constable McNeil acknowledged that he had no grounds for an investigative detention. Accordingly, the detention was unlawful and therefore arbitrary.

12 As regards the alleged s. 10(a) violation, defence counsel argued that Constable McNeil never told Mr. Fitl why he was being detained and never told him that without grounds to request identification, Mr. Fitl could decline to comply with the request.

13 Crown counsel argued in response that the private security guards were not state agents. He referred to *R v. Jacobs* 2014 ABCA 172, at paras 32-33, where the Court of Appeal determined that the mere possibility of police influence over the actions of private security personnel is insufficient to prove actual influence. The absence of police at the point of detention demonstrated that the security guards' detention of Mr. Fitl would have occurred in the manner it did without police intervention and was not influenced by police.

14 As to whether the activity of the security officers itself was a governmental activity subject to *Charter* protections, Crown counsel submitted that while the security guards detained Mr. Fitl, they did not arrest him. According to Mr. Fitl's testimony, there were no words of arrest up to the point the warrant was discovered and he became arrestable. The detention was brief. The Court should be wary about judicializing private interactions to enforce security in private premises. There was no *Charter*-protected interest up to the point of Constable McNeil's involvement.

15 Crown counsel submitted that there was no breach of Mr. Fitl's s. 10(a) rights as he was not detained up to the point of his arrest, only an investigation. Asking for identification does not create a detention. He was being constrained by non-state actors during this time, not by police.

16 As regards the alleged s. 8 violations, Crown counsel argued that the initial request for identification did not constitute a search. Based on the discovery of the traffic warrant, the arrest of Mr. Fitl was lawful. That arrest did not rely on any information furnished by the security guards. The pat down search incident to that arrest was lawful. The search of the soft pouch was also incident to the arrest as Constable McNeil was then entitled to search for evidence. After the officer's discovery of the drugs and the second arrest, the search of the cell phone by Constable McNeil at the scene and later by Constable Meyer through a mechanized process were searches for evidence related to the arrest on drug related charges. Both searches were tailored to reason for the arrest. Crown counsel did however acknowledge that there were no detailed notes taken by the officers at the time of these searches as required by *R v. Fearon*, [2014] 3 S.C.R. 621, which was decided after this investigation, and acknowledged that there is no evidence that the mechanized search in particular limited itself to recent messages.

17 Defence counsel argued in reply in relation to the s. 8 alleged violation that the arrest for the traffic offence did not entitle the officer to conduct a search of the soft pouch, the basis for the arrest not being related to drugs, and Constable McNeil having acknowledged that there have been occasions when he has not searched a person arrested on traffic charges. In this case, the evidence is unclear as to whether he was aware of the nature of the warrant, as he had no clear recollection in his testimony.

18 With respect to the searches of the cell phone, defence counsel raised the issue of whether Mr. Fitl had standing to argue the alleged breach as the Crown had not proved that the phone was actually in the possession of Mr. Fitl. In any event, defence counsel pointed to Crown counsel's acknowledgement that the manner in which the cell phone searches was conducted did not comply with the requirements in *Fearon*.

19 Having reviewed the evidence and the arguments of counsel, I make the following findings:

1. There is no admissible evidence other than that of Mr. Fitl on the issue of whether he made a drug exchange with his former girlfriend. He denied that he did so to the officer. The manner of packaging of the drugs found on his person, in small zip lock baggies, within a closed pouch, within a pocket, make it unlikely that such a transfer would have occurred while dancing with her. The lighting conditions on the dance floor - dark, crowded, movement, flashing lights that he and Constable McNeil described - would make it difficult to discern that there was a drug transaction underway.

2. I accept Mr. Fitl's testimony that he was under the physical control of one or two security guards through an armhold from the point the security guards took control of his arm on the dancefloor to their arrival three to five minutes later at the coat check area, and that he was physically released by them only upon Constable McNeil joining them there.

3. I accept Mr. Fitl's testimony that he felt that he was in the custody of Constable McNeil, a uniformed officer, having regard to the manner in which he was brought to the coat check area and the fact that the security guards remained while Constable McNeil obtained his identification from him.

4. I accept Mr. Fitl's *voir dire* testimony that the officer told him the warrant was for no insurance and registration.

5. I accept Constable McNeil's testimony that he knew he did not have grounds to detain Mr. McNeil when he was brought to him by security. His

pat down search after the arrest, while stated to be for "weapons and means of escape" turned into a search for evidence. Had the purpose of the pat down search been limited to discovering whether the hard object in his pocket was a weapon, there would have been no reason to open the soft pouch also in the pocket. Constable McNeil's intent in searching the soft pouch was to find evidence relating to drug trafficking.

6. I find it to be more likely than not that the two cell phones seized by Constable McNeil and delivered by him to Constable Meyer were seized from Mr. Fitl, having regard to Constable McNeil's belief that both phones were seized in the course of his dealings with Mr. Fitl.

20 The sections of the *Charter* relevant to these *voir dires* are:

S. 8. Everyone has the right to be secure against unreasonable search or seizure.

S. 9. Everyone has the right not to be arbitrarily detained or imprisoned.

S. 10. Everyone has the right on arrest or detention

(a) to be informed promptly of the reasons therefor;. . .

21 Dealing first with the alleged s. 9 violations, the onus is on Mr. Fitl to prove the breaches on a balance of probabilities.

22 Counsel acknowledged that the first issue to be decided is whether the security officers were state agents such that their detention of Mr. Fitl is reviewable under the *Charter*. I agree with Crown counsel's position that the evidence falls short of establishing that Constable McNeil exercised influence over the actions of the security officers. Constable McNeil could not recall there being a pre-established plan of coordination of security services for the evening. Constable Meyer's recollection of security services at other raves was not particularly probative of what the security arrangements in fact were on the evening in question. This lack of any detailed memory of security arrangements in my view bespeaks a loose arrangement. As noted in *Jacobs*, at para 33, the private security personnel required no authority or instruction from the police to search entrants to the Shaw Centre. I conclude that Mr. Fitl would have been detained in the manner described irrespective of police presence. Accordingly, the security officers were not acting as state agents such as to attract *Charter* protection.

23 This leaves then the question whether the activities of the private security guards amounted to governmental activity, in this case defined as a citizen's arrest. S. 492(2)(b) of the *Criminal Code* provides that:

(2) Anyone who is . . .

> (b) a person authorized by the owner of by a person in lawful possession of property, may arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property.

24 Our Court of Appeal considered whether an arrest by a private security guard is subject to the *Charter*. The inquiry turns on the quality of the act in issue rather than the quality of the actor: *Eldridge et al. v. British Columbia (Attorney-General) et al.*, (1997), 218 N.R. 161 (SCC) at para 44. If the activity is truly "governmental" in nature, the entity performing it will be subject to review under the *Charter* only in respect of that act. As noted in *R v. Buhay*, (2003), 305 N.R. 158 (SCC), at para 31, the exclusion of private activity from the *Charter* was not a result of happenstances but was a deliberate choice by Parliament. In *R v. Lerke*, (1986), 67 A.R. 390., it is noted that actual words of arrest (for "re-entering") in that case were spoken by a tavern manager who apprehended a young man trying to re-enter a tavern after entry had been earlier refused. Laycraft CJA determined, at p. 395, that the arrest of a citizen is a governmental function whether the person making the arrest is a peace officer or a private citizen. In so doing, the person arresting is functioning as an "arm of the state". Laycraft, CJA noted:

> A citizen making an arrest, or, indeed, a citizen complaining to a peace officer and setting him in motion, may, and usually will, have a personal motive for doing so. He wishes to recover his property, or to see punished one who has injured him or he wishes to protect his land from crime or trespass. But the purpose of the procedure, the reason for which it exists, is not that of private satisfaction; rather it is the public purpose embodied in maintaining the Queen's Peace.

25 In *R v. Dell*, (2005), 367 A.R. 279 (C.A.), the accused entered a privately owned bar. On checking a washroom, a bouncer found the accused "fiddling" with a black canister and formed the opinion the accused was in possession of illegal drugs. The manager was called and the accused was searched; the canister contained suspected drugs. Police were called and the accused was detained until their arrival. Fruman J.A., for the Court, concluded, at para 17, that *Buhay* had not overruled *Lerke* in relation to the *Charter* having application to a citizen's arrest, as Buhay involved a search and seizure. She went on to state, at para 15, that a formal application for reconsideration is necessary to overrule Lerke until it is clear that the Supreme Court of Canada has overruled a decision of her Court in whole or in part. Accordingly, I conclude that I continue to be bound by *Lerke*. In that case, however, as I noted Fruman J.A. went on to conclude, at para 26, that a mere investigative detention effected by a private citizen was not reviewable under the *Charter*.

26 In *R v. MacKenzie*, 2014 ABPC 54, Creagh, PCJ considered a situation where rather than submit to a search by private security guards outside an Event Centre, the accused left and was chased by the security guards and was tackled then restrained on the ground until police arrived. She referred, at para 55, to the Supreme Court of Canada's description of an arrest in *R v. Assante-Mensah*, 2003 SCC 38, at para 33:

> A good starting point is the description of an arrest at common law provided by Lord Diplock in *Holgate-Mohammed v. Duke*, [1984] A.C. 437 (H.L.), at p. 441:
>
> > The word "arrest" . . . is a term of art. First, it should be noted that arrest is a continuing act; it starts with the arrester taking a person into his custody, (sc. by action or words restraining him from moving anywhere beyond the arrester's control), and it continues until the person so restrained is either released from custody or, having been brought before a magistrate, is remanded in custody by the magistrate's judicial act.

27 Creagh PCJ commented, at para 56, that generally speaking, the elements of the arrest either by a peace officer or a citizen are the announcement coupled with a touching of the person with a view to his or her detention. Creagh PCJ assumed, without evidence from the security guards, as is the case here, that the actions of the guards amounted to arrest but noted that the officers took control within seconds. The charges only arose out of the officer's subsequent investigation.

28 I am of the view that the actions of the security guards in approaching Mr. Fitl from behind and pinning his arm forcefully as he described such as to bend his back backwards and directing him outside the dance area to the coat area, their actions being entirely within their control and out of the control of Mr. Fitl, constituted an arrest even though words of arrest were not uttered. Mr. Fitl was restrained from moving anywhere beyond the security guards' control and their physical control of him, more extended in time than the detention in *Mackenzie*, continued until the police officer's arrival. The situation is unlike that in *Dell* where there was a brief detention for investigative purposes and a search conducted as part of that detention. Thereafter only, the appellant was arrested by bar staff. The search in that case preceded and was not the consequence of a citizen's arrest.

29 I find that Mr. Fitl has established on a balance of probabilities that his arrest was not lawful as there was no evidence before me that the security guards found him committing a criminal offence on or in relation to the property lawfully controlled by them. The Crown conceded this to be the case; that is the fact that there was no such evidence before me, Mr. Fitl having testified that he did not touch his dancing partner before he was arrested on the dance floor and told the officer that he did not exchange any drugs with her. As noted in *R v. Grant*, [2009] S.C.J. No. 32, at para 55:

> > *Mann*, in confirming that a brief investigative detention based on "reasonable suspicion" was lawful, implicitly held that a detention in the absence of at least reasonable suspicion is unlawful and therefore arbitrary within s. 9.

30 In this case, there is no evidence that the statutory requirements for the citizen's arrest are met. The arrest was unlawful and therefore arbitrary.

31 Moving next to the involvement of Constable McNeil and whether he detained Mr. Fitl, the *Grant* decision is instructive. And I would like to spend a few minutes on the facts there. The officers were patrolling in the area of a school where there had been a history of student assaults, robberies, and drug offences occurring over the lunch hour. Mr. Grant was walking on the street. Two officers drove past him in their police vehicle and one of them noticed Mr. Grant staring at them in an unusually intense manner while at the same time "fidgeting" with his coat and pants in a way that aroused the officers' suspicions. Given their purpose for being in the area and based on what they had just seen, the officers decided to find out if he was a student and assigned a uniformed officer to speak to Mr. Grant.

32 The officer stood in Mr. Grant's intended path, asked him for his name and address and he produced a provincial health card. The two officers in the vehicle then walked toward Mr. Grant positioning themselves behind the uniformed officer, following which he made incriminating admissions prompting his arrest and a search of his person which resulted in the seizure of some marijuana and a loaded firearm.

33 McLachlin CJ., at para 26, noted:

> As held in *Mann* at para. 19, per Iacobucci J.:
>
> > .. . the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for the purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint.

34 She went on to note, at para 28:

> The general principle that determines detention for *Charter* purposes was set out in *Therens:* a person is detained where he or she "submits or acquiesces in the deprivation of liberty and reasonably believes that the choice to do otherwise does not exist" (per Le Dain J., at p. 644).

35 She then stated, at paras 31-32:

> The question is whether the police conduct would cause a reasonable person to conclude that he or she was not free to go and had to comply with the police direction or demand.
>
> The objective nature of this inquiry recognizes that the police must be able to know when a detention occurs, in order to allow them to fulfill their attendant obligations under the *Charter* and afford the individual its added

> protections. However, the subjective intentions of the police are not determinative. . .While the test is objective, the individual's particular circumstances and perceptions at the time may be relevant in assessing the reasonableness of any perceived power imbalance between the individual and the police, and thus the reasonableness of any perception that he or she had no choice but to comply with the police directive. To answer the question whether there is a detention involves a realistic appraisal of the entire interaction as it developed, not a minute parsing of words and movements. In those situations where the police may be uncertain whether their conduct is having a coercive effect on the individual, it is open to them to inform the subject in unambiguous terms that he or she is under no obligation to answer questions and is free to go. It is for the trial judge, applying the proper legal principles to the particular facts of the case, to determine whether the line has been crossed between police conduct that respects liberty and the individual's right to choose, and conduct that does not.

36 McLachlin CJ observed, at para. 41, that the length of the encounter said to give rise to the detention may be a relevant consideration. She concluded, although Mr. Grant had not testified, that he was detained when the uniformed officer told him to keep his hands in front of him, the other two officers moved into position behind him and he was embarked on a pointed line of questioning. At this point, Mr. Grant's liberty was clearly constrained and he was in need of the *Charter* protections associated with detention.

37 I reject Crown counsel's argument that Mr. Fitl was not being detained by Constable McNeil during the period of approximately 15 minutes during which he was talking to Mr. Fitl in the presence of the security guards prior to being Mr. Fitl being arrested on the traffic warrant. A psychological detention is made out here based on the manner in which Mr. Fitl was removed from the dance floor and kept under a relatively forceful and complete physical constraint until released only in the presence of a uniformed officer. It is during the officer's detention that the officer asked him to produce his identification.

38 I am of the view that Mr. Fitl testimony as to his belief that he was in the officer's custody was reasonable. That period cannot be considered in isolation but in the context of the security officers' forceful manhandling of him. Even if I am incorrect in my characterization of the actions of the security guards as an arrest, this does not change my view that Mr. Fitl's reasonable perception of his interaction with the officer was one of being in his custody, in the context of which he was required to respond to the officer's questions and produce the documents that were asked of him. The detention was not of fleeting and brief duration. The security officers continued to remain physically with Mr. Fitl while he was being questioned by Constable McNeil, enhancing the reasonableness of his belief that he was in the officer's custody.

39 Was his detention arbitrary? As McLachlin CJ noted in *Grant* at para 55, the Court confirmed in *Mann* the existence of a common law police power of investigative detention. She stated:

> *Mann*, in confirming that a brief investigative detention based on "reasonable suspicion" was lawful, implicitly held that a detention in the absence of at least reasonable suspicion is unlawful and therefore arbitrary within s. 9.

40 In *Grant*, the officers acknowledged at trial that they did not have legal grounds or reasonable suspicion to detain the accused prior to his incriminating statements. The situation is similar here as Constable McNeil acknowledged that at the point he asked Mr. Fitl for identification, he did not have any grounds to search Mr. Fitl or to enter into an investigation. Accordingly, based on this evidence the detention of Mr. Fitl was arbitrary.

41 A warrantless search is presumed to be unreasonable. To be considered reasonable, a search must be authorized by law, the law itself must be reasonable, and the search must be carried out in a reasonable manner: *R v. Collins*, 1987 CanLII 84 (SCC). The Crown in this situation has the burden of showing that the search was, on a balance of probabilities, reasonable: *R v. Caslake*, 121 CCC (3d) 97 (SCC), at para 10.

42 I also find that the elicitation of evidence in the form of identification documents in this case, was an unreasonable search.

43 In *R v. Harris*, (2007), 87 O.R. (3d) 214, the accused was a passenger in a car that was stopped by police after the driver committed a traffic offence. The officer asked the accused to identify himself in order to run a CPIC check. The Court of Appeal held that the provision by the accused of his name constituted a seizure and that it was unreasonable as the officer had no reason to suspect the accused of anything. As in *Harris*, I find the intention of Constable McNeil was to access information on police computer about Mr. Fitl, as he indicated in his evidence that he wanted to check on warrants and on any conditions. Provision of a name allows officers access to a "wealth of person information" as noted in *Harris* at para. 38. As noted in *Harris* at para 40, a person under police detention has a right to silence unless he or she makes an informed decision to waive that right and provide the requested information to the police. The seizure was unreasonable here, as Constable McNeil expressly stated that he had no basis for starting an investigation. In this case, as in *Harris*, the officer intended to use the identification to conduct a further more intrusive search. In that sense, the request for identification amounted to a search or seizure for the purposes of s. 8.

44 The characterization of Mr. Fitl's interactions with Constable McNeil being that of detention, as I have found it, Mr. Fitl also had the right to be informed promptly of the reasons for his detention pursuant to s. 10(a) of the *Charter*, and it is clear from Constable McNeil's testimony that he did not indicate any reason until he arrested Mr. Fitl on the traffic warrant. Nor can it be assumed that the substance of what Mr. Fitl could be reasonably supposed to have understood was conveyed to him, the officer himself firmly denying in his testimony that he had any grounds to start an investigation from the information he had received from the security officers.

45 I turn next to the pat down search of Mr. Fitl following his arrest after he provided his identification to Constable McNeil that led to his arrest and pat down search. As noted in

Lerke, the right to search on arrest is not automatic; it must, pursuant to s. 8, be a reasonable search. Laycraft CJA went on to note that the reluctance of Canadian courts to invalidate searches after arrest is understandable as judges cannot be blind to the dangers police officers face. In this case though, Constable McNeil identified in his testimony the reason for his search, namely, for weapons and a means of escape. His actions, in opening up the soft pouch went beyond his stated purpose. While there was information imparted to him by the security guards about drug transfer, he testified that he did not rely on that information in his interactions with Mr. Fitl. The search led to the second arrest for possession for the purposes of trafficking. In this case, I am of the view that the Crown has failed to establish that the search of the contents of the soft pouch was a proper incident of the arrest for a traffic warrant. I find that Constable McNeil was aware that the warrant related to a traffic offence yet he embarked nonetheless on a search for evidence unrelated to that offence. As noted in *R v. Caslake*, [1998] 1 S.C.R. 51, at para 18, citing *R v. Belnavis*, (1996), 107 C.C.C. (3d) 195, at p. 213, "the authority to search as an incident of the arrest does not extend to searches undertaken for purposes which have no connection to the reason for the arrest."

46 The cell phone searches that ensued, first as an immediate incident to the arrest of Mr. Fitl, that is the second arrest, and at the scene, then, also as an incident of his arrest, by Constable Meyer some days later in a mechanized process, as conceded by Crown counsel, did not meet all of the requirements of *R v. Fearon*, 2014 SCC 77, that was decided after this investigation. *Fearon* requires that four conditions be met in order for cell phone searches incidental to arrest to comply with s. 8. First, the arrest must be lawful. In this case, the difficulty is that the otherwise legitimate basis for the arrest (the outstanding warrant) came from information that was obtained in the context of an arbitrary detention. The subsequent arrest can therefore not be characterized as lawful, and the cell phone searches incidental to the arbitrary and unlawful arrest of Mr. Fitl must be characterized as unreasonable in those circumstances. There are other problems with the search arising from *Fearon*. The third and fourth conditions introduced by *Fearon* as a new limitation on police powers were not met as there was no evidence of any effort in the case of either search to tailor the search to its purpose, but more evidently so in the second search. Finally, neither officer took detailed notes of what they examined on the device and how they examined it.

47 For all of these reasons, Mr. Fitl has established a breach of his s. 9 right to be free from arbitrary arrest and detention. He has established it in relation to what I have concluded was an arrest by private security officers, and an unlawful detention in relation to the detention by him of the officer, Constable McNeil, which I find to have been arbitrary. He has also established a breach of his s.10(a) right to be informed promptly on his detention of the reasons therefor as regards his detention by Constable McNeil.

48 The Crown has failed to establish the reasonableness of the searches in the form of the officer's elicitation of information from Mr. Fitl, the search of the soft pouch and the two searches of the cell phone.

49 I will hear argument with respect to whether the evidence sought to be adduced by the Crown in the form of the drugs, the cell phones and the cash seized from Mr. Fitl

should be excluded under s. 24(2) .

50 Thank you.

(PORTION OF PROCEEDINGS OMITTED BY REQUEST)

Ruling - Section 24(2)

51 THE COURT: Earlier today I concluded that Mr. Fitl's s. 9 *Charter* right to be free from arbitrary arrest and detention was violated by what I determined to be an unlawful therefore arbitrary citizen's arrest which was followed in time by an unlawful and arbitrary detention by Constable McNeil. I also concluded that Mr. Fitl's right to be informed promptly on his arrest or detention of the reason for the arrest or detention was violated by Constable McNeil's failure to advise him of the reason in this case. I also concluded that the request by Constable McNeil for Mr. Fitl's identification in the circumstances of the detention was an unreasonable search or seizure, as was the officer's search of the soft pouch he extracted from Mr. Fitl's pocket following his arrest for the traffic warrant. I also found that the search at the scene of one of the cell phones seized by Constable McNeil was unreasonable, as was the later mechanized search of the cell phone by Constable Meyer.

S. 24(2)of the *Charter* provides that:

> Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

52 *R v. Grant*, 2009 SCC 32, set out the analysis to be conducted when determining whether or not to exclude evidence as a remedy for a *Charter* breach. As noted at para 68 and reiterated at para 107 in *R v. Fearon*, 2014 SCC 77, s. 24(2) does not focus on an immediate reaction to an individual case. The trial judge must look at whether the overall repute of the justice system, viewed in the long term, will be adversely affected by the admission of the evidence. The proper question to ask is whether a reasonable person, informed of all relevant circumstances and values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute. Grant sets out three lines of inquiry:

1. the seriousness of the *Charter* breach;

2. the impact of the breach on the *Charter*-protected interest of the accused, and

3. society's interest in the adjudication of the case on the merits.

53 As to the seriousness of the breaches, Crown counsel placed the aggregate of the breaches in the middle of the spectrum of seriousness. He noted that the initial arrest was not by police officers trained in *Charter* compliance. When the officer arrived, the physical restraint of Mr. Fitl was relaxed by the private security guards. Crown counsel conceded that the length of the detention by the officer was not, however, on the minor end.

54 As for the searches of the cell phones, the *Charter* standards set out in *Fearon* had not been established prior to this investigation. It was therefore a grey area as regards detailed note-taking and evaluating how intrusive the search should be from the perspective of going back in time in the messaging search. Constable Meyer believed he was authorized to search the cell phone as an incident of arrest.

55 As for the search of Constable McNeil of the soft pouch, a very brief departure albeit not minor from the perspective of the results of the search, this Crown counsel argued was based on a quick decision and was not a deliberate violation in terms of its seriousness.

56 Crown counsel acknowledged from the perspective of the impact of the breaches on the *Charter* interests of Mr. Fitl, that they are significant albeit the expectation of privacy was reduced in a location where patrons fully expected to be searched.

57 Crown counsel argued that the third ground - that is the third line of inquiry - favours admission - the evidence sought to be excluded is reliable evidence and without it the Crown's case cannot proceed.

58 Balancing all three lines of inquiry, Crown counsel submitted that the evidence should not be excluded.

59 Defence counsel submitted in response that albeit the third line of inquiry favours admission, the Court should be mindful of the comments in R v. Harrison, the public has avital interest not only in cases being tried on their merits but also in the justice system being beyond reproach.

60 As for the seriousness of the breaches, the first line of inquiry, defence counsel pointed out that the private security agents are dealing as part of their employment with the members of the public and should not be viewed as having lesser obligations in terms of manhandling those they are in contact with where there are no reasonable grounds for them to do so.

61 As for the searches, in this case, defence counsel pointed out that the officers' note taking -- that is both officers -- was very unsatisfactory and did not measure up to what would have been appropriate even before the *Fearon* decision was released.

62 As for the alternatives open to the officer instead of detention, his obligations when he had no grounds to commence an investigation, were clear on the authority of R v. Kokesh, [1990] 3 S.C.R. 3, at para 46, and that was simply to leave Mr. Fitl alone.

63 As for the officer's behaviour in searching beyond what was reasonable having regard to the traffic warrant for which he was initially arrested, defence counsel noted that *Caslake* is clear about the boundaries of searches incidental to arrest, and therefore should be clear to officers. This was not an inadvertent error; the officer was aware of the appropriate limits of his search, and chose to exceed them. Finally, defence counsel argued that discoverability is no substitute for non-compliance, citing *R v. Cote*, [2011] S.C.J. No. 46. Defence counsel submits that the breaches in their aggregate were serious, their impact on Mr. Fitl's *Charter*-protected rights were significant, and both these factors outweigh the societal interest in prosecuting the case on its merits.

64 I find firstly that there is sufficient connection between the breaches and the evidence seized that the evidence was obtained in a manner that violated Mr. Fitl's *Charter* right: *R v. Mian*, 2014 SCC 54, at para 83. As noted in *Mian*, the first line of inquiry is not focussed on the connection or lack thereof between the police conduct and the evidence but on the police conduct.

65 As to the first line of inquiry, the more severe or deliberate the state conduct that led to the *Charter* violation, the greater the need for the courts to dissociate themselves from that conduct by excluding evidence linked to that conduct: *Grant*, para 72. Here the multiple nature of the violations aggravated the seriousness of the breaches: *R v. Calderon*, (2004), 188 C.C.C. (3d) 481 (C.A.). However, the Court must also look at the nature of the individual breaches rather than counting how many discrete provisions of the *Charter* the conduct may have offended: *R v. Harris*, (2007), 87 O.R. (3d) 214.

66 I am of the view that the s. 9 breach in relation to the security guards' activity was serious. As police would be involved in any event if criminal activity was being observed, and Mr. Fitl was not acting out violently such that it was necessary to harness him physically without notice and direct him forcefully out of the dance room, these actions were, in my view, significant. Advising police and allowing them to take the matter further if the police judged it appropriate is an appropriate response in situations where citizens may not be aware of their *Charter* obligations when involved in security functions. Instead the officers acted deliberately and with force and not, as I indicated, in response to any violence threatened against them.

67 In the case of the detention by Constable McNeil, it was lengthy and without any explanation being given for it. The searches of the cell phones were in a grey area of the law at the time, and were for that reason less serious overall but not minor as there is a strong privacy interest in phones and there was no real attempt by the officers to record what exactly they seized in terms of information, which I am of the view was a basic requirement even prior to *Fearon*. I also agree with defence counsel that the search of the pouch was not sanctionable in the circumstances here, the officer clearly stating that the purpose of his search, which I found to be in the context of an arrest for a traffic warrant, where he stated he did not consider he had any grounds for an investigation into criminal activity and was searching for safety and preventing escape, was a serious intrusion.

68 From the perspective of the impact of the *Charter* infringing conduct, there was more than minimally infringing contact with the accused. The intrusion by the security guards on

Mr. Fitl's privacy interests was significant in the manner without notice that they physically took him in hand. The casual attitude of the officer in detaining Mr. Fitl for some 15 minutes without explanation and without grounds for an investigation is serious. In addition, the officer, in seeking to identify Mr. Fitl, was doing so to conduct another more intrusive search as identified in *Harris*, in this case for warrants and conditions notwithstanding he knew he had no grounds to hold him in investigative detention. Overall, the impact of these breaches was, in my view, on the more significant side of the scale. The impact is also significant as without the information that was seized by the officer as to Mr. Fitl's identity, there would have been no reasonable and probable grounds or arrest to justify a pat down search of his person from which the discovery of the drugs arose.

69 As for the third line of inquiry, the evidence is reliable and is important to the Crown's case. Reliability issues are generally not related to the *Charter* breach: *Fearon*, at para 122. Excluding reliable evidence, *Fearon* goes on to note, can bring the administration of justice into disrepute as it may undermine the truth-seeking function of the justice system and render the trial unfair from the perspective of the public.

70 Having weighed all three lines of inquiry and, as noted in *Fearon* at para 124, that the purpose of this analysis is not to deter future breaches but to preserve public confidence in the justice system, I find that the balancing of these lines of inquiry militates in favour of exclusion. As noted in *R v. N.O.*, 2009 ABCA 75, at para 50, while the public has a strong interest in detecting drug dealers, it also has a strong interest in preserving the rights of citizens to come and go as they please, in this case, free from police interference where the police are aware that they have no basis upon which to embark on an investigation. The nature and number of breaches in this case of Mr. Fitl's *Charter* rights are such that the admission of the evidence would bring the administration of justice into disrepute. The evidence sought to be adduced by Crown counsel is for these reasons excluded.