

Case Name.

R. v. Khan

**Between
Her Majesty the Queen, respondent, and
Kevin Kennard Khan, applicant**

[2004] O.J. No. 3819

244 D.L.R. (4th) 443

189 C.C.C. (3d) 49

24 C.R. (6th) 48

13 M.V.R. (5th) 266

63 W.C.B. (2d) 132

Court File No. F701/02

Ontario Superior Court of Justice

Molloy J.

Heard: February 16, 18-20 and May 17 and 28, 2004.

Judgment: September 15, 2004.

(71 paras.)

Constitutional law -- Canadian Charter of Rights and Freedoms -- Legal rights -- Protection against arbitrary detention or imprisonment -- Protection against unreasonable search and seizure -- Remedies for denial of rights -- Specific remedies -- Exclusion of evidence -- Criminal law -- Offences -- Controlled drugs and substances -- Possession or trafficking -- Evidence -- Witnesses -- Credibility -- Methods of proof -- Circumstantial evidence -- Character evidence -- Similar fact evidence -- Elements of the offence -- Actus reus

Application by the accused Khan for the exclusion of evidence on the basis that his rights under sections 8 and 9 of the Charter were violated. The police claimed that they detained Khan because he was driving erratically. They further alleged that Khan was trying to push something under the driver's seat when they approached the vehicle. Officer Asselin claimed that he could see a large garbage bag protruding from under the driver's seat, and that he detected the strong distinctive odour produced by a large amount of cocaine. The bag was found to contain one kilogram of cocaine, and Khan was arrested for possession of cocaine for the purpose of trafficking. Khan testified that there was nothing unusual about his driving, and denied any knowledge of the cocaine. He argued that his detention was arbitrary, and that the search of his vehicle was unreasonable. He alleged that he was the victim of racial profiling, and

that the police pulled him over solely because he was a young black man driving an expensive car. The car had been out of Khan's possession for two days before the arrest, and the garbage bag did not contain his fingerprints.

HELD: Application allowed. The evidence was excluded, and Khan was acquitted. The resolution of this case depended entirely on which version of events was accepted. Khan was a very credible witness. He testified in a straightforward manner, and was unshaken in cross-examination. Moreover, his evidence was fully consistent with the documentary evidence and evidence of independent witnesses. By contrast, the evidence of the police officers was inconsistent with the documentary evidence and defied common sense. The cell phone and police computer records were also inconsistent with the evidence given by the officers. They fabricated significant aspects of their evidence. They targeted Khan and searched his vehicle because of racial profiling. Khan's rights under sections 8 and 9 of the Charter were violated, and the evidence of the cocaine was excluded. In any event, Khan did not have possession, care or control of the cocaine, so he was not guilty of the offence charged.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 8, 9, 24(2).

Highway Traffic Act, R.S.O. 1990, c. H.8., ss. 130, 216(1).

Counsel:

Michael Passeri and Marco Mendicino, for Her Majesty the Queen.

John S. Struthers, for the Accused, Kevin Khan.

REASONS FOR DECISION #2
(Application Under s. 8 and 9 of Charter and Trial)

MOLLOY J.:--

A. OVERVIEW

1 Kevin Khan is charged with possession of cocaine for the purpose of trafficking. The Crown alleges that Mr. Khan was stopped by police because of erratic driving. Police witnesses testified that when they approached Mr. Khan's stopped vehicle they could see him fumbling with something in the glove box with one hand and trying to shove something under the driver's seat with the other. He failed to comply with repeated police requests to place his hands on the steering wheel. Officer Asselin, who was at the driver's side door, removed Mr. Khan from the car. He could see a large garbage bag partially shoved under the driver's seat and detected a distinctive odour indicating a large amount of cocaine. Mr. Khan was immediately arrested for possession of cocaine for the purpose of trafficking. The garbage bag contained one kilogram of cocaine, with an estimated street value of \$100,000.

2 Mr. Khan's version of events is markedly different from that of the two police officers. He testified there was nothing unusual about his driving. He alleges that he was a victim of racial profiling and that the police pulled him over solely because he was a young black man driving an expensive car. Mr. Khan claims he cooperated fully with the police. He said he provided his identification to the police and they told him the computer check on his driver's license revealed an outstanding fine and license suspension.

He said that while he was on the side of the road attempting to call someone to drive his car away for him, Officer Asselin was searching the vehicle. According to Mr. Khan he was only placed under arrest when the search turned up a bag of cocaine somewhere in the car. He denies any knowledge of the cocaine.

3 Mr. Khan brought an application to exclude the evidence of the cocaine. He alleges the police stop of his vehicle was arbitrary, unlawful and in breach of s. 9 of the Charter because it was motivated by racial profiling. Further, he alleges the search of the vehicle was unlawful and in breach of s. 8 of the Charter. Mr. Khan elected to be tried by judge alone. Both parties agreed the evidence with respect to the defence Charter motions would be heard at the same time as the evidence on the substantive charge. The Crown concedes that without the cocaine the substantive charge cannot be proven. If Mr. Khan is unsuccessful on his Charter applications, he has also raised a defence on the merits claiming the cocaine was not his and he did not know it was in the car.

4 I dismissed an earlier motion brought by the defence to obtain documents relating to all arrests made by Officer Asselin (the senior officer involved in the stop and arrest of Mr. Khan). In the course of my reasons on that motion, I ruled that, as a matter of principle, prior similar conduct by the officer involved was relevant and potentially admissible to support the accused's allegation of racial profiling. At trial, the defence sought to rely on the circumstances surrounding the arrest of Sheldon Jackson by the same two officers in March 2001, alleging this was similar fact evidence of racial profiling. It was not possible to rule on the ultimate admissibility of the evidence without first hearing the particulars of that evidence. Accordingly, the evidence was called, but subject to my later ruling on its admissibility and weight.

5 These reasons are organized under the following headings:

A. OVERVIEW (paras. 1-4)

B. THE EVIDENCE OF THE POLICE OFFICERS

- (i) Background Information (para. 6)
- (ii) The Incident at the Intersection (paras 7-9)
- (iii) Driving After the Intersection and the Stop (paras. 10-12)
- (iv) Events After the Car Was Stopped (paras. 13-20)

C. THE DEFENCE EVIDENCE

- (i) Background Information (paras. 21-27)
- (ii) The Incident at the Intersection (para. 28)
- (iii) Driving After the Intersection and the Stop (para. 29)
- (iv) Events After the Car Was Stopped (paras. 30-37)

D. ARBITRARY DETENTION: (s. 9 of the CHARTER) (paras. 38-55)

- (i) Position of the Parties (paras. 38-40)
- (ii) The Initial Stop (para. 41-47)
- (iii) Similar Fact Evidence and Racial Profiling (paras. 48-58)
- (iv) Further Detention After the Stop (paras. 60-62)

E. UNLAWFUL SEARCH: (s. 8 of the CHARTER) (para. 63)

F. ANALYSIS and CONCLUSIONS (paras. 64-69)

G. DEFENCE ON THE MERITS --- CARE AND CONTROL OF THE COCAINE (paras. 70-71)

B. THE EVIDENCE OF THE POLICE OFFICERS

(i) Background Information

6 On October 22, 2001, Officers Glenn Asselin and Craig James were on general patrol duty as part of the Community Response Unit of 13 Division in Toronto. Officer Asselin was at that time a uniformed sergeant and a 12-year veteran of the police force. He had been promoted a year or so before to 13 Division in a supervisory role. Prior to that he had been a plain-clothes officer in the Drug Squad. Officer Asselin acknowledged on cross-examination that drug enforcement was his favourite form of police work. He is now a detective and is again doing drug enforcement work, although at the time of Kevin Khan's arrest, he had not yet applied for that transfer. In 2001 Officer James was a First Class Constable, having been a police officer for five years. As such, he had responsibility for training other officers. However, his experience in drug work was not extensive. He has since left the police force, citing as reasons a dislike of shift work and concern about career prospects.

(ii) The Incident at the Intersection

7 On October 22, 2001, Officers Asselin and James left the police station for routine patrol duties at approximately 11:35 a.m. Officer Asselin was driving. At approximately 12:23 p.m., the officers were proceeding east along Livingston Avenue, approaching the intersection with Locksley Avenue. Locksley Avenue runs north/south. Livingston runs east/west up to Locksley, but is one-way eastbound after Locksley. Officer Asselin stopped at the intersection of Livingston and Locksley. There is a three-way stop at the intersection. Officer Asselin testified that by the time he reached the stop sign a silver Mercedes Benz had already been there for "some three to five seconds." Since the Mercedes would have the right-of-way, Officer Asselin waited. He noticed the driver of the Mercedes (the accused Kevin Khan) and could tell he was a black male, but did not recall anything else about his clothing or appearance. Officer Asselin testified that Mr. Khan sat with his hands fixed on the steering wheel, "kind of in a frozen state" staring at the police car. Officer Asselin did gesture to Mr. Khan that he should proceed. After what he described as an "uncomfortably long" stop, Officer Asselin himself proceeded through the intersection. He said Mr. Khan's eyes followed the police car as it drove through the intersection. As they proceeded through the intersection, Officer Asselin was aware Officer James was running a CPIC check on Mr. Khan's license plate. He testified this is a very routine occurrence and officers could do hundreds of them during a shift. Officer Asselin considered Mr. Khan's conduct to be "peculiar". He wondered what he was doing but said "there was nothing more to it than that."

8 Officer James testified that at 12:23 p.m., as the police car was approaching the intersection with Locksley Avenue, he saw Mr. Khan's vehicle slow to a stop. He said it was clear Mr. Khan had the right-of-way and he expected him to move. Officer James testified that Mr. Khan was looking at the police vehicle, but that there was "nothing out of the ordinary" about the look. He just looked at the vehicle as any driver would. Officer James described the length of the stop as "an extended period", several seconds longer than a normal stop. He decided to run a CPIC check after they passed through the intersection because he was wondering why Mr. Khan did not earlier drive on or motion them to proceed. He thought it possible there was an expired license tag, or suspended driver or stolen vehicle and that the driver was reluctant to go ahead of the police as they would have a better chance to look at his license plate. Officer James testified the CPIC check was run as a matter of routine. The fact that the driver was black and driving a Mercedes was not in any way a factor.

9 The police department CPIC computer records indicate that the license plate check on Mr. Khan's vehicle was run at 12:23:12 p.m., which is consistent with the times recorded in the officers' notes. It revealed nothing out of the ordinary.

(iii) Driving After the Intersection and the Stop

10 After the police car proceeded through the intersection, Mr. Khan could have proceeded straight ahead on Locksley, turned left onto Livingston or turned right onto Livingston. He elected to turn right, following the police car. Officer Asselin testified he continued to watch Mr. Khan's vehicle in his rear view mirror, from a distance of about 30-40 feet. He said he observed Mr. Khan's demeanor change. He was looking down, focused on something in his lap area, with only one hand on the steering wheel as he was making the turn. Officer Asselin said that as Mr. Khan was making the turn on to Livingston, the turn became "very wide" and he nearly collided with cars parked on the north side of the street. He then observed Mr. Khan "yank the steering wheel very hard", which brought him back into position, but he missed a side mirror on a parked car by inches. When he thought Mr. Khan was going to hit the parked car, Officer Asselin made some sort of exclamation to his partner and Officer James spun around in his seat to watch. As Mr. Khan continued to follow the police car, Officer Asselin testified he was again looking down at his lap area. Directly after witnessing the near collision, Officer Asselin decided to stop Mr. Khan. He testified there could have been many explanations for the driving he saw, such as spilled coffee or a cigarette. Alternatively, there could have been a medical problem or Mr. Khan may have been drinking. He decided to investigate. Officer Asselin pulled over to the side of the road and allowed Mr. Khan's vehicle to pass. He then followed it a short distance (one or two blocks). When Mr. Khan turned left, heading north on Marlee Avenue, Officer Asselin activated his emergency lights. Officer Asselin denied that Mr. Khan's race was in any way a factor in the decision to pull him over.

11 Officer James was unaware Mr. Khan's car was following them until he heard his partner say he had almost hit a parked car. At that point, Officer James turned around to look and observed Mr. Khan's car close to cars parked on the north side of the road, such that his mirror and the mirror of the parked cars were only several inches apart. He then saw Mr. Khan move towards the center of the road. At that time he was driving with one hand on the steering wheel and was hunched over, appearing to be fumbling in the footwell area of the car with his other hand. Officer James agreed there could be many reasons for Mr. Khan being hunched over, some of them innocuous. However, he also could have been impaired, or trying to hide something. He thought it warranted further investigation. He confirmed Officer Asselin's evidence about pulling to the side, then following Mr. Khan, and activating the emergency lights when both vehicles were northbound on Marlee Avenue.

12 The police computer records show these officers advised central dispatch they had a vehicle stopped at 12:25:08 p.m. This was just under two minutes after the license plate CPIC check was done and is consistent with the approximate driving time between the two points.

(iv) Events After the Car Was Stopped

13 Officer Asselin testified that after he activated his emergency lights, Mr. Khan pulled to the right side of the street "very abruptly." He was removing his seat belt and leaning forward in his vehicle. Officer Asselin approached on the driver's side; Officer James on the passenger side. Officer Asselin said Mr. Khan's right hand was extended towards the glove box area on the right and he was leaning forward with his left hand dangling between his legs. Officer Asselin approached at a "quick jog" because he was concerned Mr. Khan was trying to hide something or possibly retrieve a firearm. Mr. Khan's driver door window was down. Officer Asselin advised Mr. Khan two or three times to put his hands on the steering wheel, but Mr. Khan continued to stare at him while fumbling blindly with his right hand in the glove box. He also continued with his left hand to push what appeared to be a garbage bag under the driver's seat, while simultaneously pushing at the bag with the backs of his heels.

14 Officer Asselin opened the driver's door and pulled Mr. Khan from the vehicle. When he opened

the door, Officer Asselin detected an obvious strong odour of cocaine, which he said "came flying out of the car." He recognized the smell from his years of experience working on drug cases. He described the smell as being like cat urine with a chemical hint. He said he knew from the strength of the smell that this was a large quantity of cocaine. He also knew, because the smell of cocaine does not linger, that if there was a smell, then the cocaine was actually present. He immediately directed Officer James to place Mr. Khan under arrest for possession for the purpose of trafficking. He did this before he even looked inside the garbage bag.

15 After Mr. Khan had been removed, Officer Asselin looked inside the garbage bag and confirmed it contained a substance that appeared to him to be about one kilogram of powdered cocaine. It was packaged in a closed zip-lock baggie, which was then inside another closed zip-lock baggie, which in turn was inside the garbage bag. The garbage bag was rolled up but not tied. Since it was clear to Officer Asselin that the car would be seized, he proceeded to carry out a search of the vehicle.

16 Officer James testified that after the emergency lights were activated, Mr. Khan pulled over and stopped "rather abruptly, a little faster than what we're used to." He said he could see Mr. Khan leaning forward with his left leg reaching between his legs and his right hand in the glovebox. He approached the vehicle quickly for safety reasons. He heard Officer Asselin tell Mr. Khan to place his hands on the steering wheel. He described Mr. Khan as "unresponsive" to that request. Officer Asselin then advised Mr. Khan to get out of the vehicle, at which point Officer James also went over to the driver's side of the car. Officer James testified that he did not ask Mr. Khan to produce his license or documentation and did not speak to Mr. Khan at all until after he was out of the vehicle. At that point he was advised by Officer Asselin to arrest Mr. Khan for possession of cocaine for the purpose of trafficking. He did place Mr. Khan under arrest and conducted a frisk search of him at that time. According to Officer James' notes, the arrest was made at 12:27 p.m. He was not sure where he got that time from. However, he had also noted the intersection incident to have been 12:23 p.m. and the stop to have occurred at 12:26 p.m., so if Mr. Khan was arrested immediately upon getting out of the vehicle, 12:27 p.m. would fit that timeline.

17 Officer James testified he did not handcuff Mr. Khan at this point. He went with him to the side of the road and permitted Mr. Khan to make a call on his cell phone. He said Mr. Khan was courteous and polite and he therefore did him the favour of not cuffing him and allowing him to arrange to have his car driven away by somebody else, rather than incurring a towing fee. He did not know who Mr. Khan called and did not listen to the conversation. While Mr. Khan was using his cell phone at the side of the road, Officer Asselin called out to Officer James that he should take the phone away from him. Initially in his testimony Officer James made no mention of any reason given by Officer Asselin for taking away the phone. However, on cross-examination, Officer James conceded the accuracy of his testimony at the preliminary inquiry, which was that Officer Asselin told him to stop Mr. Khan from using the phone because they were going to keep the car. He was unsure whether he removed the cell phone from Mr. Khan or whether Officer Asselin did it. However, it was removed. Officer James had no recollection of being disciplined or reprimanded for having permitted Mr. Khan to use his cell phone.

18 Officer Asselin's evidence was that he was clear in his own mind as soon as he found the cocaine that Mr. Khan's car would be impounded. He testified that after Officer James placed Mr. Khan under arrest, "several moments went by" while he stared at the seizure of cocaine he had just made and looked around other areas of the car. He then happened to look up and see through one of the car windows that Mr. Khan was on the sidewalk with Officer James, and Mr. Khan was using a cell phone. Officer Asselin said he immediately jumped from the car, removed the phone from Mr. Khan and hung it up. He said allowing someone in Mr. Khan's situation to use a cell phone was not consistent with good police work. He also said Mr. Khan should have been handcuffed upon arrest. According to Officer Asselin, he reprimanded Officer James for these breaches.

19 Officer James testified that after the cell phone was taken away, he took Mr. Khan to the police cruiser. He then conducted a CPIC check in respect of Mr. Khan's name and date of birth while both he and Mr. Khan were in the police car. He also at that time advised Mr. Khan of his rights. Officer James recorded in his notes that he read Mr. Khan the rights to counsel at 12:35 p.m. Officer James maintained that from the time Mr. Khan was placed under arrest upon being removed from his car, up to the time his cell phone was taken away, he (Officer James) did not return to the police cruiser. He said he did not do the CPIC check on Mr. Khan until he returned to the cruiser after the cell phone calls. During the entire time after the arrest, he was with Mr. Khan outside the cruiser. He never left Mr. Khan and returned to the cruiser alone. He denied having told Mr. Khan prior to that time that his license was under suspension for failure to pay a reinstatement fee. He pointed out that he himself had no way of knowing about the license suspension until he obtained that information from the CPIC check of Mr. Khan's name. That sort of information would not have been available from the CPIC check previously run on the license plate because the registered owner of the car was a corporation. Accordingly, he said he did not know, and could not have known, about the license suspension until 12:35 p.m., after he was in the police cruiser.

20 The police CPIC computer records indicate that the CPIC search on Kevin Khan's name was run at 12:26:47 p.m. The answer to that inquiry, noting the license suspension for non-payment of a fee, was sent at 12:26:48 p.m. Officer James acknowledged in cross-examination that the computer record times do not fit with his evidence of when things happened. His explanation was that the times must be wrong.

C. THE DEFENCE EVIDENCE

(i) Background Information

21 Kevin Khan was 26 years old at the time of his arrest. He graduated from York University in 1998 with a Bachelor of Arts degree with honours in education and sociology. He had been employed as a teacher by the Toronto District School Board, with his teaching time split half-and-half between physical education and Grade 8 core subjects. Subsequently, he had been involved in a car accident and, at the time of his arrest, was still on medical leave because he was unable to do the physical education part of his job, although he continued to do supply teaching in other subjects. In addition to his teaching career, Mr. Khan had some business ventures, one of which was buying condominium units, refurbishing them and then reselling them. Over several years, he had purchased and resold a total of 34 units at a condominium building at 135 Marlee Avenue.

22 Mr. Khan also had a business interest in a hair salon at Islington and Albion. His brother worked at the salon.

23 Mr. Khan is, and was in 2001, engaged to be married to Leslie-Ann Grant who is a high school English teacher and guidance counsellor. They have a young daughter together, who is now three years old. Mr. Khan normally resided with his mother during the week, but lived with Ms. Grant and their daughter on weekends. Mr. Khan owned, through his corporation, a 2000 Mercedes CLK 320. Ms. Grant owned a 1992 Saturn. Mr. Khan testified that he occasionally would lend his Mercedes to his brother for the weekend when he was at Ms. Grant's and the family would then use her car. He had given his brother a set of keys for the car. There was no fixed pattern, but often after the weekend Mr. Khan would pick up his car at the salon where his brother worked.

24 Mr. Khan's arrest was on Monday, October 21, 2001. He testified he spent the weekend before that Monday with his fiancée and daughter and had loaned his Mercedes to his brother. On the Monday morning, Ms. Grant went to work, taking their daughter with her as the daycare was near the high school where Ms. Grant worked. Mr. Khan testified he had an appointment to meet Ronald Thompson between

12:30 and 1:00 p.m. at 135 Marlee to show him a condominium he was interested in buying. He said Ms. Grant came and picked him up during her spare period shortly after 11:30 a.m. and dropped him off at the hair salon. Mr. Khan testified that he did not speak to his brother. He simply got in the car and headed for Marlee Avenue.

25 Leslie-Ann Grant confirmed Mr. Khan's testimony. She testified he stayed with her on the weekend before October 21 and did not have his Mercedes the whole weekend. On the Monday morning, she dropped her daughter off at day-care and went to work, leaving Mr. Khan at home. Her lunch break began at 11:25 a.m. and she estimated she would have been back home to pick up Mr. Khan within 5 or 10 minutes of that, as it was only a few blocks. She drove him to the parking lot of the hair salon. She saw him get into his Mercedes. She then followed him out of the parking lot in her car. He headed in the general direction of Marlee Avenue, and Ms. Grant's understanding was that he was going to an appointment there.

26 Ronald Thompson testified he had previously purchased a condominium from Mr. Khan and was interested in purchasing another one as an investment. He confirmed he had an appointment to meet Mr. Khan at the building somewhere around 1:00 p.m. on October 21, 2001. He said Mr. Khan called him on route to tell him he was nearly there. Mr. Thompson has no connection with Mr. Khan other than in respect of purchasing the condominium unit. He was introduced to Mr. Khan by their mutual accountant.

27 Mr. Khan's cell phone records indicate he placed a call at 12:20 p.m. Mr. Khan testified that this call was to Mr. Thompson to tell him he was about 5 minutes away. Mr. Thompson confirms this call was to his telephone number.

(ii) The Incident at the Intersection

28 Mr. Khan testified he approached the intersection of Livingston and Locksley at about the same time as the police cruiser. He simply waited for the police car to go ahead. He did not make any gesture to that effect. He did not consider there was any unusual pause at the stop sign. He said it was about two or three seconds.

(iii) Driving After the Intersection and the Stop

29 After the police car passed, Mr. Khan turned right on Livingston, following the police car and heading towards Marlee Avenue. He testified there was nothing unusual about his driving. He said he was not using his cell phone while making the turn onto Livingston. He was sure the call to Mr. Thompson was before he came to the intersection of Locksley and Livingston. Mr. Khan denied ducking his head down or looking into his lap and denied almost hitting a parked car. He said there are spots on Livingston that are narrow because of traffic calming islands and parked cars. Therefore, he could have been close to parked cars, but there was no near-accident. Mr. Khan testified he simply drove straight down Livingston, stopping at the stop sign at the end of the first block. After that stop sign, the police car pulled over to the right and he went past it. After he turned left on Marlee, he was stopped by the police.

(iv) Events After the Car Was Stopped

30 Mr. Khan said he pulled to over to the right shoulder of Marlee, removed his seatbelt and rolled down his driver's window. Both officers approached the car, one on either side. He could not remember their pace. Officer James commented on his windshield being chipped and Mr. Khan acknowledged this was so but that he had not gotten around to having it repaired. Mr. Khan testified that Officer Asselin

then asked for his driver's license and registration. His registration and insurance were in the glove box. He testified the glove box is a little further away from the driver than in many cars and it was necessary to reach his whole body across to get the documents out of the glove box. He thought he probably would have used both hands to do this as he is left-handed. His driver's license was in his day-planner which was in a pocket on the driver's door. He retrieved all of these documents and gave them to Officer Asselin. He said both officers then returned to their police cruiser and he simply waited.

31 Mr. Khan testified that after about one to three minutes, Officer Asselin returned and asked him if he was aware his license was suspended, and he replied he was not. Officer Asselin then opened the driver's door and asked him to step out of the car, which he did. Officer Asselin directed him to go stand with Officer James who was directly behind the Mercedes. Mr. Khan did so. He said Officer James told him that because his license was under suspension he would not be able to drive and that he should call and get someone to come and get his car.

32 Mr. Khan said he then called Wayne Duhaney, to whom he had previously sold a condo and who lived at 135 Marlee, which was just down the street from where the car was stopped. He told Mr. Duhaney that his license was suspended and he needed someone to come get his car. Mr. Duhaney advised him that he did not have a driver's license. Mr. Khan therefore asked Mr. Duhaney to check with another person in the building, named Jerome, to see if he could come. After he hung up from talking to Mr. Duhaney, Mr. Khan received a call on his cell phone from Mr. Thompson, whom he was supposed to be meeting. Mr. Thompson was at the building. Mr. Khan asked him if he could walk over and pick up his car for him.

33 Mr. Duhaney testified he received a telephone call from Mr. Khan who told him he had been stopped by the police because his license was suspended and asked him to come pick up his car. Mr. Duhaney told him he did not have a driver's license. He said Mr. Khan asked him to try Jerome McKenzie to see if he could do it. He tried without success to find Mr. McKenzie. He then walked down Marlee to where the police had Mr. Khan. He said he was hassled by the police and not permitted to speak to Mr. Khan. Mr. Duhaney was unshaken in his testimony with respect to these events. However, I do note he has a fairly substantial criminal record, about which he was less than fully forthcoming until subpoenaed to return to court and confronted with the printed record.

34 Mr. Thompson testified that upon arriving at 135 Marlee for his meeting, he waited for about 5 minutes, and then called Mr. Khan to see where he was. Mr. Khan told him he had been pulled over because his license was suspended and asked if he could walk over to get his car. Mr. Thompson walked down Marlee and saw Mr. Khan in the back of the cruiser. He was told by the police that he could not take the car.

35 Mr. Khan testified that while he was on the phone, Officer Asselin was searching his car, including the trunk, glove compartment, and under the seats. After Mr. Khan had been waiting for perhaps four or five minutes, Officer Asselin called out to Officer James to take away his cell phone and place him under arrest. Mr. Khan said it was only then he was advised he was under arrest, handcuffed and placed in the police cruiser. While he was in the cruiser he saw both Mr. Duhaney and Mr. Thompson arrive and speak to the police. The police acknowledge that two people came to the scene inquiring about the Mercedes.

36 Mr. Khan testified he was unaware of any drugs being in the car. He did not smell anything unusual in the car, even with the windows closed. He did not know where in the car the drugs had been found. He asked his brother about it because he was the last person who had the car, but his brother denied any knowledge of the drugs. Mr. Khan's brother has a criminal record relating to assault and drugs.

37 Mr. Khan's cell phone bill indicates a call was placed to a number identified by Mr. Duhaney as his, at 12:31 p.m. That call was noted to be one minute, but all calls up to one minute are recorded at the one-minute minimum. At 12:32 p.m, Mr. Khan's bill shows an incoming call, which lasted 2 minutes and 11 seconds.

D. ARBITRARY DETENTION (s. 9 of the CHARTER)

(i) Position of the Parties

38 The Crown concedes that the police stopping Mr. Khan's vehicle was a detention within the meaning of s. 9 of the Charter. However, the Crown takes the position that the stop was lawful, and not arbitrary as the police were acting legitimately under the statutory authority of the Highway Traffic Act R.S.O. 1990, c. H.8. Further, the police decision to remove Mr. Khan from his vehicle was also a detention. The Crown argues that the police had articulable cause for this detention, because of officer safety concerns and the prevention of crime.

39 On Mr. Khan's version of events, the only legitimate police action was to prevent him from driving once his driver's license suspension was discovered. However, that would not have been discoverable but for the initial stop, which was itself without lawful cause. If I accept Mr. Khan's evidence, it is clear the initial stop was arbitrary. According to Mr. Khan, he was driving in a perfectly normal manner and was pulled over for no reason. He was not trying to hide anything and was not fumbling with anything as the police approached his stopped vehicle. He complied with all requests made by the police. Therefore, there was no basis to remove him forcibly from his car and detain him while it was searched.

40 On the other hand, if I accept the evidence of Officers Asselin and James, the police had articulable cause for their decision to stop Mr. Khan's car and for removing him from his vehicle once it was stopped.

(i) The Initial Stop

41 Section 216(1) of the Highway Traffic Act provides:

A police officer, in the lawful execution of his or her duties and responsibilities, may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signaled or requested to stop by a police officer who is readily identifiable as such, shall immediately come to a safe stop.

42 This provision authorizes police officers to stop vehicles for purposes relating to traffic regulation and traffic safety. It is not necessary that the police witness an actual traffic violation in order to justify such a stop, as long as one of their reasons for the stop is legitimately related to traffic safety: *Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1 (Ont. C.A.) [*Brown v. Durham Regional Police Force*]. In this situation, the conduct of the accused at the intersection would not, by itself, warrant stopping him. However, Mr. Khan's manner of driving after that, as described by Officer Asselin, gave rise to legitimate highway safety issues. He was not paying attention to his driving. He was looking down into his lap or the floor area of the car instead of at the road, and he very nearly hit a car parked on the side of the road. There was reason to investigate why Mr. Khan was not driving in a safe manner, and this falls squarely within s. 216(1) of the Highway Traffic Act.

43 The officers had an additional concern. They initially wondered why Mr. Khan did not proceed ahead of them at the intersection. One possible reason that occurred to them was that he wanted to avoid having the police behind him where they would be in a better position to get a close look at his license

plate. This aroused their suspicions. Further, as they observed Mr. Khan's driving along Livingston, the officers were suspicious about his bending over inside the car and focusing on something other than the road. Again, the officers realized there could be many explanations for such behaviour, but one possibility they considered was that Mr. Khan was trying to hide something. These suspicions were part of the circumstances informing the police decision to pull Mr. Khan over, in addition to highway safety concerns. This would not amount to more than a "hunch" or "intuition" and would not, in and of itself, constitute articulable cause for a detention: *R. v. Simpson* (1993), 79 C.C.C. (3d) 482 (Ont. C.A.) at 501-502 [*R. v. Simpson*].

44 The Court of Appeal held in *Brown v. Durham Regional Police Force* that the existence of police concerns other than highway safety do not taint an otherwise valid traffic stop under s. 216(1) of the Act. In that case, the trial judge found that highway safety concerns were one of the reasons for setting up roadblocks and stopping individuals who were members of a motorcycle gang on their way to a party. The judge also found that the police had additional reasons relating to their suspicion that the motorcycle gang was involved in criminal activity: the police wanted to identify members of the motorcycle gang for investigative purposes. The trial judge rejected the argument that the existence of other reasons for stopping these individuals, in addition to highway safety concerns, made the stops unlawful. The Court of Appeal, at para. 30, agreed with the trial judge, quoting his reasons as follows:

I think such a conclusion would be unreasonable because it would remove the authority of the police to stop motorists where they had an unrelated purpose which might not lawfully justify a stop but also had highway traffic concerns which alone would justify a stop. It would mean that where a police officer has other reasons to want to stop a motorist he is thereby deprived of the right under the Highway Traffic Act to use his established right to stop a motorist in order to investigate highway traffic matters.

It seems to me that where the police have highway traffic concerns and other related concerns, then the limit on their conduct should be imposed by limiting their conduct after the stop.

45 Doherty J.A. (who wrote the unanimous decision of the Court of Appeal) adopted the trial judge's reasoning, stating (at para. 31), "[a]s the trial judge pointed out, known criminals should not be more immune from s. 216(1) stops than law abiding citizens who are not known to the police." However, Doherty J.A. did so subject to two caveats: 1. the additional police purpose cannot be used to infringe the liberty and security of the detained person beyond that contemplated by the purpose underlying s. 216 of the Highway Traffic Act; and 2. the additional purpose must itself be a lawful one, even though not in and of itself justifying a detention. Highway traffic stops used as a ruse to effect an illegal purpose such as an unauthorized search are not protected. Likewise, if the additional police purpose is itself improper, the stop will not be lawful even if there are also valid highway safety concerns. Doherty J.A. provided as an example of such an improper purpose, one which is motivated by race. He held, at paras. 38 and 39:

While I can find no sound reason for invalidating an otherwise proper stop because the police use the opportunity afforded by the stop to further some other legitimate interest, I do see strong policy reasons for invalidating a stop where the police have an additional improper purpose. Highway safety concerns are important, but they should not provide the police with a means to pursue objects which are themselves an abuse of the police power or are otherwise improper. For example, it would be unacceptable to allow a police officer who has valid highway safety concerns to give effect to those concerns by stopping only vehicles driven by persons of colour.

Section 216(1) of the HTA does not, in my view, authorize discriminatory stops even when there is a highway safety purpose behind those stops.

When I refer to improper police purposes I include purposes which are illegal, purposes which involve the infringement of a person's constitutional rights and purposes which have nothing to do with the execution of a police officer's public duty. Officers who stop persons intending to carry out unauthorized searches, or who select persons to be stopped based on their sex or colour, or who stop someone to vent their personal animosity toward that person, all act for an improper purpose. They cannot rely on s. 216(1) of the HTA even if they also have highway safety concerns when making the stop.

(Emphasis added)

46 The police in this case rely, not only on the general power to stop in s. 216(1) of the Highway Traffic Act, but also on s. 130 of the Act, the careless driving provision. The police officers specifically deny that Mr. Khan's race was a factor in their decision to stop his car.

47 In my opinion, if the officers are believed, their evidence affords proper grounds for them to stop Mr. Khan's vehicle. He was driving in a careless manner, without due care and attentions and they had valid highway safety concerns. Further, they had reasonable suspicions about whether his conduct was furtive. While these concerns might not have been sufficient in and of themselves, to warrant a detention, they were not improper purposes and were concerns properly within the execution of a police officer's duty. The presence of such suspicions would not invalidate an otherwise proper highway traffic stop: *Brown v. Durham Regional Police Force: R. v. Coates* (2003), 176 C.C.C. (3d) 215 (Ont. C.A.).

(ii) Similar Fact Evidence and Racial Profiling

48 On the other hand, if as Mr. Khan alleges, he was targeted by these officers because of racial profiling, this would constitute an improper purpose and would invalidate the stop, and everything that flowed from the stop. A finding that a police officer was motivated by racism, whether consciously or unconsciously, is a serious matter. It ought not to be made lightly. Knowledge of the existence of racial profiling by police of young black males driving expensive cars, even knowledge that such profiling exists in Metro Toronto, is not sufficient to establish that it actually occurred in this particular case. It would be improper to infer racist motivation in the absence of evidence that the particular officer or officers involved actually had that intent: *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484.

49 In *R. v. Brown* (2003), 173 C.C.C. (3d) 23 (Ont. C.A.) the Court of Appeal noted that racial profiling will rarely be proven by direct evidence, as officers are not likely to admit their motivation was overtly racist. The Court held that one way racial profiling can be proven is by circumstantial evidence where: (a) the circumstances relating to the detention correspond to the phenomenon of racial profiling (as is the case here); and (b) the circumstances provide a basis for the court to infer that the police officer is lying about why the police officer singled out the accused person for attention: *R. v. Brown* at paras. 44 and 45.

50 As I noted in my earlier ruling on the production motion in this case, that is only one of the ways in which racial profiling may be proven. I ruled that an accused could also rely on evidence that the officer in question had acted in a similar manner in the past or on evidence of bias. In the case before me, evidence was called by the defence with respect to the detention and arrest of Sheldon Jackson by these same two officers in March 2001 (about 7 months before Mr. Khan's arrest). The officers testified they were driving along St. Clair Avenue and passed Mr. Jackson who was driving in the opposite

direction in an expensive BMW. Mr. Jackson is also a young black male. Officer Asselin noticed that when Mr. Jackson saw the police, he gave a strange look, as if he looked guilty. The officers made a U-turn and followed Mr. Jackson's vehicle which, they testified, was being driven in an erratic manner suggestive of an attempt to avoid the police. A CPIC check disclosed the owner of the vehicle was a suspended driver. The officers pulled Mr. Jackson over. As Officer Asselin was approaching the car, he said he could see Mr. Jackson frantically trying to put a white powdered substance wrapped in clear plastic into a hand-held single bottle beer cooler with a zipper on it. Mr. Jackson was asked to step out of the car and he accompanied Officer James to the police cruiser. Officer Asselin then went to Mr. Jackson's car and retrieved the beer cooler, which did in fact turn out to have cocaine in it.

51 Mr. Jackson's version of events was quite different. He said he was driving along St. Clair Avenue going toward a restaurant to meet a friend. He did not notice the police car on St. Clair and did not make eye contact with the officers. He turned off St. Clair and travelled a number of one-way side streets to find a parking spot. He then noticed the police lights and siren behind him and pulled over. He was asked to step out of the car, which he did. He was also asked to unlock the doors, which he also did. Officer James then took him back to the police cruiser while Officer Asselin proceeded to search his car. Mr. Jackson acknowledged there were drugs in the car and that they were inside a zipped up red single-bottle beer cooler. However, he said he put the drugs in the bottle cooler earlier that day, and then hid it in a space at the back of his headrest, which, he said, is where Officer Asselin actually found it.

52 As I have already ruled, evidence of discreditable conduct, bad character or bias is admissible against a mere witness in a trial even in circumstances where it might not be admissible against an accused. The strictures surrounding the admission into evidence of similar fact evidence against an accused do not apply with the same rigour against a non-accused witness. That said, many of the same considerations apply to the weight that can be given to the similar fact evidence and its degree of probative value.

53 In *R. v. Handy* (2002), 164 C.C.C. (3d) 481 at paras. 102-136, the Supreme Court of Canada held that in assessing the probative value of similar fact evidence it is relevant to consider: (a) the potential for collusion; (b) identification of the issue in question; (c) the degree of similarity or dissimilarity between the allegations in the case and the similar fact evidence (otherwise referred to as "connecting factors"); and (d) the strength of the evidence that the similar acts actually occurred. Within category (c), the trial judge should consider any factor connecting the similar facts to the circumstances being alleged, including:

- (i) proximity in time of the similar acts;
- (ii) extent to which the other acts are similar in detail to the conduct alleged;
- (iii) number of occurrences of the similar acts;
- (iv) circumstances surrounding or relating to the similar acts;
- (v) any distinctive features unifying the incidents;
- (vi) intervening events;
- (vii) any other factor which would tend to support or rebut the underlying unity of the similar events.

(*R. v. Handy* at para. 82)

54 As a preliminary matter, I am satisfied that collusion between Mr. Jackson and Mr. Khan can be ruled out. They did not know each other. Each, coincidentally, happened to retain the same criminal defence counsel and it was their lawyer who noted the similarity between the two arrests and the fact that the same two officers were involved.

55 Other factors enhancing the probative value of the similar fact evidence in this case are their proximity in time and the degree of similarity between them. In both situations, the targeted individuals were young black men driving expensive vehicles. The officers' initial reasons for curiosity were slightly different in each case. Mr. Khan was staring straight ahead, and he failed to take the right-of-way; Mr. Jackson had a look of guilt on his face. However, both Mr. Khan and Mr. Jackson allege that the police followed them for no reason and then pulled them over without there having been any traffic infraction. In both cases, the police allege a traffic infraction in full view of the police as an initial reason for the stop. In both cases, the police allege that as they approached the stopped vehicle they could see the driver attempting to hide something. Both Mr. Khan and Mr. Jackson allege that they were first removed from their cars and detained by Officer James while Officer Asselin searched their vehicles and that they were not arrested until his search turned up drugs.

56 There are also dissimilarities between the two events, as one would expect. Further, the circumstances in which the incidents arose (a routine traffic stop) are so similar that there will almost inevitably be some degree of similarity between the two events. For example, when police pull over any vehicle for an alleged traffic violation and then find drugs, it is not uncommon for the driver to deny the traffic violation. There will always be some similarities between cases of this nature.

57 I do not propose to dwell at length on these and other connecting factors because in my opinion there are two critical factors that completely undermine the probative value of the similar fact evidence. The first, and lesser in importance, is the fact that there is only one incident. That is not necessarily fatal. However, the fact that a person has done something once before is not nearly as compelling as the fact he has done it, say, twenty times before. If there is only one other similar incident, its probative strength in other areas would need to be greater. For example, I would be less concerned about attaching weight to one prior incident if it was so similar in detail as to be almost a "fingerprint." Conversely, in the absence of striking similarity, I would be reluctant to conclude that one prior incident was a coincidence so compelling as to be highly probative.

58 The second, and most persuasive, negative factor is the strength of the evidence that the similar act actually occurred. Sheldon Jackson is not the most credible of witnesses. He is an admitted drug dealer. He has a criminal record, including a drug-related offence. He was a suspended driver, but was driving. He was using a fabricated driver's license with false identification, and had used it with success in the past. He attempted to flee the scene. He had a motive to fabricate, as he is himself facing charges of possession for the purposes of trafficking in relation to that same event. Of course, none of this means he is not telling the truth about this particular incident. However, since proof that this incident occurred depends entirely on Mr. Jackson's credibility, I am driven to the conclusion that this evidence is frail, at best, and possibly unproven.

59 I have a discretion in determining the weight and admissibility of evidence of this nature. Having heard the evidence, I am of the view that its probative value is too weak to attach any weight to it. That means, as is undoubtedly often the case, Mr. Khan is in the difficult position of having to prove racial profiling by showing that the police have lied.

(iv) Further Detention After the Stop

60 Normally, on a routine traffic stop, the police would have no reason to remove a person from his vehicle and further detain him. In this case, however, if the officers are believed, their actions in removing Mr. Khan from his vehicle, even abruptly and with some force, are justifiable. According to the officers, Mr. Khan was rummaging in his glove compartment with his right hand, while at the same groping around in the footwell area at the driver's side with his left hand. He was told to stop and to put

his hands on the steering wheel but he did not comply. I accept that it was vital for police safety that Mr. Khan's actions be stopped. He could, for example, have been attempting to retrieve a firearm or other weapon. Objectively speaking, there could have been reason to believe Mr. Khan was attempting to hide something, and both officers said they believed that to be the case.

61 In analyzing the reasonableness of police action after the fact, it is crucial to view it in context. Police officers are required to make split-second decisions in highly volatile, dangerous conditions. As noted by Doherty J.A. in *R. v. Golub* (1997), 117 C.C.C. (3d) 193 at para. 18 (Ont. C.A.), in such situations, "[j]udicial reflection is not a luxury the officer can afford." As a question of law, looking at the totality of the circumstances as described by the officers, there was a "constellation of objectively discernible facts" giving the officers articulable cause to further detain Mr. Khan and remove him from his vehicle: *R. v. Simpson* at 501.

62 On the other hand, if Mr. Khan is believed, he did absolutely nothing wrong, and the police had no cause to remove him from his car prior to the discovery of his license suspension. Again, the determining factor will be the credibility of the witnesses.

E. UNREASONABLE SEARCH (s. 8 of the CHARTER)

63 As is the case with the arbitrary detention issue, the resolution of the s. 8 unreasonable search issue depends entirely on the facts. If Mr. Khan's version of the events is accepted, clearly this was an unauthorized search. On the other hand, if Officer Asselin's evidence is accepted, he could see the accused trying to stuff something under his seat, he could see the garbage bag lying there and he could detect a very strong smell unique to a large quantity of cocaine. He had reasonable grounds to arrest Mr. Khan and lawful authority to seize the garbage bag and search the car prior to its being impounded.

F. ANALYSIS and CONCLUSIONS

64 I found Kevin Khan to be a very credible witness. He did not exaggerate his evidence, but rather testified in a straightforward manner. He was not evasive. He was unshaken in cross-examination. The Crown suggests it is not plausible that Mr. Khan would recall whether or not he was looking at something in his lap area or was distracted by something as he was driving along Livingston. Mr. Khan's explanation is a compelling one. He recalls what happened because of the events that followed and knows he did not do anything to cause the police to pull him over. What is most compelling, however, is how Mr. Khan's evidence dovetails exactly with all the other evidence, apart from that of the two arresting officers. In particular, his version of events fits the timing from internal police computer records, which he could not possibly have known about before, as they were only disclosed at trial. It is useful to look at his evidence juxtaposed against the other evidence which verifies it

- (a) Mr. Khan's Evidence: Mr. Khan recalls making a call to his prospective client, Mr. Thompson, shortly before he reached the intersection of Locksley and Livingston.

Verification: Mr. Thompson confirms receiving a call from Mr. Khan who said he was five minutes away. Mr. Khan's cell phone records confirm a call to Mr. Thompson at 12:20 p.m. The police computer records indicate the CPIC check, called in by Officer James when Mr. Khan was at the intersection, took place at 12:23:12 p.m.

- (b) Mr. Khan's Evidence: Mr. Khan said that upon his being pulled over, he immediately provided his driver's license and other documentation to Officer

Asselin and both officers then returned to their cruiser while he waited one to three minutes.

Verification: The police computer discloses that the two officers stopped Mr. Khan's car at 12:25:08 p.m. That is consistent with the time it would take to travel from the Livingston/Locksley intersection to the point of the stop on Marlee. The police computer further reflects a CPIC check on Mr. Khan's name and date of birth at 12:26:47 p.m., with a result transmitted at 12:26:48 p.m. That is consistent with the time it would take for the officers to obtain his license after the stop at 12:25 p.m. and enter the information on the computer in the police cruiser.

- (c) Mr. Khan's Evidence: Mr. Khan testified that when the police came back to his car, he was asked to step out of the vehicle and was told his license had been suspended.

Verification: The CPIC check conducted at 12:26:47 p.m. revealed that Mr. Khan's license was under suspension. Officer James' notes indicate Mr. Khan was removed from the car at 12:27 p.m. Immediately thereafter, Mr. Khan spoke to two individuals on his cell phone. They both confirm that he told them he had been stopped by the police and his driver's license was under suspension. This would be a highly unusual thing for Mr. Khan to do if he had not in fact been told that by the police. However, Officer James maintains that he did not find out this information until he returned to the cruiser after Mr. Khan's cell phone had been taken away from him.

- (d) Mr. Khan's Evidence: Mr. Khan testified he was told by Officer James that he would not be able to drive the car because his license was under suspension and that he therefore called Mr. Duhaney to see if he could pick up the car. When Mr. Duhaney stated that he did not have a driver's license, Mr. Khan asked him to check with a person named Jerome.

Verification: Mr. Khan's cell phone bill indicates a call was placed to Mr. Duhaney at 12:31 p.m. Mr. Duhaney confirmed the call and its content. Mr. Duhaney was unable to contact Jerome and therefore came over to the area where Mr. Khan was being detained.

- (e) Mr. Khan's Evidence: Mr. Khan testified that right after he spoke to Mr. Duhaney, he received a call from Mr. Thompson who was waiting for him and wondering where he was. Mr. Khan told Mr. Thompson about the license suspension and Mr. Thompson agreed to come over and pick up the car.

Verification: Mr. Khan's cell phone bill indicates an incoming call at 12:32 p.m. which lasted 2 minutes and 11 seconds. Mr. Thompson confirmed the call and its content. Mr. Thompson actually attended at the scene and spoke to the officers there about taking the car.

- (f) Mr. Khan's Evidence: Mr. Khan testified that after he finished the call with Mr. Thompson, Officer Asselin (who in the meantime had been searching Mr. Khan's vehicle) called out to his partner that he should take away the cell phone and place him under arrest. At that point he was handcuffed, placed in the

police cruiser and advised of his rights.

Verification: The cell phone call with Mr. Thompson commenced at 12:32 and lasted for 2 minutes and 11 seconds. The precise number of seconds after 12:32 p.m. that the call was received are not recorded on the bill. Therefore, the call could have been anywhere between 12:32:00 to 12:34:11 p.m. and 12:32:59 to 12:35:10 p.m. Officer James' notes indicate that Mr. Khan was placed in the cruiser and read his rights at 12:35 p.m., which is consistent with Mr. Khan's evidence and his cell phone records.

65 Mr. Khan's evidence is fully consistent with the documentary record and the evidence of independent witnesses. His story hangs together and makes sense. This is in stark contrast to the evidence of the police officers, which is both inconsistent with the documentary evidence and defies common sense. I have the following significant difficulties with the testimony of the officers:

- (a) if, on the Crown's theory, Mr. Khan did not proceed in front of the police because he had a kilogram of cocaine in his car and did not want to be followed by them, why would he turn right on Livingston and follow the police car? He could have turned left on Livingston or proceeded straight ahead and avoided the police altogether. Further, once he had turned onto Livingston and was following the police car, why would he drive in such a manner as to attract police attention?
- (b) Officer Asselin testified that as soon as he opened the door to remove Mr. Khan a strong odour of cocaine came "flying out of the car." He said he had "never smelt it that strong before" and that he knew there "had to be quite a quantity of cocaine there to make that odour so present." He said he advised his partner to place Mr. Khan under arrest for possession of cocaine for the purpose or trafficking before he had even looked inside the bag. First of all, it is highly improbable that cocaine inside two closed zip-lock bags and then further wrapped in a garbage bag would have a smell so strong it would be overpowering as soon as the car door was opened. However, because I was curious about that fact, I had the cocaine seized by the police brought into the courtroom and placed on the dais during the trial. I could smell nothing. Since the cocaine was now inside a sealed plastic exhibits bag which is fairly thick, I directed that the bag be opened. I allowed the bag to sit on the dais, fully opened for a considerable period of time. I could smell nothing. I then placed the open bag on the floor at my feet to see if the smell would rise up. It did not. I could smell nothing. Finally, I actually sniffed directly at the top of the open bag. The smell was certainly detectable, and exactly matched Officer Asselin's description of what a large quantity of cocaine smells like. However, it certainly did not come "flying out," and it is difficult to believe that even the most sensitive of human noses would have smelled it to the extent described by Officer Asselin, given that he was standing outside the car and the cocaine was lying on the floor of the car inside three plastic bags, two of which were zipped shut.
- (c) Officer James testified that he arrested Mr. Khan for possession of cocaine for the purposes of trafficking at 12:27 p.m. However, he did not handcuff him and he did not place him in the police cruiser. He also did not advise Mr. Khan of his rights until 12:35 p.m. There was no adequate explanation for a delay of 8 minutes between the purported arrest and the point when Mr. Khan was placed in the cruiser and advised of his rights.

- (d) The police records show the vehicle was stopped at 12:25:08 p.m. Both Officer Asselin and Officer James indicated that they approached Mr. Khan's car very quickly because they believed he was hiding something under his seat. According to Officer Asselin he removed Mr. Khan from the car almost immediately upon reaching the car. He had, according to him, recovered the drugs right at that time. What was he doing for the next 8-9 minutes that occupied him to the point that he did not notice Mr. Khan standing right beside the car talking on his cell phone?
- (e) Officer James said that after he placed Mr. Khan under arrest for possession for the purposes of trafficking, he stood by the side of the road with Mr. Khan and permitted Mr. Khan to make calls on his cell phone. He said he did not listen to the calls and did not know who Mr. Khan called. If Mr. Khan was the drug dealer Officer James apparently believed him to be, he could easily have been notifying other drug associates to dispose of incriminating evidence elsewhere, or he could have been warning them away from the area, or any other manner of things that good police practice would seek to avoid at that stage. It is difficult to understand how a first class constable with five years experience on the job could make such an obvious mistake. His only explanation for this breach of protocol was that Mr. Khan was being polite and cooperative and so he was returning the favour. Officer Asselin alleged that he reprimanded Officer James for allowing Mr. Khan to use his cell phone, but Officer James did not recall being reprimanded.
- (f) Officer James testified that he did not return to the police cruiser until he went there with Mr. Khan after Mr. Khan's cell phone had been taken from him. He said that would have been 12:35 p.m., which is consistent with Mr. Khan's cell phone records. Officer James testified that for the entire 8 minutes from the point of arrest to the time he went back to the cruiser, he was at the roadside with Mr. Khan. Therefore, the first opportunity he had to run a CPIC check on Mr. Khan's name was when he returned to the cruiser at 12:35 p.m. He testified he ran that CPIC check at 12:35 p.m. However, the police computer records indicate the CPIC check was run at 12:26:47 p.m. Officer James conceded on cross-examination that this could not be reconciled with his evidence and that the times must have been wrong.
- (g) Officer James denies telling Mr. Khan his license was under suspension while they were at the side of the road. He said he did not know the license was under suspension until after he returned to the cruiser at 12:35 p.m. However, Mr. Khan told both Mr. Thompson and Mr. Duhaney that the police had stopped him and that he could not drive his car because his license was under suspension. How could he have known that unless the police told him? And even if he had known himself about the suspension, why would he be calling people and telling them they should come and get his car because he was a suspended driver? That is not consistent with him having been told he was under arrest for possession of cocaine for the purposes of trafficking.
- (h) Officer James acknowledged he told Mr. Khan he could have somebody pick up his car rather than having it towed. Why would an experienced officer, who had just placed a believed drug dealer under arrest for possession for the purposes of trafficking, think it would make sense for the drug dealer's friends to come and pick up the car before there had been any decision about whether it would be impounded or further examined for evidence or forensic analysis?
- (i) Allowing Mr. Khan to arrange for a friend to pick up his car is fully consistent with normal police procedure if the problem was his license suspension (as he

alleges) and completely inconsistent with police procedure after an arrest for possession of a kilogram of cocaine.

- (j) Officer Asselin testified that as soon as he saw Mr. Khan talking on the cell phone, he got out of Mr. Khan's car (which he had been searching) and removed the cell phone from him. Officer James testified that Officer Asselin called out to him to take the cell phone away. That was Mr. Khan's evidence as well. Further, Officer James testified that Officer Asselin said he should take away the cell phone because they would be keeping the car. The logical inference is that Officer Asselin knew why Mr. Khan was making phone calls; he was trying to find someone to pick up his car. The further logical inference is that something had now arisen that made it necessary or advisable to impound the car. Yet, if the drugs had been found right at the beginning, as Officer Asselin said, nothing would have changed in the meantime. Officer Asselin's own evidence is that he knew immediately upon finding the drugs that the car would be impounded.

66 I accept the evidence of Mr. Khan as more credible than that of either officer. I quite simply do not believe the evidence of the officers. The cell phone record times and the police computer times are highly likely to be accurate. Those records match each other, are internally consistent and are completely consistent with Mr. Khan's testimony. They are inconsistent with the evidence of the police officers. It cannot be true that Officer James did not run the CPIC check on Mr. Khan's name until 12:35 p.m. He ran it at 12:26 p.m. That does not fit at all with the evidence of the officers as to how events unfolded at the car and how the bag of cocaine was discovered. It also makes no sense that Mr. Khan was permitted to use his cell phone after he had been arrested for possession of a kilogram of cocaine, nor that he was told he could have a friend pick up his car. In my view, the evidence is overpowering that the testimony of Officer Asselin and Officer James is untrue.

67 I find as a fact that when Mr. Khan was pulled over, he was asked for his driver's license and a check was run on CPIC. Because that revealed a license suspension, he was told he could have someone come to pick up his car. He started making phone calls at 12:31 p.m. In the meantime, Officer Asselin was conducting an illegal search of Mr. Khan's car and at about 12:24 or 12:35 p.m. he found the cocaine. It was only at that point that Mr. Khan was placed under arrest. In accordance with protocol, he was immediately handcuffed, placed in the police cruiser and advised of his rights.

68 It follows from these conclusions that the officers involved in this case fabricated significant aspects of their evidence. Why did they single out Mr. Khan on Marlee Avenue at about noon on a Monday in October and decide to search his car? Because he was a young black male driving an expensive Mercedes. That is a reasonable inference based on all of the circumstances and the evidence before me. The Ontario Court of Appeal has held that where the "circumstances relating to a stop correspond to the phenomenon of racial profiling and provide a basis for the court to infer that the police officer is lying about why he or she singled out the accused person for attention, the record is then capable of supporting a finding that the stop was based on racial profiling": *R. v. Brown* at para. 45. Having concluded that the officers in this case fabricated their evidence in respect of the search of Mr. Khan's car, I cannot find their evidence to be at all reliable with respect to the events leading up to the stop. Mr. Khan has proven to be a reliable and credible witness. I accept his evidence that he did nothing to cause the officers to stop him. In any event, even if there had been some minor thing about his driving, I do not believe that was the real reason he was stopped. The police stopped him for an improper purpose. Mr. Khan was targeted for this stop because of racial profiling, because he was a black man with an expensive car.

69 Mr. Khan's rights under both s. 8 and 9 of the Charter were violated. The Crown fairly conceded

that if there was a finding of racial profiling, it would not be appropriate to admit the evidence of the cocaine under s. 24(2) of the Charter. I agree entirely. Conduct of this kind by the police is reprehensible. It cannot be condoned or excused. It is a most serious breach of Mr. Khan's human rights, as well as his rights under ss. 8 and 9 of the Charter. The evidence of the cocaine is excluded. In the absence of the drugs, the Crown has no case. The charge against Mr. Khan is dismissed.

G. DEFENCE ON THE MERITS: CARE AND CONTROL OF THE COCAINE

70 Given the result on the Charter motions, it is not, strictly speaking, necessary for me to consider whether the charge would be proven on its merits but for the illegal means by which the evidence was obtained. However, in fairness to Mr. Khan and in recognition of what he has been through, I think it appropriate to clear his name completely.

71 As I have already stated, I found Mr. Khan to be a credible witness. He testified he did not know the cocaine was in the car. I believe him. The bags the cocaine was in were tested for fingerprints, but Mr. Khan's prints were not found. I do not believe Officer Asselin's testimony that the drugs were under the driver's front seat. Given the amount of time it took him to find the cocaine, I conclude it was secreted somewhere else in the car where it was less likely to have come to Mr. Khan's attention. The car had been out of his possession for the entire weekend prior to this incident, which occurred at around noon on Monday. He had only been in the car for about half an hour before he was stopped by the police. I find as a fact that the cocaine was not his and that he did not know it was in the car. He therefore did not have possession, care or control over the cocaine. He is not guilty of the offence charged.

MOLLOY J.

cp/s/in/qw/qlrme

drs/e/qljxb/qljal