S.C.C. File No. 36328

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF ALBERTA)

BETWEEN:

ALI HASSAN SAEED

Applicant
(Appellant)

- and -

HER MAJESTY THE QUEEN

Respondent
(Respondent)

RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL ATTORNEY GENERAL OF ALBERTA, RESPONDENT AND MOTION FOR AN EXTENSION OF TIME

(PURSUANT TO RULE 27 OF THE RULES OF THE SUPREME COURT OF CANADA)
(PURSUANT TO RULE 49 OF THE RULES OF THE SUPREME COURT OF CANADA)

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OVERVIEW

1. The respondent consents to the applicant's request for an extension of time.

2. The respondent further agrees with the applicant that the issue raised in this case is one of national importance in the area of criminal law, and for that reason is an appeal in which leave should be granted. The decision of the Alberta Court of Appeal leaves the law with respect to penile swabbing in an unworkable state.

3. Should leave to appeal be granted, that will be where the respondent's agreement with the applicant will end. Mr. Saeed raped a 15 year-old girl at knifepoint on the lawn of his apartment complex, and the results of the testing of the penile swab taken upon his arrest prove his guilt conclusively. Exclusion of that evidence would allow Mr. Saeed to artificially turn this case into a frailties-of-eyewitness-identification case. That is not the interests of justice.

PART I: STATEMENT OF FACTS

4. The complainant was a 15 year-old group-home resident who, together with her 14 year-old friend, left her group home at midnight one night to go party with a friend, "Skip". Skip took them to an apartment where there were two men. The complainant had been to this apartment before, and had met the appellant before. She knew him only as "Ali".

5. After a period of time drinking, the complainant became very tired and drunk. Her friends helped her into a bedroom to sleep. The 14 year-old friend and Skip then left the apartment to go for a walk around the complex, leaving the complainant, Ali, and the other man behind in the apartment. When Skip and the friend returned from their walk, the complainant was no longer in the apartment. They went outside looking for her. They heard her screaming and found her on the ground, with her clothing ripped off, with Ali on top of her with a knife in his hand. Ali's pants were below his knees and he was attempting to force the complainant's legs open. The complainant was screaming "help". Skip pulled Ali off of the complainant. The 14 year-old helped the complainant up and back to Skip's car. They drove back to the girls' group home and from there the police were called.

6. Police responded to the call at 5:10 a.m., gathered initial information and sent the complainant to hospital (she had facial injuries and appeared to have a broken nose). One of the officers took the 14 year-old witness in his car so that she could point out the apartment building

where this occurred. She directed him to the building and told the officer the apartment number. The complainant's hair extensions and sandals were found outside on the lawn there. The officer then left the witness in the back of his police car as he went inside. He knocked on the door of the apartment indicated by the witness and the applicant answered the door and said his name was Ali. There was another person in the apartment whose name was Abas Nur. The applicant was arrested. The time of his arrest was 6:05 a.m. As he was led outside to another waiting police car, the witness 14 year-old saw him being brought out of the building and recognized him as the rapist.

7. For reasons not clearly explained in the evidence, someone released the appellant from the police station at 7 a.m. It was a mistake, and so the investigating officer went back to Ali's apartment again at 8:35 and arrested him again and brought him back to the station. He was placed in a dry cell, seated on the floor, handcuffed with his hands behind his back to a steel pipe on the wall of the cell. It was not a comfortable position. He was not given the opportunity to use the washroom. At 8:45 a.m., police obtained information from the complainant, who was interviewed at the hospital, that there had been penile/vaginal penetration. Mr. Saeed was kept in his dry cell, handcuffed to the wall, until 10:25 a.m. when police obtained a penile swab as a search incident to arrest. An officer gave Mr. Saeed instructions and allowed him to wipe his own penis with the swab. The officer then seized the swab. Later testing showed the complainant's DNA on the swab from the applicant's penis.

8. At trial, defence sought to exclude the DNA results on the basis that the search was unreasonable, violating s. 8 of the *Charter* and therefore should be excluded under s. 24(2). An expert testified regarding DNA transfer and degradation. There was evidence that the risk of loss of DNA due to wiping, washing or urination is the reason the taking of a penile swab should be done as soon as possible. There was evidence that a penile swab was potentially better evidence than looking for DNA on a suspect's seized underwear. And there was evidence from the officers involved in the decision to take a penile swab in this case: Det Fermaniuk testified that he considered getting a warrant, but considered this to be incident to arrest (and therefore no warrant was required). He believed the offence had occurred between 4:00 and 5:00 a.m. (so 5-6 hours had elapsed already). He testified that obtaining a warrant would have taken three hours or longer and that that amount of delay "would not be respectable or honourable or – or caring for the accused", given that Mr. Saeed was being handcuffed to the wall as he was. No consideration was given to seeking a telewarrant. The other officer involved also testified as to the purpose of the search: to

collect evidence. He also testified about his concern not to have Mr. Saeed handcuffed to the wall for too long.

9. At trial, the trial judge followed the framework for analysis suggested in *R v Golden*, 2001 SCC 83 and concluded that the police took appropriate steps to ensure the violation of privacy of the accused was minimal, and the procedure was carried through in a reasonable fashion. However, the trial judge, following the decision of Schulman J in *R v Laporte*, imported a requirement of "exigent circumstances" into the assessment of whether a search is properly incident to an arrest, and because she found no "exigent circumstances" held there had been a s. 8 violation.[1] Despite the finding that the swabbing was an unreasonable search and seizure, following a *Grant* analysis, the trial judge nonetheless concluded the interests of society in having the evidence admitted outweighed the other considerations, and the evidence was not excluded.

10. This issue became the sole issue on appeal. The appellant argued that the evidence ought to have been excluded under 24(2) of the *Charter*, and the Crown response was that the trial judge erred in finding a s. 8 violation in the first place as this was properly search incident to arrest (akin to GSR or other skin swabbing procedures).

11. The appeal was dismissed, but with a very unsatisfactory decision in terms of guidance for future cases. McDonald JA gave a well-reasoned judgment, agreeing that there was no s. 8 violation and this was a proper search incident to arrest (analogizing to *R v Backhouse*, the Ontario Court of Appeal's GSR swabbing case). He found that the trial judge erred in incorporating a requirement of exigent circumstances for swabbing done at a police station, but also found that the highly time-sensitive nature of the evidence being sought does constitute exigent circumstances in any event. The majority judgment of Watson and Bielby JJA, however, is what has left the law of penile swabbing in Alberta in an unsatisfactory state. The majority judgment introduces a new prerequisite to the exercise of the power to search incident to arrest – what is termed "the presumptive requirement for prior judicial authorization". Relying on *R v Spencer,* 2014 SCC 43, and *Riley v California*, 134 S Ct 2473 (2014), neither of which had been mentioned in the arguments at the hearing of the appeal, and drawing an analogy to *R v Stillman*, [1997] 1 SCR 607, where it was seizure of the accused's DNA that was sought in the seizure, the majority concluded that penile swabbing, because it is of a nature as to "infringe upon bodily integrity", must have a warrant presumption: "Such a search cannot be justified, without warrant, simply on the basis of being

[1] Ruling, p. 288, line 33 to p. 289, line 33

incidental to arrest, without more." The majority therefore found a s. 8 violation (although not the same violation as the trial judge found). The majority described the "essential character of the breach" as failing to get a telewarrant. The appeal was nonetheless dismissed on the basis that the evidence was properly admissible on a s. 24(2) analysis.[2]

[2] Court of Appeal judgment, Tab 4 of the applicant's materials

PART II: POINTS IN ISSUE

12. While the applicant's conviction depends on a s. 24(2) decision that the DNA evidence was admissible, the applicant properly acknowledges that the real issue is the characterization of the alleged *Charter* breach. The respondent's position on appeal will be that there was no breach – that penile swabbing, properly done in accordance with the decisions in *R v Backhouse* and *R v Golden*, is justified under the police power to search incident to arrest. No exigent circumstances are required (unless, as in *R v Golden*, the location of the search deprives the accused of privacy), and there is no warrant presumption prerequisite to the exercise of the power to search incident to arrest.

PART III: ARGUMENT

Application for Extension of Time

13. The respondent consents to the extension of time.

Application for Leave

14. The Court of Appeal majority's decision in this case leaves the law with respect to penile swabbing in an unsatisfactory state. The new warrant presumption would prohibit penile swabbing incident to arrest in circumstances where police have a person arrested for a sexual assault, having reasonable and probable grounds for his arrest and also having information to support a belief that evidence of that offence (the complainant's vaginal fluid) could be preserved by means of swabbing. Instead, while such highly relevant evidence is at risk of deterioration or other loss, the Court of Appeal majority would have police keep a man handcuffed with hands behind his back to a bar on a wall in a dry cell, without water, without toilet facilities, and presumably somehow also preventing him from urinating, while an officer prepares an information to obtain a warrant and then contacts the appropriate judicial officer either in the ordinary way or by way of telecommunications, and while that judicial officer takes the necessary time to consider the application and issue a warrant. This proposed procedure would interfere with the humane treatment and respect for the dignity of the detainee, and would also unnecessarily increase the risk of loss of highly probative evidence in sexual assault cases.

15. A warrant presumption prerequisite to the exercise of the power to search incident to arrest has not been the law in Canada in the past, and ought not to be the law in Canada now.

16. The majority decision puts the state of the law in Alberta in conflict with decisions of lower courts in three other provinces where the power to search incident to arrest has been accepted as proper authority for penile swabbing. In *R v Harasemow*, 2014 BCSC 2287, penile swabbing was found to be a proper search incident to arrest. In *R v Laporte*, 2012 MBQB 227, it was accepted that penile swabbing could properly be done incident to arrest, although the trial judge in that case incorporated an exigent circumstances requirement in the same way the trial judge in this case did. In Ontario, penile swabbing was found justified incidental to arrest in *R v Hodgson*, [2008] OJ No

4748 (Sup Ct), and two subsequent trial decisions accepted that it could be incident to arrest (although evidence in those cases was excluded for other reasons).[3]

17. Not only does the majority decision hamper the ability of police to search incident to arrest, but the majority's characterization of penile swabbing as being an infringement upon bodily integrity may preclude any existing legislative warrant authority from authorizing such a search. General warrants under s. 487.01 of the *Criminal Code* are not available for any act which involves interference with the bodily integrity of any person. Existing DNA warrant provisions are available only to authorize the taking of a sample of a suspect's DNA. If penile swabbing is characterized in the traditional sense, as encroaching on privacy and humility interests, perhaps the general warrant and related telewarrant provisions could apply. Schulman J had his doubts in *R v Laporte*.[4] But if the characterization is, as the majority states, interference with bodily integrity, then a general warrant is statutorily precluded.[5]

18. The proper characterization of penile swabbing, and the ability of the police to undertake this important investigative procedure is an issue of general and national importance in the area of criminal law, and the respondent therefore agrees with the applicant that this is an appeal that ought to be heard by this Court.

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[3] *R v Pun*, 2012 ONSC 5305 (Applicant's authorities, Tab 9); and *R v Amey*, 2013 ONSC 5108 (Applicant's authorities, Tab 4)
[4] *R v Laporte*, 2012 MBQB 227 at para 21 and fn 1 (Applicant's authorities, Tab 8)
[5] *Criminal Code*, RSC 1985 c C-46, s. 487.01(2)

PART IV: SUBMISSION ON COSTS

19. The Respondent makes no submissions regarding costs.

PART V: NATURE OF ORDER REQUESTED

20. The respondent consents to the requested extension of time.

21. The respondent agrees with the applicant and submits that the application for leave to appeal should be granted in this case.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at the City of Edmonton, in the Province of Alberta, this 24th day of March, 2015.

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PART VI: TABLE OF AUTHORITIES

PART VII: STATUTES RELIED UPON

Criminal Code, RSC 1985, c C-46, s. 487.01

487.01 (1) A provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552 may issue a warrant in writing authorizing a peace officer to, subject to this section, use any device or investigative technique or procedure or do any thing described in the warrant that would, if not authorized, constitute an unreasonable search or seizure in respect of a person or a person's property if

(a) the judge is satisfied by information on oath in writing that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed and that information concerning the offence will be obtained through the use of the technique, procedure or device or the doing of the thing;

(b) the judge is satisfied that it is in the best interests of the administration of justice to issue the warrant; and

(c) there is no other provision in this or any other Act of Parliament that would provide for a warrant, authorization or order permitting the technique, procedure or device to be used or the thing to be done.

Limitation

(2) Nothing in subsection (1) shall be construed as to permit interference with the bodily integrity of any person.

Code criminal, LRC 1985, ch C-46, s 487.01

487.01 (1) Un juge de la cour provinciale, un juge de la cour supérieure de juridiction criminelle ou un juge au sens de l'article 552 peut décerner un mandat par écrit autorisant un agent de la paix, sous réserve du présent article, à utiliser un dispositif ou une technique ou une méthode d'enquête, ou à accomplir tout acte qui y est mentionné, qui constituerait sans cette autorisation une fouille, une perquisition ou une saisie abusive à l'égard d'une personne ou d'un bien:

(a) si le juge est convaincu, à la suite d'une dénonciation par écrit faite sous serment, qu'il existe des motifs raisonnables de croire qu'une infraction à la présente loi ou à toute autre loi fédérale a été ou sera commise et que des renseignements relatifs à l'infraction seront obtenus grâce à une telle utilisation ou à l'accomplissement d'un tel acte;

(b) s'il est convaincu que la délivrance du mandat servirait au mieux l'administration de la justice;

(c) s'il n'y a aucune disposition dans la présente loi ou toute autre loi fédérale qui prévoie un mandat, une autorisation ou une ordonnance permettant une telle utilisation ou l'accomplissement d'un tel acte.

Limite

(2) Le paragraphe (1) n'a pas pour effet de permettre de porter atteinte à l'intégrité physique d'une personne.