

R. v. Gawich, [2005] O.J. No. 5834

Ontario Judgments

Ontario Superior Court of Justice

Toronto, Ontario

B.L. Croll J.

Oral judgment: October 19, 2005.

[2005] O.J. No. 5834

Between Her Majesty the Queen, and Ahmed Gawich

(19 paras.)

Case Summary

Constitutional law — Canadian Charter of Rights and Freedoms — Legal rights — Protection against arbitrary detention or imprisonment — Protection against unreasonable search and seizure — Right to retain and instruct counsel without delay — Remedies for denial of rights — Specific remedies — Exclusion of evidence — Application to exclude evidence allowed because the accused's right to be secure against unreasonable search and seizure, his right not to be arbitrarily detained, and his right to retain and instruct counsel were violated — Canadian Charter of Rights and Freedoms, 1982, s. 8, s. 9, s. 10(b), s. 24(2).

Application by the accused, Ahmed Gawich, to exclude evidence on the basis that his right to be secure against unreasonable search and seizure, his right not to be arbitrarily detained, and his right to retain and instruct counsel were violated -- The accused sought to have any observations made by the police officers, any evidence seized by the officers, and any statements made to the officers around the time of arrest and detention excluded -- Three police officers responded to a radio call that a motion counter alarm had been triggered at a store on the corner of Jane and Bloor West -- Officer Granata, took a slow approach in a marked cruiser, and noticed the accused with a black knapsack -- Granata testified that after he and the accused made eye contact, the accused looked away then began walking away -- Granata testified that he saw the accused look back at him in the police car -- He testified that he then proceeded to the convenience store, where he was informed by Officer Forestall that there was a broken window at the store -- Granata then doubled-back and stopped to ask Granata questions about where he had been, where he was going, and what was in his knapsack -- He told the accused to open his knapsack and found three unopened packs of cigarettes -- According to Granata, moments later Forestall drove up and advised him that there had been an entry into the store and that cigarettes were found on the floor -- Granata then arrested the accused for break and enter -- Officers' Forestall and Rochon unequivocally testified that Granata never attended the store before arresting the accused.

HELD: Application allowed.

Officers' Forestall and Rochon's testimony was preferred and it was found that Granata never attended the convenience store prior to arresting the accused -- The detention of the accused commenced when the accused was asked about his knapsack -- Granata did not have articulable cause to detain the accused -- The detention was arbitrary -- At the time of the search of the accused's knapsack, there was no lawful detention, no arrest, no warrant, and no concern for officer safety or for anyone else's safety -- The search of the knapsack and seizure of its content was unlawful -- The accused's right to counsel was also breached in that he was not advised of his rights upon detention but only after his arrest -- There was clearly a causal connection between the evidence that the accused sought to exclude and the breaches of his Charter rights -- The utterances the accused made were conscriptive evidence -- As such, the admission of such evidence would affect trial fairness and it should be excluded -- The combined impact of the Charter breaches led to a very serious violation of the accused's rights --

The administration of justice would suffer if the evidence in this case were admissible.

Statutes, Regulations and Rules Cited

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

Counsel

P. Tsui, Esq. for the Crown

S. Reid, Esq. for the Accused

B.L. CROLL J. (orally)

1 Ahmed Gawich is charged with break and enter and theft, mischief by damaging a window, the value of which is under \$5,000, and being in possession of property, that is cigarettes, knowing that they were obtained by the commission of an offence. All these offences are alleged to have occurred on February 5, 2005. Mr. Gawich has elected to be tried by judge alone and as a preliminary matter, the defence brings an application to exclude evidence on the basis that Mr. Gawich's rights to be secure against unreasonable search and seizure, not to be arbitrarily detained and to retain and instruct counsel pursuant to sections 8, 9 and 10(b) of the Charter were violated. As a result of these violations, the defence seeks to have any observations made by the police officers, any evidence seized by the officers, and any statements made to the officers around the time of the arrest and detention, excluded from evidence pursuant to section 24(2) of the Charter.

2 Three police officers gave evidence about what happened early in the morning of February 5, 2005. A fourth officer, the scene of crime officer, gave evidence that focused primarily on the photographs that were taken at the scene.

3 On February 5, 2005, there had been a radio call over the police radio that a motion counter alarm had been triggered at a store at 2454 Bloor Street West. This is the address of the Old Mill Convenience Store, a convenience store in the Bloor West and Jane area of Toronto. Sergeant Sal Granata was in the area and he responded to the call by driving westbound on Bloor Street West, in his marked cruiser. His evidence was that he took a slow approach, as it was his practice to observe the area in these situations. As he came to the Jane and Bloor West intersection, he saw Mr. Gawich for the first time, on the north side of Bloor West, between Jane Street and the convenience store. Mr. Gawich was standing there, zipping or unzipping a black knapsack. According to Sergeant Granata, the two men made eye contact, and then Mr. Gawich looked away and began walking East on Bloor Street West. Sergeant Granata testified that he continued to drive westbound past Mr. Gawich, but kept on observing him through his side and rear-view mirrors and by looking back over his shoulder, and that he saw Mr. Gawich look back at him. Sergeant Granata's evidence was that he then arrived at the convenience store, and while remaining in his car, was informed by Officer Forestall, who was on the scene, that there was a broken window at the store. At that time, Sergeant Granata could still see Mr. Gawich and he made a u-turn in his car to go and talk to him. This part of Sergeant Granata's evidence conflicts with the evidence of both officer Forestall and Officer Rochon, the two other officers who responded to the radio dispatch. Both Officers Forestall and Rochon

testified that Sergeant Granata was never at the scene of the convenience store until after Mr. Gawich had been arrested. However, according to Sergeant Granata he doubled back from the scene and pulled up beside Mr. Gawich, at which time he observed Mr. Gawich gesturing to a man in a cube van making a delivery. He then stopped his car while Mr. Gawich was walking westbound on the north side of Bloor West, and called out to Mr. Gawich. Mr. Gawich stopped and was quite cooperative, answering most of the questions that the sergeant asked. The initial questions included where Mr. Gawich was going, where he was coming from, and what was in the knapsack. Mr. Gawich told Sergeant Granata that he was going home, to Islington, after being with friends, and that he had cigarettes in his knapsack, maybe three or four, and that they were DuMaurier. Sergeant Granata then said, 'Open the knapsack', at which time he noted three unopened packs of cigarettes: Benson and Hedges, Rothmans and DuMaurier. Moments afterwards, according to Sergeant Granata, Officer Forestall approached in his squad car, and advised that there had been an entry into the convenience store, and that cigarettes were on the floor of the store. Sergeant Granata then arrested Mr. Gawich for break and enter. Mr. Gawich was put in the rear of Officer Forestall's squad car, and read his rights to counsel by Officer Forestall.

4 Officer Forestall's evidence was that he arrived at the scene of the convenience store with his partner, Officer Rochon, about a minute or two after the call came over the radio dispatch. Although he too, like Sergeant Granata, makes a practice of always observing people in the area of a call, he had no recollection of seeing Mr. Gawich while en route to the convenience store. Upon seeing the broken window on the west side of the store, Officer Forestall testified that he told the radio dispatcher that there was a confirmed break and enter at the store. At the same time, he heard over the radio that Sergeant Granata was investigating a male walking eastbound on Bloor West, and he drove over to meet up with Sergeant Granata, leaving Officer Rochon behind to secure the property. When Officer Forestall got to Sergeant Granata, Sergeant Granata was investigating Mr. Gawich. Officer Forestall's evidence was that he told the sergeant there had been a break and enter at the convenience store at which time Sergeant Granata arrested Mr. Gawich. The two officers then put Mr. Gawich in officer Forestall's car, and he was read his right to counsel by Officer Forestall.

5 As I have just noted, Sergeant Granata's evidence differs in some respects from that of Officers Forestall and Rochon. Indeed, both Officers Forestall and Rochon were quite clear that Sergeant Granata was not at the scene before Mr. Gawich was arrested. I have considered this conflict in the evidence, and, in particular, I have considered the certainty in the evidence of both Officers Forestall and Rochon. I have also considered the fact that Officer Forestall reported what he saw to the dispatcher as a break and enter, and not simply a broken window, which is how Sergeant Granata said Officer Forestall described the scene. Given the unequivocal evidence of officers Forestall and Rochon and the fact that Officer Forestall apparently never described just a broken window, I prefer the evidence of Officers Forestall and Rochon over that of Sergeant Granata with respect to when he was at the scene, and I am satisfied that Sergeant Granata did not go to the scene prior to questioning Mr. Gawich.

6 Having resolved some of the evidentiary issues, I will now begin with the section 9 issue, that is, whether Mr. Gawich was subject to an arbitrary detention. Section 9 of the charter provides that:

Everyone has the right not to be arbitrarily detained.

It must first be determined whether Mr. Gawich was detained. The Crown concedes that Mr. Gawich was detained, and submits that the detention occurred when Sergeant Granata asked Mr. Gawich to open the knapsack. I note here that while the Crown refers Sergeant Granata "asking" Mr. Gawich to open the knapsack, there was nothing in Sergeant Granata's evidence to lead me to conclude that this was phrased as a request, such as "Will you please open the knapsack" but rather, I am satisfied it was more of a directive, "Open the knapsack".

7 The defence position is that the detention began as soon as Sergeant Granata, in whatever words he used, conveyed the message to Mr. Gawich that he was to stop walking away, because Sergeant Granata wanted to ask him some questions. In *Therens*, the Supreme Court of Canada reviewed what constitutes detention:

Detention may occur without the application or threat of physical restraint if the person concerned submits or acquiesces in the deprivation of liberty because he reasonably believes he has no other choice.

In this regard, the Court noted most people are unaware of the precise limits of the law, and rather than risk any problems, they err on the side of caution, assume lawful authority and comply with the police demands. Sergeant Granata was in uniform, in a marked police car, with his sidearm weapon. He never advised Mr. Gawich that he did not have to speak with him. Mr. Gawich and Sergeant Granata were just a few feet away from the marked police cruiser. They were alone, on the street in the dark hours of an early winter morning. Given the circumstances, I am satisfied that detention occurred shortly after the start of the questioning, when Sergeant Granata moved from the general information about Mr. Gawich's coming and going, to asking about what was in the knapsack, how many packs and the like. In my view, the detention occurred before the instruction to open the knapsack.

8 However, regardless of when detention actually began, given the Crown's concession that there was detention, the more significant question is whether it was arbitrary.

9 Sergeant Granata adopted his evidence from the preliminary inquiry that when he first saw Mr. Gawich, Mr. Gawich was about 100 meters from the convenience store. Sergeant Granata stated that his suspicions were first aroused after he and Mr. Gawich made eye contact, and Mr. Gawich quickly looked away. He then noticed Mr. Gawich looking in the general direction of his police cruiser, again piquing the Sergeant's interest. When Mr. Gawich quickened his pace while crossing the street against the light, this further troubled Sergeant Granata. Sergeant Granata also stated that his suspicions were heightened when the driver of the cube van did not appear to acknowledge or recognize Mr. Gawich, although he acknowledged that he had made the decision to stop Mr. Gawich before he observed the gesture to the driver of the cube van. In other words, it was Mr. Gawich's demeanour and his proximity to the address where the motion alarm had been reported in the early morning hours that caused Sergeant Granata to be suspicious and to stop and question Mr. Gawich. On the evidence, there was no other reason to detain Mr. Gawich. Given my rejection of Sergeant Granata's evidence that he had been to the scene and had spoken to Officer Forestall before detaining Mr. Gawich, it cannot even be said that he knew that there had been a broken window.

10 In *Simpson*, [1993] O.J. No. 308, Doherty J., writing for the Ontario Court of Appeal, said;

that a lawful detention requires that the detaining officer must have articulable cause to detain the person under investigation. Articulable cause requires a factual basis to support reasonable suspicion that the person being detained is criminally implicated in the activity under investigation.

At the time when Mr. Gawich was questioned about his knapsack, and indeed when his knapsack was searched, Sergeant Granata knew nothing more than that there had been a counter alarm call at the convenience store. By Sergeant Granata's own evidence, at neither time did he know that anything had been taken from the store, nor did he know that cigarettes were seen on the floor of the store. No description of any person involved with the alarm had been broadcast. Mr. Gawich was not observed in any criminal activity that morning, except for possibly jaywalking, which was never an issue for Sergeant Granata. There was certainly no evidence to suggest that Jane and Bloor West is a high crime area.

11 On these facts, I find nothing to justify the detention, whether as I have found, it commenced at the time Mr. Gawich was first asked about his knapsack, or as conceded by the Crown, it commenced with the search of the knapsack. In *Mann*, [2004] 3 S.C.R. 59, the Supreme Court of Canada restated the principle from *Simpson*, and held that police officers may detain an individual if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that the detention is reasonably necessary on an objective view of the circumstances. None of the information that Sergeant Granata had could provide reasonable suspicion that Mr. Gawich was involved in a criminal activity, and that the detention was necessary on an objective view. Indeed, Sergeant Granata did not even know what the criminal activity was, and acknowledged on cross-examination that the alarm could have been triggered by an animal, or inadvertently by the owner of the store. For all these reasons, I am satisfied that Mr. Gawich was arbitrarily detained, in breach of his section 9 Charter right.

12 Section 8 provides protection against unlawful search and seizure. At the time of the search of Mr. Gawich's

knapsack, there was no lawful detention, no arrest, no warrant and no concern for officer safety, or the safety of anyone else. I am satisfied that the search of the knapsack violated Mr. Gawich's section 8 Charter right.

13 Finally, I turn to the 10(b) right to counsel. At no time did Sergeant Granata ever advise Mr. Gawich of his right to counsel. In closing submissions, the Crown conceded that there was a 10(b) breach at the time the investigation evolved into a detention, that is, at the time Mr. Gawich was instructed to open the knapsack. In my view, the 10(b) breach occurred earlier, that is, when Mr. Gawich was asked questions about the contents of his knapsack. However, even on the Crown's concession, the 10(b) breach occurred before certain utterances were made by Mr. Gawich.

14 I now turn to the defence submission that as a result of the Charter breaches, any utterances made by Mr. Gawich, anything found in the search of the knapsack, and any observations made about tears in Mr. Gawich's clothing should be excluded from evidence under 24(2) of the Charter. There are two preconditions to the exclusion of evidence. Firstly, the evidence must be "obtained in a manner that infringed or denied one's Charter rights." In this case, without the arbitrary detention, there would have been no opportunity to search the knapsack. Had there been no search of the knapsack, which allowed Sergeant Granata to see the three cigarette packages, there would have been no reason to arrest Mr. Gawich after Officer Forestall apparently reported that cigarettes were found on the floor. With no arrest, there would be no opportunity to observe Mr. Gawich's clothing close up. Had Mr. Gawich been provided his right to counsel at the detention stage, the utterances may not have been made. There is clearly a causal connection between the evidence that the defendant seeks to exclude and the breaches. As such, in this case, the first precondition has been met.

15 Secondly, it must be determined whether the admission of the evidence would bring the administration of justice into disrepute. In this regard, the applicable test is set out in Collins, and requires the Court to consider three factors, namely trial fairness; seriousness of the breach; and the effect of the admission of the evidence on the administration of justice.

16 The utterances made by Mr. Gawich in light of the 10(b) breach are conscriptive evidence. To allow these statements into evidence would affect trial fairness, and as such, I am satisfied that they should be excluded. However, as the observations of the police officers and the contents of the knapsack are not conscriptive evidence, this evidence must still be assessed in terms of seriousness of the breach and the administration of justice. In assessing the seriousness of the charter violations, the factors that should be considered include

1. Whether the violation was inadvertent or committed in good faith, or was it willful, deliberate and flagrant
2. Whether the violation was serious or merely of a technical nature:
3. Whether the violation was motivated by a situation of urgency or necessity, and
4. Whether there were other investigative means available to the police that would not infringe the Charter.

17 In this case, Sergeant Granata admitted that he could have provided Mr. Gawich with his right to counsel immediately upon stopping him, or before the knapsack was searched, but that he did not think it was necessary, as they were just having a conversation. He also acknowledged that he did not want to break up the flow of his conversation with Mr. Gawich as he wanted to get more information. While the 10(b) breach directly relates to the admission of the utterances, in my view, this breach can still be considered when assessing the admissibility of other impugned evidence as it typifies the attitude of Sergeant Granata, and was closely entangled with the section 8 and 9 breaches. Sergeant Granata readily admitted that there was no urgency to the situation, no concern that Mr. Gawich would flee and no concern about losing evidence. There was nothing technical about these breaches, as for example, there may be in the case of a defective search warrant. Sergeant Granata in his evidence continually and repeatedly, referred to his interest in, and suspicion of, Mr. Gawich. This interest and suspicion, in

my view, amounted to nothing more than a hunch, and as Trafford J. stated in R. v. Peck, [2001] O.J. No. 4581:

stopping people on the basis of a hunch is a serious departure from the standard we demand and expect from our police officers.

18 When assessing the seriousness of the breach, I must also comment in particular on the Crown's closing submission that there was no bad faith on the part of Sergeant Granata, and that the questioning and detention simply "evolved organically". In this regard, I again refer to Mann, where the Supreme Court of Canada cited its decision in Buhay, [2003] 1 S.C.R. 631, and noted that:

Good faith cannot be claimed if a Charter violation is committed on the basis of a police officer's unreasonable error or ignorance as to the scope of his or her authority.

Sergeant Granata is a police officer with 17 years experience. He told the Court that the right to counsel did not enter his mind, despite acknowledging in cross-examination that at some point his questioning of Mr. Gawich about became an investigative detention. For him to act on a hunch and nothing more, and to flagrantly ignore the right to counsel in this case is inexcusable. In my view, the combined impact of the three breaches lead to a very serious violation of one's basic right to walk freely down the street without interference.

19 Finally, I have considered the negative impact that excluding the evidence will have on the administration of justice. In this regard, I have considered the seriousness of the offences. Breaking into a convenience store by smashing a window to allegedly steal three packages of cigarettes is far, from the most egregious of crimes. While the administration of justice will suffer somewhat if this evidence is excluded, in my view, it would suffer much more if the evidence is admissible. By his conduct, Sergeant Granata displayed a serious disregard for Mr. Gawich's constitutional rights. As Doherty J. stated in Clayton, [2005] O.J. No. 1078:

The Courts cannot be seen to at one and the same time wave a judicial finger of disapproval at police conduct that violates individual rights while embracing the evidentiary product of these violations whenever they do not undermine trial fairness.

For all these reasons, evidence of any utterances made by Mr. Gawich, evidence of any observations made by Sergeant Granata and Officer Forestall, and evidence about the contents of the knapsack are excluded from the evidence.