

Citation: ☀ R. v. Abarca
2019 BCPC 232

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Registry: Vancouver

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

REGINA

v.

LUIS FERNANDO ABARCA

**RULING ON CHARTER VOIR DIRE
OF THE
HONOURABLE JUDGE R.P. HARRIS**

Counsel for the Crown:

C. Coulson

Counsel for the Defendant:

S. Janicki

J. Davidson

Place of Hearing:

Vancouver, B.C.

Date of Hearing:

February 11, 12, 13, June 25, 2019

Date of Ruling:

September 18, 2019

INTRODUCTION

[1] On June 22, 2017, Constable Cheng checked a vehicle that was stopped in a parking stall with its brake lights on. Constable Cheng approached the vehicle and he began interacting with the occupant, Mr. Abarca. The interaction culminated in a detention, a foot chase, a capture, an arrest, a search and the discovery of a quantity of drugs. Mr. Abarca is now charged with drug offences.

[2] In response to the charges, Mr. Abarca applies to exclude evidence on the basis that his rights as guaranteed by the *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982, c 11*, (*Charter*) were violated. Specifically, he argues he was arbitrarily detained, his vehicle was unreasonably searched and he was denied the opportunity to immediately retain and instruct counsel. The trial commenced with a *voir dire* wherein three officers testified. Mr. Abarca did not call evidence.

[3] If it is established that Mr. Abarca's rights were violated, the court will then have a hearing on whether the admission of the evidence would bring the administration of justice into disrepute pursuant to section 24 (2) of the *Charter*.

THE EVIDENCE

Constable Cheng

[4] Constable Cheng has been a police officer since the spring of 2011. He has worked in patrol and as School Liaison Officer. He has performed numerous traffic stops and he has conducted some drug investigations. Constable Cheng has performed investigations related to simple drug possession, he has responded to tips involving drug trafficking, he has performed drug investigations related to drug trafficking in schools and he has been involved with two investigations related to the cultivation of marihuana.

[5] On June 22, 2017, Constable Cheng was on duty, working as a School Liaison Officer and driving a marked police unit. Shortly before noon he was driving through a

parkade when he saw a Honda Accord (the “vehicle”) parked in a stall, facing a concrete wall with its brake lights on.

[6] Constable Cheng did not see anyone in the vehicle and he only saw the back of the front passenger’s seat. This caused him to believe that the driver’s seat was reclined. Given that he could not see anyone inside the vehicle, Constable Cheng wondered why the brake lights were on.

[7] Constable Cheng queried the vehicle’s licence plate and he received information indicating that the registered owner had a Chinese name and he received a photograph of the registered owner. Further information indicated that the vehicle was linked to drug trafficking investigations, that the registered owner had a history related to drug trafficking, and that the registered owner did not have a driver’s licence.

[8] Constable Cheng testified he had previously seen cars parked in a similar fashion. In those instances, the explanation for the parking included; medical distress, mechanical breakdown, a person taking a nap, or a stolen vehicle. Constable Cheng felt that any of these possibilities could explain the vehicle’s positioning.

[9] Constable Cheng decided to conduct a traffic stop. He then stopped behind the vehicle and activated his emergency lights. Constable Cheng exited his police car and walked to the driver’s side of the vehicle. He testified that he approached the vehicle pursuant to section 33 of the *Motor Vehicle Act*, which he understood related to determining if someone could drive based on the status of their driver’s licence.

[10] On reaching the driver’s side, Constable Cheng saw Mr. Abarca who was seated in the driver’s seat in a reclined position with his eyes closed. He noted that Mr. Abarca did not match the photograph of the registered owner. He also observed 2 cellular phones and a wallet in Mr. Abarca’s left hand and a cellular phone in his right hand. Constable Cheng does not recall if he saw the keys to the vehicle when he first approached.

[11] When Constable Cheng was standing at the driver’s door one of the phones that Mr. Abarca was holding rang. Mr. Abarca opened his eyes and Constable Cheng told

him that the registered owner did not have a driver's licence and he asked to see Mr. Abarca's driver's licence. Mr. Abarca responded by saying something about getting his driver's licence.

[12] What followed was a constant flow of movement. Specifically, Mr. Abarca began looking around the interior of the vehicle. He checked around the centre console, he reached to the front leg area, he also moved things from one hand to the other and at one point he moved his hands toward the ignition. At this stage, Constable Cheng observed that there was a key in the ignition. He also felt that Mr. Abarca's search for his licence was unusual in that he did not check the wallet that he was holding.

[13] Eventually, Constable Cheng believed that Mr. Abarca was rummaging through things because he was nervous. When asked by the Crown as to what he was thinking, Constable Cheng responded that he was concerned about officer safety and he explained that he had experienced similar situations where the occupant ultimately tried to escape and assault officers. A further concern was that Constable Cheng did not know if Mr. Abarca was trying to get a weapon or an implement that would help him get out of the situation.

[14] With the above in mind, Constable Cheng told Mr. Abarca to stop rummaging and he advised him that he was being detained for officer safety. In response, Mr. Abarca quickly moved his hands toward the storage compartment located at the base of the driver's door. When this occurred, Constable Cheng opened the driver's door so he could see Mr. Abarca's hands and to ensure that there were no weapons within reach.

[15] Once the door was open, Constable Cheng could see Mr. Abarca's hands and he noted that he was not holding a weapon. He told Mr. Abarca to get out and to face the vehicle. As he got out of the vehicle, Mr. Abarca told Constable Cheng to calm down and he held his hands out in front of him. Once out of the vehicle, Constable Cheng told Mr. Abarca to turn around. Mr. Abarca did not follow Constable Cheng's direction so Constable Cheng repeated that he was being detained for officer safety. He then grabbed Mr. Abarca's left wrist and Constable Cheng felt Mr. Abarca resist.

[16] Thereafter, there was a brief struggle and Mr. Abarca managed to pull away from Constable Cheng. Constable Cheng told Mr. Abarca that he was under arrest for obstruction. Constable Cheng testified that his grounds for the arrest stemmed from Mr. Abarca not producing a driver's licence.

[17] While telling Mr. Abarca that he was under arrest Constable Cheng noticed Mr. Abarca clench his fist and raise it. This caused Constable Cheng to believe that that he was about to be punched. Constable Cheng took out his police baton and Mr. Abarca started to run.

[18] Constable Cheng pursued Mr. Abarca and shouted for him to stop and that he was under arrest. Eventually Mr. Abarca tripped on a curb and fell to the ground. During the pursuit, Constable Cheng tried to grab Mr. Abarca's leg and when he did this he was holding his police baton.

[19] Once on the ground Constable Cheng began taking control of Mr. Abarca. Then, and with the assistance of Constable MacDermid, Mr. Abarca was handcuffed.

[20] Constable Cheng searched Mr. Abarca and he found a car key. Mr. Abarca was taken from the arrest location and placed into the rear of Constable MacDermid's police car. At 11:49 am, Constable Cheng told Mr. Abarca that he was under arrest for obstruction and informed him of his right to counsel and he provided him with the police warning. Mr. Abarca responded that he understood and that he wanted to speak to a lawyer.

[21] Constable Cheng then obtained Mr. Abarca's name and date of birth. He used this information to make enquiries on the police computer. Constable Cheng's information received matched Mr. Abarca. Specifically, he received a photograph and information regarding Mr. Abarca's address.

[22] At 11:57 am, Constable Cheng returned to the vehicle. His purpose was to search the vehicle for Mr. Abarca's wallet as Constable Cheng suspected it contained identification. Constable Cheng acknowledged that Mr. Abarca's identity had been confirmed by the police computer, however, he had experienced situations where

information had been incorrectly entered into the police computer. An example provided was a situation where the information was correct but the photograph of the subject was wrong.

[23] Later in his evidence Constable Cheng testified that he returned to the vehicle in order to look for Mr. Abarca's wallet and the phones. When questioned on this point Constable Cheng indicated he intended on seizing the vehicle and he was going to put the phones with Mr. Abarca's effects. He also indicated that he was doing an inventory search.

[24] As Constable Cheng approached the vehicle, he noticed that it was in the same position as when the foot chase started and that the driver's door was still open. When he was a few feet from the vehicle, Constable Cheng looked toward the open driver's door and he saw a clear plastic baggie that contained smaller baggies. It was his belief that the baggies contained drugs. The bag was in the handle area of the interior side of the driver's door and clearly visible. Constable Cheng then searched the vehicle and he found money in the centre console, three phones, and a wallet. Upon finding these items, Constable Cheng, informed Mr. Abarca at 12:20 pm that he was under arrest for possession for the purpose of trafficking, and for several counts of breaching his court order. Mr. Abarca indicated that he understood and he told Constable Cheng that he wanted to speak with a lawyer.

[25] Constable Cheng called for a tow truck and he waited with the vehicle. Constable Cheng had no further dealings with Mr. Abarca.

[26] In cross-examination, Constable Cheng confirmed that he could not recall if the vehicle was running when he approached it, that he did not see exhaust, and that he did not check the hood to see if it was warm. Constable Cheng also confirmed that he had never dealt with Mr. Abarca and that prior to getting out of the vehicle that Mr. Abarca had not been aggressive, that he did not swear, nor was he disrespectful.

[27] As for his grounds to arrest Mr. Abarca, Constable Cheng testified that the obstruction arose because of Constable Cheng's inability to confirm Mr. Abarca's identity or driving status due to Mr. Abarca pulling away.

[28] Constable Cheng denied striking Mr. Abarca with his police baton. He indicated that he was holding his police baton when he was running and just before Mr. Abarca fell he reached toward him while still holding his baton.

[29] Counsel for Mr. Abarca challenged Constable Cheng's assertion that he was looking for the wallet to identify Mr. Abarca. Constable Cheng confirmed that the majority of the identifying information that Mr. Abarca provided matched the information from the police computer. Specifically, the residential address, the recognizance conditions, the photograph and the place of birth. Despite these matches Constable Cheng responded that he preferred government identification rather than relying on the police computer.

[30] As for giving Mr. Abarca his *Charter* rights for the drug offences, Constable Cheng testified he started searching the vehicle at 11:57 am and that the search took approximately 5 to 10 minutes and that he did not *Charter* Mr. Abarca for the drug offences until 12:20 pm.

[31] Constable Cheng was asked why he did not bring Mr. Abarca to the (nearby) community police office so he could access counsel and Constable Cheng indicated that the community police office lacked privacy thus private communication with counsel would be impossible.

Constable MacDermid

[32] On June 22, 2017, Constable MacDermid was dispatched to assist Constable Cheng who was checking a male. While heading to Constable Cheng's location, Constable MacDermid heard Constable Cheng broadcast that he was involved in a foot pursuit.

[33] Constable MacDermid went to Constable Cheng's location and he saw Constable Cheng chasing Mr. Abarca. Constable MacDermid noted that Constable Cheng had his baton extended and he appeared to swing it at Mr. Abarca's lower calf at which point Mr. Abarca fell to the ground and Constable Cheng started to handcuff him.

[34] Constable MacDermid exited his police car and assisted with the handcuffing process. During this process Constable Cheng told Mr. Abarca that he was under arrest and Mr. Abarca asked why he was being arrested. Constable Cheng informed him that he was being arrested for obstructing a police officer. Mr. Abarca was then escorted to Constable MacDermid's police car.

[35] Mr. Abarca was secured in Constable MacDermid's police car and Constable Cheng gave Mr. Abarca his *Charter of Rights* and police warning. Thereafter, Constable Cheng went to retrieve items that had fallen at the arrest location. Constable MacDermid then drove Mr. Abarca to the vehicle and waited while Constable Cheng searched the vehicle.

Constable Koskelainen

[36] On June 22, 2017, Constable Koskelainen was dispatched to assist Constable Cheng. Constable Koskelainen arrived at 1:00 pm and he took custody of Mr. Abarca. Constable Koskelainen does not recall if he received information about Mr. Abarca wanting to speak to a lawyer. Constable Koskelainen assumed that this had been done, however, he did not provide evidence in support of his belief. Constable Koskelainen read to Mr. Abarca the standard police warning. Constable Koskelainen then transported Mr. Abarca to the Burnaby RCMP detachment arriving there at 1:26 pm.

[37] At the detachment, Mr. Abarca was searched, fingerprinted, and photographed and these activities could have taken between 30 minutes to an hour. At 2:29 pm, Mr. Abarca was given access to a lawyer and according to Constable Koskelainen there could have been multiple attempts before that. Constable Koskelainen does not recall if the cells were busy with multiple prisoners.

ALLEGED CHARTER BREACHES

[38] Mr. Abarca alleges the following *Charter* breaches; the right not to be arbitrarily detained, the right to be given immediate access to counsel and the right to be free from unreasonable search or seizure.

Section 9 *Charter* - Arbitrary Detention

[39] Mr. Abarca alleges three breaches of his right not to be arbitrarily detained. He argues that Constable Cheng lacked the authority to detain him for the purpose of ensuring he had a driver's licence. He also argues that Constable Cheng lacked the authority to detain him for officer safety and finally he argues that his arrest for obstructing a police officer was unlawful.

Detention – To Ensure That Mr. Abarca Had A Driver's Licence

[40] The Crown argues that Mr. Abarca was operating a motor vehicle and therefore, pursuant to section 33 of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 ("*MVA*"), he was justified in detaining Mr. Abarca for the purpose of obtaining his driver's license.

[41] In contrast, counsel for Mr. Abarca argues he was not driving or operating a motor vehicle and therefore he was not legally required to produce a driver's licence. Accordingly, Constable Cheng lacked the authority to detain Mr. Abarca for the purpose of demanding that he produce a driver's licence.

[42] The lawfulness of Mr. Abarca's detention is dependent on whether or not Mr. Abarca was obligated to produce a driver's licence. I will consider this issue first and then I will determine if Mr. Abarca was detained.

[43] The issue of whether or not Mr. Abarca was required to produce a driver's licence can be decided by considering if he was operating a motor vehicle as contemplated by section 33 of the *MVA*.

Was Mr. Abarca Operating a Motor Vehicle?

[44] In determining this issue, I will first consider the meaning of “operate” as contained in section 33 of the *MVA*, I then will make findings of fact and I will conclude by deciding if Mr. Abarca’s actions equated to operating a motor vehicle.

Meaning of “operate” in Section 33 of the *MVA*

[45] Section 33 of the *Act* reads in part:

Production of licence and liability card, duplicates

33 (1) Every person, except

- (a) a person driving or operating a motor vehicle exempted under section 2 (5) or section 8 or 10, or
- (b) a person driving or operating a motor vehicle of a fire department of a municipality, must have his or her driver's licence and driver's certificate and a motor vehicle liability insurance card or financial responsibility card, issued for the motor vehicle he or she is driving or operating, in his or her possession at all times while driving or operating that motor vehicle on a highway, and must produce the licence, certificate and card for inspection on demand of a peace officer.

[46] From the above and on the plain reading, an individual who is driving or operating a motor vehicle must have their driver’s licence in their possession at all times and they must produce it on the demand of a police officer.

Relevant Principles of Statutory Interpretation

[47] Section 8 of the *Interpretation Act*, RSBC 1996, c 238, s 33, provides:

Enactment remedial

8 Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[48] Further to the above, statutory interpretation requires one to harmoniously interpret the words of a statute in accordance with their entire context, their grammatical

and ordinary sense, the scheme and object of the statute, and the intention of the legislature: (*Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21).

[49] When interpreting regulatory legislation, I am mindful that the objectives of regulatory legislation should not be impeded by relying on principles developed in another context. Further, the importance of regulatory legislation necessitates that the courts be cautious about unduly interfering with the regulatory role of government: (*R.v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 paras.84-5).

Plain Meaning Of The Word “operate”

[50] In the *Concise Oxford English Dictionary, Ninth Edition*, “operate” is defined as: manage, work, control; put or keep in a functional state; produce an effect; exercise influence.

[51] The online edition of, *The Oxford English Dictionary* defines control as: “to cause or direct the functioning of; to control the working of (a machine, boat, etc.).”

“Operate” in the MVA

[52] The term “operate” appears in several sections of the *MVA*. It is noteworthy that a person must be licenced in order to drive or operate a motor vehicle. In my view, the context signifies that the operation of a motor vehicle involves activities that require a proven standard of competency before a person is awarded a driver’s licence and the competency involves not only the driving of a motor vehicle, but also the operation of a motor vehicle. In other words, it signifies something more than just sitting in a driver’s seat.

[53] A further review of the *MVA*, underscores what appears to be an inconsistent application of the word “operate.” For example, section 146 addresses speed limits and makes it an offence to drive or operate a motor vehicle in excess of the speed limit. Whereas, section 147 addresses the speed limit in school grounds and makes it an offence to drive over the posted speed limit during regular school days. There is no mention of operating a motor. Similarly, section 148 sets out the circumstances in which

a person is excessively speeding and notably the section only mentions that a person must not drive in excess of 40 km/h over the applicable speed limit.

[54] As for definitions, section 1 contains definitions that apply to the entire *MVA*. This section does not define the term drive or operate. In contrast, section 94.1 defines “operate” in the following manner:

Notice of driving prohibition

94.1 (0.1) In this section and in section 94.6:

...

"operate", in relation to a motor vehicle, means to drive the motor vehicle or to have care or control of the motor vehicle.

[55] Significantly, section 94.1 expressly limits the definition to sections 94.1 and 94.6. This makes sense given the section deals with persons in control of vehicles while impaired. To accept that “operate” as defined in section 94.1 of the *MVA* should have broad application including to section 33 would result in circumstances where an individual would be required to possess a driver’s licence and produce it on the demand of a peace officer if they were in the care and control of a motor vehicle. As such, simply occupying the driver’s seat of a motor vehicle would require a driver’s licence.

[56] In *R. v. Steeden*, 1995 CanLII 322 (BCCA), the court commented on “operate” in the context of considering whether failing to apply the parking brake before exiting a parked motor vehicle was driving. At paragraphs 15 and 16, the court commented:

15. It is apparent from the various other expressions that are used throughout the ***Motor Vehicle Act*** to describe activity which has the effect of exerting control over the movement of motor vehicles, that the Legislature has made a deliberate choice of language when describing the rules of the road or defining various offences. For example, the word “operate” is used to describe the controlled movement of both cycles and motorcycles; see s. 185 and s. 195 respectively. Similarly, the expression “drive or operate” is used in the description of some rules; see, for example: s. 145, (Obedience to speed signs); s. 146, (Obeying flagman); and s. 151 (Speed limits), whereas “drive” alone is used when describing other rules such as those found in s. 149, (Careless driving); s. 150, (Slow driving); and s. 155, (Driving on laned roadway). While it is not always easy to visualize a circumstance in which the alternative “operate” would

describe an activity distinct from driving, as for example with respect to the speed limit provisions found in s. 151, one must nevertheless accept that the Legislature's choice of language was deliberate and that the use of different words was intended to convey different meanings.

16. The word "operate" obviously defines a scope of activity which is broader than the word "drive". A vehicle need not be in motion to be in operation. In that sense, "driving" is a more specific form of activity than "operating". In my view, this is significant, particularly when the history of s. 149 is considered. Prior to 1950, the predecessor to the present section was described in the following language:

[57] And at paragraph 20 the court observed:

20. From all of this it would seem that the Legislature was aware, and made use, of a wide variety of words and phrases to describe different types of activity associated with the movement of or control over motor vehicles. They cover a range all the way from the very specific and narrow concept of "driving" to the much broader concept of "care or control". ...

[58] The Crown provided the court with cases wherein "operate" was considered in the context of civil cases. Although, I have reviewed the cases, I find their context, specifically insurance matters, to be of little assistance because in those cases the term is considered in context of financial risk which contrasts to the *MVA*'s context of protecting the public.

Conclusion re: "operate"

[59] From the above, I conclude that "operate" within section 33 of the *MVA* relates to those activities which at their narrowest involve; activating, attempting to activate, using or attempting to use a system of a motor vehicle that is integral to its operation. Examples include, starting a motor vehicle, controlling a motor vehicle's idle, having control of a motor vehicle while it is idling, attempting to start a motor vehicle or activating the ignition of a motor vehicle. I base my conclusion on the wording of section 33, the plain meaning of operate, the reasoning in *Steedan* and the purpose of the *MVA*, specifically, protecting the public by regulating activities related to the operation of motor vehicles.

Factual Findings

[60] From the evidence I make the following findings. Constable Cheng saw the vehicle parked and he noticed the brake lights on. Constable Cheng did not see anything to suggest that the engine was on or that the ignition was activated. On approaching the vehicle, Constable Cheng saw Mr. Abarca reclined in the driver's seat with his eyes closed and holding items in each hand. Shortly thereafter, Mr. Abarca appeared to wake up and Constable Cheng immediately asked to see his driver's licence.

Conclusion - Operation

[61] I conclude that Mr. Abarca was not operating a motor vehicle as contemplated in section 33 of the *MVA*. In support, there is no evidence indicating that any system integral to the operation of the motor vehicle was activated or that Mr. Abarca was attempting to activate the system. In fact, the only "system" that was activated were the brake lights. In my view, the brake lights do not constitute a system integral to the operation of the motor vehicle.

Detention to determine if Mr. Abarca had a driver's licence

[62] This issue requires the court to determine if Mr. Abarca was initially detained and if so was the detention justified? I am satisfied that Constable Cheng detained Mr. Abarca. My conclusion is based on the evidence and the legal principles in *R. v. Grant*, [2009] 2 S.C.R. 353.

[63] As for the evidence of detention, Constable Cheng was in uniform when he approached Mr. Abarca, he singled Mr. Abarca out for the specific purpose of determining if Mr. Abarca was licenced, he made demands of Mr. Abarca and he verbally directed Mr. Abarca's movements. The interaction was not trivial or insignificant and given all of the circumstances a reasonable person in Mr. Abarca's position would feel that they had no choice but to comply with Constable Cheng's directions. As such, I find psychological detention as discussed in *Grant*.

[64] I now turn to consider if the detention was justified. Section 33 of the *MVA* requires a person who is driving or operating a motor vehicle to produce a driver's

licence on the demand of a peace officer. Clearly, the section implies some detention, this is because detention is necessary for the production of a driver's licence. The limit on a police officer's authority to detain is that the person must be operating or driving a motor vehicle when the demand is made. In this case, there is no evidence that Mr. Abarca was driving or operating a motor vehicle at the time, therefore, Constable Cheng lacked the authority to detain Mr. Abarca for the purpose of obtaining a driver's licence. Consequently, the detention of Mr. Abarca was in violation of his section 9 right not be arbitrarily detained.

Detention for “officer safety”

[65] Counsel did not present any legal authority that is directly for or against the proposition that police have the power to detain for officer safety. Recently, the Supreme Court of Canada in *R. v. Fleming*, 2019 SCC 45 restated the analysis that should be undertaken for the purpose of determining if police action is authorized at common law and whether the associated interference with an individual's liberty interest is justified. At paragraphs 46 – 49 the court commented:

[46] At the preliminary step of the analysis, the court must clearly define the police power that is being asserted and the liberty interests that are at stake (*Figueiras v. Toronto Police Services Board*, 2015 ONCA 208, 124 O.R. (3d) 641, at paras. 55-66). The ancillary powers doctrine comes into play where the power in issue involves *prima facie* interference with liberty. The term “liberty” here encompasses both constitutional rights and freedoms and traditional common law civil liberties (see *Clayton*, at para. 59; *Figueiras*, at para. 49). Once the police power and the liberty interests have been defined, the analysis proceeds in two stages:

- (1) Does the police action at issue fall within the general scope of a statutory or common law police duty?
- (2) Does the action involve a justifiable exercise of police powers associated with that duty?

(*R. v. MacDonald*, 2014 SCC 3, [2014] 1 S.C.R. 37, at paras. 35-36; *Reeves*, at para. 78)

[47] At the second stage of the analysis, the court must ask whether the police action is reasonably necessary for the fulfillment of the duty (*MacDonald*, at para. 36). As this Court stated in *Dedman*:

The interference with liberty must be necessary for the carrying out of the particular police duty and it must be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference. [p. 35]

In *MacDonald*, the majority of the Court set out three factors to be weighed in answering this question:

1. the importance of the performance of the duty to the public good;
2. the necessity of the interference with individual liberty for the performance of the duty; and
3. the extent of the interference with individual liberty. [para. 37; citations omitted.]

[48] Throughout the analysis, the onus is always on the state to justify the existence of common law police powers that involve interference with liberty.

[49] The ancillary powers doctrine has repeatedly been applied by this Court to determine whether — and in what circumstances — a particular power exists at common law. In each case, the Court has endeavoured to define the power at issue and to clearly specify the particular conditions for its use (see *MacDonald*, at paras. 39-40; *Mann*, at paras. 34 and 40; *Reeves*, at para. 95 (per Moldaver J.); *R. v. Godoy*, [1999] 1 S.C.R. 311, at para. 22; *Kang-Brown*, at paras. 58-60 (per Binnie J.), and 169 (per Deschamps J.); *Cloutier v. Langlois*, [1990] 1 S.C.R. 158, at pp. 185-86). Once the Court has defined the parameters of the power, it has then considered whether the police action in question fit within those parameters (i.e. did the police act in accordance with their common law power).

[66] As noted by Côté J., for the majority, that the above analysis was referred to as the “*Waterfield test*”, however, the court now refers to it as, “ancillary powers doctrine” (para. 43). I also note, the court’s guidance in that judge’s should “tread lightly” when considering common law police powers (para. 41).

Analysis

[67] Turning to the first stage of the analysis, police powers are seeded from the nature and scope of their duties. I note that police duties include the preservation of the peace, the prevention of crime, and the protection of life and property (*R. v. Mann*, [2004] 3. S.C.R. 59). Given that the protection of life falls within the scope of Constable

Cheng's duties, I conclude that Constable Cheng's conduct fell within the scope of his common law duties. Specifically, the protection of life which in this case was his own.

[68] I now turn to stage two of the analysis, specifically whether the detention of Mr. Abarca was a necessary for the performance of Constable Cheng's duties? This requires the Court to consider all of the circumstances including those which informed Constable Cheng's reasonable grounds to suspect that the detention of Mr. Abarca was necessary. Additionally, the Court must consider the importance of Constable Cheng's duty to the public, the necessity to interfere with Mr. Abarca's liberty for the performance of the duty and the extent in which Constable Cheng interfered with Mr. Abarca's liberty.

[69] After considering all of the circumstances, I find that it was reasonable for Constable Cheng to be concerned about officer safety and for him to believe that detention was necessary. In this regard, I note the facts that contributed to Constable Cheng's concern. Constable Cheng was alone and he had not identified Mr. Abarca. Mr. Abarca's movements were constant and they did not make sense in that he did not look for his driver's licence in the most reasonable spot, (his wallet). Further, his movements appeared to be driven by nerves and he did not follow the direction to stop rummaging. Constable Cheng lost sight of Mr. Abarca's hands. Finally, Constable Cheng's previous experience wherein persons in similar situations have tried to escape and assault officers.

[70] The duty of police officers to protect their safety and the safety of others is of critical importance to a safe and peaceful society. Moreover, and notably, the ability to ensure their safety contributes to the officer's ability to fulfill their duties of preserving the peace, protecting the public and protecting property. In the instant case, the protection of Constable Cheng's personal security was also integral to continuing his investigation.

[71] Clearly, the protection of officer safety may necessitate some interference with an individual's liberty. In the circumstances of the instant case, the direction to have Mr. Abarca exit the vehicle was necessary in that it provided Constable Cheng the opportunity to see Mr. Abarca's hands and better control his movements.

[72] As for the extent of the interference with Mr. Abarca's liberty, the detention was brief and progressive in nature. Specifically, the entire transaction was a matter of a few minutes. As for the progressive nature, Constable Cheng told Mr. Abarca to stop rummaging, to show his hands, to get out of the vehicle, and to face the vehicle. Thereafter Constable Cheng momentarily took hold of Mr. Abarca's wrist.

[73] Balancing the above, I conclude that Constable Cheng was acting pursuant to his common law power to detain persons for officer safety and that his use of this power was reasonable and necessary in all of the circumstances. Accordingly, I conclude that Constable Cheng's actions were justified and he did not violate Mr. Abarca's section 9 rights.

Arbitrary detention – arrest for obstruction

[74] Mr. Abarca argues he was not operating a motor vehicle and therefore under no obligation to produce identification to Constable Cheng, hence, the arrest for failing to produce a driver's licence was unlawful.

[75] The Crown responds to Mr. Abarca's alleged breach by highlighting the principles related to a police officer's power to arrest without warrant as set out in section 495 of the *Criminal Code*. Specifically, a police officer must subjectively believe that he or she has reasonable and probable grounds to make an arrest and the grounds must be objectively reasonable: *R. v. Storrey*, [1990] 1 SCR 241, and *R. v. Jir*, 2010 BCCA 497 at para. 27.

[76] The assessment of whether objective grounds exists was commented on by Bennett, J.A. in *R. v. Luong*, 2010 BCCA 158 at para. 24:

[24] The assessment of whether objective grounds exist undertaken by a trial judge is conducted by first looking at the observations of the officer (which the trial judge has found as facts) through the lens of someone who has the same experience, training, knowledge and skills as the officer who is making the observations, and then deciding if a reasonable person with the same lens would come to the same conclusion as the police officer. The standard of "reasonable grounds" does not require a prima facie case

for conviction, rather it is less than the civil standard and as Madam Justice Wilson stated in *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1166:

I agree with Martin J.A. that the appropriate standard is one of “reasonable probability” rather than “proof beyond a reasonable doubt” or “*prima facie* case”.

[77] The Crown points out that a lawful arrest can occur if it is apparent to the officer that an offence is being committed and that the analysis is from the stand point of a reasonable person in the shoes of the officer.

Analysis

[78] Constable Cheng’s actions and his testimony supports a conclusion that he subjectively believed that Mr. Abarca was required to produce a driver’s licence and that his failure to do so obstructed Constable Cheng in the execution of his duties.

[79] As for whether there were objectively reasonable grounds for Constable Cheng’s subjective belief, I observe the vehicle was not running, the ignition was off and Mr. Abarca was in a reclined position with his eyes closed. In these circumstances, I conclude that a reasonable police officer with Constable Cheng’s experience and training, would not reasonably conclude that Mr. Abarca was operating a motor vehicle and therefore required to produce a driver’s licence. Hence, I find that Constable Cheng’s subjective belief was not objectively reasonable. As such, Constable Cheng lacked the required reasonable and probable grounds to arrest Mr. Abarca for obstructing a police officer. Accordingly, the arrest was unlawful.

SECTION 8 – Unreasonable Search

[80] Mr. Abarca submits that the search of the vehicle was not incidental to a lawful arrest and therefore it was unreasonable and contrary to section 8 of the *Charter*. In the alternative, Mr. Abarca argues if the arrest was lawful then the search was excessive in scope and purpose.

[81] The Crown argues the search was incidental to a lawful arrest and that the purpose of the search was related to the arrest; specifically to obtain Mr. Abarca’s

identification and inventory the items in the vehicle. As such, the Crown argues that the search was not unreasonable and not contrary to the *Charter*.

[82] Warrantless searches are *prima facie* unreasonable and a violation of an individual's section 8 *Charter* rights. This presumption can be rebutted if the Crown can establish the following, that the search was authorized by statute or common law, the law itself is reasonable and the manner in which the search was carried out was reasonable: *R. v. Collins*, [1997] 1 S.C.R. 265.

Analysis

[83] Constable Cheng stated he searched the vehicle incidental to the arrest of Mr. Abarca and that it was for the purpose of confirming Mr. Abarca's identity and obtaining the cell phones so he could place them into Mr. Abarca's effects. As indicated, the arrest of Mr. Abarca was unlawful and therefore it cannot be stated that the search of the vehicle was incidental to a lawful arrest. Accordingly, I conclude that the search of the vehicle's interior for the identification and the phones was unreasonable and a violation of Mr. Abarca's rights.

[84] As for the recovery of the drugs from the door of the vehicle, I find that the drugs were in plain view. In this regard, Mr. Abarca exited the vehicle pursuant to a lawful detention, and shortly thereafter he fled leaving the driver's door open. Constable Cheng pursued and once Mr. Abarca had been arrested and secured, Constable Cheng returned to the vehicle and on approaching the open door he saw the drugs. According to Constable Cheng, the drugs were in the handle area of the interior side of the driver's door and clearly visible. As such, I find that the drugs were not discovered by virtue of an unreasonable search, rather, they were found in a location that was clearly visible to all members of the public who happened to walk by.

Section 10 (b) – Failure To Provide Immediate Access To Counsel

[85] Mr. Abarca alleges he was not provided immediate access to counsel. In support Mr. Abarca points out that 2 hours and forty minutes elapsed without him being provided access to counsel.

[86] In response, the Crown argues that there is some “discretion” or leeway afforded to police officers in fulfilling s. 10 (a) and (b) obligations particularly in circumstances that are “emergent or exigent”.

[87] I observe the words “without delay” as contained in s. 10 (b) of the *Charter* have been interpreted as meaning “immediately”: *R. v. Suberu*, 2009 SCC 33 at para. 42.

[88] In *R. v. Ashby*, 2013 BCCA 334, the court commented on immediate access to counsel and permissible delays in facilitating immediate access. At paras. 71 to 73 the court commented:

[70] Section 10(b) of the *Charter* provides that a person who has been arrested or detained has the right “to retain and instruct counsel without delay and to be informed of that right”. In *R. v. Suberu*, 2009 SCC 33 at para. 42, [2009] 2 S.C.R. 460, the Supreme Court of Canada interpreted the words “without delay” to mean “immediately”. However, it accepted that concerns for officer and public safety could excuse immediate compliance. Years before, in *R. v. Strachan*, [1988] 2 S.C.R. 980 at 999, that Court accepted that the police can delay allowing a detainee access to a telephone until the situation was “under control”. As well, in *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1146, 1147, it held that, as a general rule, the police are not required to suspend a search incidental to arrest until the arrestee has had an opportunity to speak with a lawyer.

[71] Delay by the police with respect to what is known as the implementational component of their duties under s. 10(b) of the *Charter* was an issue in *R. v. Montgomery*, 2009 BCCA 41, 241 C.C.C. (3d) 469. Mr. Montgomery was one of four persons arrested in a vehicle for possession of cocaine for the purpose of trafficking. He indicated that he wished to speak with a lawyer. However, as the police had a policy against allowing arrested persons to use cellular telephones at the scene of an alleged crime, he was not allowed to speak with a lawyer until he was taken to the detachment. Due to the number of persons that had been arrested, several hours passed before he spoke with a lawyer. In dismissing a conviction appeal, Mr. Justice Tysoe agreed with the trial judge that the delay in allowing access to counsel did not result in a breach of s. 10(b):

[35] The trial judge concluded that it was neither reasonable nor practical to allow the appellant to use a cell phone at the scene of his arrest. I agree with him. The police considered the arrest to be one of high risk. The appellant was believed to be associated with an organization that used violence. It would have been difficult for the police to ensure that the call

was not used for an improper purpose and to provide the appellant with privacy at the scene of his arrest while ensuring that he was secure.

[36] The police station had only one private phone for conversations with lawyers, and the police had to deal with the three other men arrested with the appellant, as well as an unrelated matter. The trial judge made the finding of fact that the appellant was provided access to counsel as soon as was reasonably possible in all of the circumstances. I am not persuaded that the judge made a palpable error in making this finding.

[Emphasis added.]

[72] That the exigencies of an arrest situation can excuse immediate compliance with s. 10(b) was more recently discussed in *R. v. Nelson*, 2010 ABCA 349 at para. 17, 265 C.C.C. (3d) 273, wherein the Court stated:

People are not always arrested in locations where it is possible for police to implement access to counsel. The delay that was involved in this case was, in the circumstances, minimal and the police refrained from questioning the appellant until after he had a chance to meet with counsel of his choice face to face. Immediacy does not mean instantaneous; practical considerations still play a role, particularly with respect to the police's obligation to implement an arrested person's contact with counsel.

Analysis

[89] I conclude the police failed to provide Mr. Abarca with immediate access to counsel and that this failure cannot be justified by the circumstances of Mr. Abarca's arrest.

[90] In arriving at my decision, I note Mr. Abarca indicated that he wanted to speak to a lawyer at 11:49 am and rather than ensuring that Mr. Abarca was transported to the detachment where this could occur, Constable Cheng had Mr. Abarca wait in Constable MacDermid's police vehicle. There is no evidence explaining why this occurred. The result of this delay was that Mr. Abarca sat in limbo while Constable Cheng searched the vehicle.

[91] Further to the above, at 12:20 pm Mr. Abarca was informed that he was also being arrested for drug offences and he responded by indicating that he wanted to speak with a lawyer. This request was not acted on, rather, Constable MacDermid waited for Constable Koskelanien this was because Constable MacDermid had a call to attend to. There was no evidence indicating why Constable MacDermid felt that the call took priority over facilitating Mr. Abarca's access to counsel.

[92] Lastly, at 1:00 pm., Constable Koskelanien transported Mr. Abarca to the detachment arriving at 1:26 pm. Thereafter, Mr. Abarca was fingerprinted and photographed and at 2:29 pm he was given access to counsel. There is no reliable evidence explaining this delay. The only explanation was Constable Koskelanien's evidence which comprised of him guessing as to how long the fingerprinting and photographing took.

[93] During cross-examination, counsel for Mr. Abarca questioned the officers about the community police office that was close to the arrest location. The theme of the questions suggested that the community police office could have been used to facilitate access to counsel. Based on the evidence, I am satisfied that the officers were justified in not using the community police office as a venue for facilitating access to counsel. This is because, there was no privacy and it was not secure. Despite this finding, the totality of the evidence fails to justify why immediate and reasonable steps were not taken to facilitate Mr. Abarca's immediate access to counsel.

CONCLUSION – ALLEGED *CHARTER* VIOLATIONS

[94] Based on the above I conclude the following;

Section 9 - Arbitrary Detention

[95] Constable Cheng unreasonably detained Mr. Abarca when he detained him for the purpose of demanding that he produce a driver's licence. He also unreasonably detained Mr. Abarca when he arrested him for obstructing a police officer. Finally, Constable Cheng's detention of Mr. Abarca for officer safety was lawful and reasonably performed, thus, I am not satisfied that the detention for this purpose was unreasonable.

Section 8 – Unreasonable Search And Seizure

[96] The interior search of Mr. Abarca's vehicle was performed in absence of lawful authority and therefore in violation of Mr. Abarca's right to be secure against unreasonable search and seizure. As for the drugs seized from the open door, the drugs were in plain view and accordingly validly located and seized.

Section 10 (b) – Right To Retain And Instruct Counsel Without Delay

[97] Mr. Abarca was not provided immediate access to counsel and therefore his section 10 (b) rights were violated. He was not given access to counsel until 2 hours and 40 minutes had elapsed from his first request to speak to a lawyer. Some of this period was justified, however, having Mr. Abarca waiting in a police car and at the detachment without explanation fails to justify the total delay.

The Honourable Judge R.P. Harris
Provincial Court of British Columbia