CITATION: R. v. Brooks, 2022 ONSC 1731
COURT FILE NO.: CR 19-5-324
DATE: 20220321

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
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HER MAJESTY THE QUEEN	)	*Michael Coristine* and *Corena McNeill*,
	)	for the Crown
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- and -	)	
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	)	
BARRINGTON BROOKS	)	*Mitchell Chernovsky*,
	)	for the accused
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	)	**HEARD:** February 28, March 2-3, 7, 2022

K.L. Campbell J.:

PRE-TRIAL RULING
ADMISSIBILITY OF PROPERTY SEIZED FROM LOCKER

A. OVERVIEW

[1] The accused is charged with a number of alleged offences, including the attempted murder of Morvin George on January 20, 2018. The accused has pled not guilty to all of the alleged offences and has elected trial by jury. However, prior to the outset of his jury trial, the accused brought a pre-trial application, pursuant to ss. 8 and 24(2) of the *Canadian Charter of Rights and Freedoms*, arguing: (1) that the police seizure of his blue winter jacket from his assigned locker was in violation of his right to be secure against unreasonable search and seizure; and (2) that, in the result, the jacket should be excluded from evidence.

[2] On Saturday, January 20, 2018, Morvin George was working as a hair stylist at the Moonshine Unisex Hair Salon located on Jane Street in Toronto. It was a busy Saturday, and the Hair Salon was full of people. Mr. George was busy cutting the hair of one of his clients. At one

point in the day, a man entered the Hair Salon, wearing a blue winter jacket. He immediately approached Mr. George and quickly stabbed him in the chest with a large knife. Shortly thereafter, following a brief scuffle on the floor, during which the attacker further stabbed Mr. George in the back and legs, the attacker fled from the Salon. The entire incident was captured on two CCTV cameras located inside the Hair Salon. Further, Mr. George positively identified the accused, Mr. Brooks, who was previously known to him, as his attacker.

[3] Ultimately, a warrant was issued for the arrest of the accused. The police understood that, at one point, the accused had been temporarily residing at "Seaton House," a large men's shelter in Toronto. However, when the police attended at that location on January 21, 2018, the accused was not present. The police advised the staff at Seaton House that, if the accused returned to the facility, they should contact them. On January 27, 2018, an employee of Seaton House recognized the accused, contacted the police through a "911" call, and advised them that the accused was on the second floor of the facility, clearing out his locker.

[4] Upon receipt of this information, the police quickly attended at Seaton House, where they were directed to a second-floor washroom/shower area, where the staff believed the accused to be located. The police entered the washroom and quickly arrested the accused for "attempted murder," without incident. The attending police officers planned to seize everything in the accused's nearby locker incident to his arrest. However, as the police were removing the handcuffed accused from the washroom/shower area and taking him to one of the waiting police cars just outside the facility, the accused repeatedly told the police that he wanted them to gather his things from his locker and bring them with him. More particularly, the accused repeatedly mentioned that he wanted the police to retrieve his jacket from the locker. Ultimately, the Seaton House staff opened the locker that had previously been assigned to the accused, and the police retrieved everything inside, including a blue winter jacket, and placed everything in fresh garbage bags provided by the staff from Seaton House.

[5] The blue winter jacket that the police seized (and photographed) from the accused's assigned locker appears to match perfectly the blue winter jacket worn by the attacker of Mr. George on January 20, 2018. It is anticipated that "identification" will be one of the main issues at the trial of this matter, and this evidence would appear to show that the accused owned a blue winter jacket that is indistinguishable from the jacket worn by the man that attacked Mr. George in the Hair Salon.

[6] As I have already noted, however, the accused now contends that the police obtained this winter jacket in violation of his right to be secure against unreasonable search and seizure contrary to s. 8 of the *Charter of Rights*, and he also contends that the items seized from the locker by the police should be excluded from evidence under s. 24(2) of the *Charter of Rights*. The Crown contends, in response, that while there may be a technical breach of s. 8 of the *Charter* because the jacket was not properly seized incident to the arrest of the accused, it was nevertheless properly seized pursuant to the repeated requests of the accused, and should not be excluded from evidence, in any event, under s. 24(2) of the *Charter of Rights*.

[7] For the reasons that follow, I have concluded that the evidence concerning the police seizure (and photographing) of the accused's blue winter jacket from his assigned locker at Seaton House, is *admissible* evidence, and cannot properly be excluded under s. 24(2) of the *Charter of*

Rights. Accordingly, the pre-trial application brought on behalf of Mr. Brooks must be dismissed. I have already advised the parties of the result of this application, and that I would eventually provide them with reasons in support of this disposition. These are those reasons.

B. THE RELEVANT FACTS

[8] On this pre-trial application I heard the *viva voce* testimony of officers Kevin Graham, Michael Cioffi, and Matt Gerry of the Toronto Police Service, and Ms. Wendy Hope, a staff member of Seaton House. Predictably, their respective evidence was not, at all times, perfectly consistent. But, but I am fully satisfied that they all testified sincerely and honestly. Based upon their testimony, which I accept, I find the relevant facts to be as follows.

[9] Just before 9:00 a.m. on January 27, 2018, Wendy Hope placed a 911 telephone call, advising the police that the accused, Mr. Brooks, was currently on the second floor of Seaton House, cleaning out his assigned locker.

[10] Ms. Hope testified that, when lockers are assigned to men who are temporarily staying at the Seaton House facility, a document is prepared and signed by a representative of the facility and the client, indicating that the client has the exclusive use of the locker temporarily, but that Seaton House also maintains at least one key to the locker, and may exercise their right to access the locker under certain circumstances.

[11] Following the 911 telephone call from Ms. Hope, Toronto Police Service officers from 51 Division, Michael Cioffi and Matt Gerry, who were partnered together that day, quickly attended at the scene of Seaton House, with the intention of effecting the arrest of the accused, pursuant to the outstanding warrant for his arrest. They were met there by officer Kevin Brown, who was going to assist them, if necessary, with his "less than lethal" weapon. None of these three police officers were involved previously in the investigation of the attack on Mr. George. These three officers arrived within minutes of the 911 call and were directed, by staff at Seaton House, to the second-floor washroom/shower area, where the accused was then understood to be located. Members of the Seaton House staff accompanied the police officers up to the second-floor location to which the officers had been directed.

[12] When the three police officers entered the second-floor washroom/shower area of the facility, they saw the accused, about 20-25 feet away. He appeared to be getting ready to have a shower. The accused appeared to be "surprised" by the attendance of the police officers. When the officers yelled for the accused to get down on the floor, he immediately complied and got down onto the floor. This speedy compliance may have been assisted by the fact that officer Brown displayed his "less than lethal" weapon, which looked like a shotgun. At this point, the three police officers approached the accused. Officer Cioffi told the accused that he was under arrest for "attempted murder|," and the accused was handcuffed with his hands behind his back. The police performed a quick "pat down" protective search for weapons, but this search revealed "nothing."

[13] The officers did not immediately advise the accused of his "right to counsel," as they thought it would be more prudent to do that momentarily on the "in car video" in the police car located just outside the facility.

[14] Officers Cioffi and Gerry then walked the accused downstairs and out to their waiting police car. The officers told him where they were taking him. While they were walking *en route* to the police car, Officer Cioffi told the accused, more specifically, about the nature of the "attempted murder" allegations against him and told him that he would be advised of his "right to counsel" when they got to the police car.

[15] At this time, as they were proceeding downstairs, the accused told the officers, on a number of occasions, that he wanted his "property," including his toiletry bag and his clothes, that he had left in his locker, and that he did not want any of those things left behind at the shelter. The accused indicated that he needed these personal items. The officers reassured the accused that his things would not be left behind. The police officers knew that the accused was talking about the clothes in his locker, as the accused specifically mentioned the clothes in his locker. Officer Cioffi explained that it was his common practice, when arresting someone in a shelter like Seaton House, to secure all of their personal belongings so as to accommodate their interest in safekeeping their personal property. Officer Cioffi explained that, even if the accused had not expressly indicated that he wanted the officers to obtain his personal property from his assigned locker, the police would have seized this property in any event, incident to his arrest for attempted murder. Accordingly, the police were going to secure the property from the accused's assigned locker – one way or the other.

[16] The police then exited, with the hand-cuffed accused in their custody, out the front door of Seaton House, and placed him in the rear seat of the police car. At that point, when the "in car video" camera was activated, the accused was told that he was on "video," advised again of the reason for his arrest, and fully advised of his right to counsel. The accused was also given a "caution" about making any statements to the police. This informational transaction between the police and the accused was, of course, captured on the "in car video" recording. The accused did not respond to any of the information conveyed to him, nor did he even acknowledge that he understood the information provided to him – he simply refused to respond. Instead, the accused repeatedly indicated that he wanted to go to the "hospital," explaining that it was because of "[his] hand" and because he was "feeling dizzy" and had a "headache" and because his "chest was hurting."

[17] While officer Gerry sat in the driver's seat of the police car, officer Cioffi went back inside the Seaton House facility. Shortly thereafter, the accused indicated that he still had some "stuff in [his] locker," including his "jacket" and some "other items" that he wanted to "get". The accused asked officer Gerry to contact the Seaton House "staff" so he could get his property. The officer assured him that they would "get [his] property." The accused then questioned the officer about why he did not seem to be in a "rush" to get him to the hospital. Officer Gerry explained that the accused "seemed fine before," but that now that he was under arrest, he had to go to the hospital. The accused denied that he was "fine before."

[18] Officer Gerry testified that he did not take the accused to the hospital because he did not seem to be in any medical distress, notwithstanding his comments to the contrary. Officer Gerry explained that this type of request, following an arrest, happens quite often – in about 95% of his cases – so he tries to gauge whether the accused is really in need of any medical attention at the time, or whether the accused would simply rather be in the hospital instead of a jail cell. Officer Gerry testified that, in his admittedly non-medical opinion, the accused did not seem to be in need

of any medical attention, and that he told Mr. Brooks that the hospital was only for "sick people" so he would not be taken there. Had he believed that Mr. Brooks was in some medical distress, officer Gerry would have acted differently. However, officer Gerry honestly believed that Mr. Brooks was "faking" his alleged medical ailments.

[19] When officer Cioffi returned to the police car, the accused told him that he had "some more stuff in [his] locker," including his "property" and some identification. When the officer told him not to worry about that, the accused asked "why not" and the officer told him that they were going to "seize everything" and that it would all be "going with [him]," and the accused said that was a "good thing."

[20] At one point following the arrest of the accused, Officer Cioffi contacted police officers who were involved in the investigation of the attack on Mr. George, and Officer Cioffi was asked to seize the seize the items in the accused's assigned locker incident to the arrest. Subsequently, when officer Cioffi indicated that they were going to "grab [his] stuff" so that it would be going with him to the 12 Division police station, the accused said that it was a "good thing" that he was going to the 12 Division police station. However, the accused maintained that he wanted to go to the "hospital first" because of his "swollen" finger that might be "infected," and because he was "not feeling right" and was "still dizzy." After refusing to answer a further question as to whether he wanted to "speak to a lawyer," the accused again asserted his desire to go to the hospital, and said that his "very fishy" arrest, and the charge that he was arrested for, were "not gonna stick" and were "bullshit."

[21] Locker 31, which had been assigned to the accused by Seaton House, was (approximately) less than 100 feet away from the door to the washroom/shower area where the accused had been arrested, around a corner, on the second floor of the Seaton House facility. By the time, officer Chioffe went back to this area, the Seaton House staff had already used their own key, to open the locker that had been assigned to the accused. They directed the officer to the accused's assigned locker. Further, again at their own initiative, the staff of Seaton House had provided clean, fresh, unused black garbage bags to the police, by the locker, so that the items in locker 31 could be placed into the garbage bags and removed from the facility. Indeed, when officer Cioffi returned to the Seaton House facility, the locker was already open, the fresh garbage bags were on the floor, and the staff were about to start cleaning out the accused's locker themselves. However, they had not yet commenced that task.

[22] Officer Cioffi testified that locker 31, which was on the top level of the various lockers in this location, was "quite full." He explained how he removed all of the property from the locker, in the general presence of officer Graham and four or five staff from Seaton House, and put it all into the fresh garbage bags that had been provided. Officer Cioffi also explained that this was all done within a "few minutes," and with no real organization or searching on his part – he was just trying to ensure that there was nothing "sharp" in the property that might hurt him as he placed it into the garbage bags. Officer Cioffi testified that he did not know what he should search for in any event, as he was not involved in the investigation concerning the knife-attack on Mr. George, and so he did not know what might be "evidence" that the investigating police officers might be looking for. Once he got all of the property emptied out of locker 31, and into the garbage bags, officer Cioffi placed them in the trunk of his police car.

[23] The officer agreed that he did not have any warrant to authorize him to seize the property from the Seaton House locker that had been assigned to the accused.

[24] The police officers then transported the accused (and the property the police seized from his assigned locker) to the 12 Division police station. They arrived at the station at 9:59 a.m., but waited, as required, to parade him before the desk Sergeant until 10:13 a.m.

[25] Subsequently, at the request of the accused, the police found $40 in a pocket of his winter jacket. The police also found a large "machette" (not the knife used in the attack on Mr. George), in its accompanying sheath, in the property obtained from locker 31. Officer Cioffe could not explain why he did not initially see this large "machette" when he was removing the property from the locker and putting it in garbage bags.

[26] Shortly thereafter, Mr. Brooks was placed in an interview room in the police station and was permitted to speak privately with his lawyer, as he eventually requested.

[27] Subsequently, officer Cioffe observed some cuts on the accused's hand, which were at least a few days old, and he contacted a "Scene of Crime Officer" (SOCO) to photograph these cuts. Subsequently, the SOCO arrived and took the requested photographs of the cuts on the accused's hand.

[28] Clearly, the police who arrested the accused at the Seaton House facility, and removed the items from locker 31, thought that this property was being seized incident to the arrest of the accused. The *Report* that was subsequently prepared to explain the seizure of this property indicated that the contents of the locker were seized incident to the arrest of the accused. Moreover, officer Cioffi agreed that no thought was given to obtaining any type of warrant to permit the police to seize the property from locker 31. Further, no one ever asked Mr. Brooks for his key to the locker, nor did any police officer tell the accused that he had a right to refuse police entry into his assigned locker at Seaton House. Finally, officer Cioffi testified that he thought that, at the time of his arrest, the accused was no longer a resident of Seaton House, and was being discharged from Seaton House (because of his arrest).

C. ANALYSIS

1. The Accused Had a Reasonable Expectation of Privacy in the Locker

[29] The parties are agreed that, originally, the accused had a reasonable expectation of privacy in his assigned locker at Seaton House. Mr. Brooks had been residing at Seaton House, temporarily, at least periodically, and he had been assigned locker 31. He had been given a key to locker 31, so that he might safely store at least some of his personal items in that locker. Accordingly, the accused had a reasonable expectation of privacy in that locker. It is fair to observe, however, that it was a relatively low expectation of privacy in all of the circumstances, especially given that Seaton House maintained its own key to the locker. Nevertheless, the accused still a reasonable expectation of privacy. See: *R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at paras. 2-8, 17-24; *R. v. Kyriakopoulos*, [2008] O.J. No. 263 (S.C.J.), at paras. 21-33, 42; *R. v. Campbell*, 2011 SCC 32, [2011] 2 S.C.R. 549, at paras. 6, 15; *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531, at paras. 11-14, 24, 28; *R. v. Santana*, 2020 ONCA 365, at para. 22; *R. v. Myers* (1987), 78 A.R. 255, 58 C.R. (3d) 176 (Q.B.).

[30] Accordingly, as the seizure was warrantless, it was *prima facie* unreasonable, and can only be found to be reasonable if the Crown can establish that: (1) it was authorized by law; (2) the law itself is reasonable; and (3) the manner in which the seizure was carried out was reasonable. See: *R. v. Collins*, [1987] 1 S.C.R. 265, at p. 278; *R. v. Buhay*, at paras. 11, 32. I should say, near the outset of this analysis, that I am satisfied that the Crown has met this burden, and has shown that the warrantless search of the locker by the police was, indeed, reasonable.

[31] It is also worthwhile to observe, near the outset of the analysis, that the employees of Seaton House, who contacted the police about the presence of the accused in the facility, and who subsequently opened his assigned locker with their own key following his arrest for attempted murder, were never "state agents" in this case – they were simply civilians employed by Seaton House. Accordingly, their conduct does not attract *Charter* scrutiny. See: *R. v. Buhay*, at paras. 25-31.

2. Assuming the Seizure Was Not Incident to the Arrest of the Accused

[32] The Crown concedes that the seizure of the contents of the locker assigned to the accused by the police was *not* made incidental to his arrest, given the sheer territorial distance between the location of the arrest of the accused and the location of locker 31. The evidence was certainly unclear as to this precise distance.

[33] In any event, I am prepared to assume – without deciding – for the purposes of analysis, that the Crown is correct in fairly making this concession. Accordingly, I am prepared to assume that there was, at least, a technical breach of s. 8 of the *Charter of Rights* in the circumstances of this case. See, for example: *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at paras. 12-25, 44-46, 89-99; *R. v. Ellis*, 2016 ONCA 598, 132 O.R. (3d) 510, at paras. 25-43; *R. v. Bakal*, 2021 ONCA 584; 157 O.R. (3d) 401, at paras. 47-61.

3. The Seizure Was Pursuant to the Unequivocal and Express Request of the Accused

[34] In my view, however, the police were legally entitled to seize the property from locker 31, including the accused's blue winter jacket, given that: (1) the locker was lawfully opened by the employees of Seaton House, who were *not* state agents; and (2) the accused expressly and repeatedly asked the police to obtain all of his property (including his winter jacket) from locker 31, and to enlist the services of the employees of Seaton House to help them do so if necessary.

[35] In *R. v. Buhay*, Arbour J., delivering the judgment of the unanimous Supreme Court of Canada, in considering the police seizure of a bag of marihuana from a bus depot locker, stated, as follows, at para: 33:

> The appellant initially had a reasonable expectation of privacy regarding the contents of his locker. His privacy was invaded by the security guards. The guards then placed his belongings back in the locker. The appellant's reasonable expectation of privacy was continuous. Just because the security guards violated his privacy once does not mean that any subsequent violations will be permissible. The conduct of the police — *opening of a locked locker over which the appellant still had lawful control and taking possession of its contents — constituted a "search"* within the meaning of s. 8 *as well as a "seizure"*, the

> essence of which is the "*taking of a thing from a person by a public authority without that person's consent*": *R. v. Dyment*, [1988] 2 S.C.R. 417, at p. 431, *per* La Forest J. [emphasis added]

[36] Applying this important statement of legal principle in the present case, a police officer went into a locker assigned to the accused, which had *already* been unlocked and opened by non-state agents in the employ of Seaton House, and then seized property that the accused expressly and repeatedly asked the police to secure (with the assistance of the employees of Seaton House if necessary). In the result, it is difficult to see how the conduct of the police, in all of the circumstances of this case, could have amounted to a significant violation of s. 8 of the *Charter of Rights*.

[37] In *R. v. Wills* (1992), 7 O.R. (3d) 337, 70 C.C.C. (3d) 529, Doherty J.A., delivering the judgment of the Court of Appeal for Ontario, held that, generally speaking, the stringent "waiver" test applied in cases where the Crown has argued that an accused has yielded a constitutional right during the course of a police investigation, and that the onus was on the Crown to show that the accused decided to relinquish his or her constitutional right with full knowledge of the existence of the right and an appreciation of the consequences of waiving that right. Accordingly, in a case where the Crown had argued that the accused had consented to a search requested by the police during the course of their investigation (i.e. a "voluntary" breathalyzer test), Doherty J.A. held that the Crown was required to show that the accused knew that he had the right to refuse his consent to the search proposed by the police. See also: *R. v. Lewis* (1998), 38 O.R. (3d) 540, 122 C.C.C. (3d) 481 (Ont.C.A.), at para. 12; *R. v. S.(S.)*, 2008 ONCA 578, 176 C.R.R. (2d) 68, at paras. 48-60.

[38] Importantly, however, *Wills* was a case where it was one of the *investigating police officers* who *proposed* that the accused *consent* to the suggested search, and the accused had not been advised that he had the right to refuse to consent to the proposed search. Indeed, the police did not warn the accused about any potential criminal consequences flowing from the proposed breathalyzer test, as the police did not think there would be any. Rather, the accused was told only that it was likely to his *benefit* (in any subsequent civil proceedings), that he consent to the proposed search.

[39] Doherty J.A. held that, in those circumstances, the Crown was required to prove that there had been a valid and informed waiver of the constitutional right by the accused in order for there to be an effective consent by the accused to a proposed search and seizure by the police. Indeed, in finding that the "voluntary" breathalyzer test in *Wills* was a "search" within the scope of s. 8 of the *Charter of Rights*, Doherty J.A. expressly warned against interpreting his language too broadly, and as suggesting that the taking of a breath sample "always amounts to a seizure." Doherty J.A. noted in this regard that "[n]ot every taking by the state is a seizure," citing the passage in *R. v. Dyment*, mentioned above, in which La Forest J., for the majority, indicated that the "essence" of a police seizure under s. 8 of the *Charter* was "the taking of a thing from a person by a public authority without that person's consent." See also: *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at pp. 493, 505; 54 C.C.C. (3d) 417, at pp. 466, 475.

[40] Moreover, Doherty J.A. in *Wills* expressly noted that "[i]f an individual chooses to give something to a police officer, it is a misuse of the language to say that the police officer seized the thing given." Rather, the police officer "simply received it." In such circumstances, as "there is no seizure, the reasonableness of the police conduct need not be addressed." See: *Illinois v. Rodrigues*, 110 S.Ct. 2793 (1990), at pp. 2804-2807. Ultimately, after noting the coercive reality of "co-operative policing," Doherty J.A. concluded that the "voluntary" breathalyzer test provided by the accused in *Wills* amounted to a seizure of his breath, attracting the constitutional protection of s. 8 of the *Charter of Rights*. Doherty J.A. stated, at pp. 540-541 C.C.C.:

> ….. Co-operation must, however, be distinguished from mere acquiescence in or compliance with a police request. True co-operation connotes a decision to allow the police to do something which they could not otherwise do. *Acquiescence and compliance signal only a failure to object; they do not constitute consent*.
>
> *The dynamics which operate when a police officer "requests" the assistance of an individual cannot be ignored*. It would be naive to equate most requests made by a police officer with similar requests made by one private individual to another. *The very nature of the policing function and the circumstances which often bring the police in contact with individuals introduce an element of authority, if not compulsion, into a request made by a police officer*. This is particularly true where the request is made of someone who is the target of an ongoing investigation …..
>
> The danger to constitutionally protected individual rights implicit in the equating of consent with acquiescence or compliance is self-evident and does not require detailed elaboration. *When the police rely on the consent of an individual as their authority for taking something, care must be taken to ensure that the consent was real. Otherwise consent becomes a euphemism for failure to object or resist*, and an inducement to the police to circumvent established limitations on their investigative powers by reliance on uninformed and sometimes situationally compelled acquiescence in or compliance with police requests. …..
>
> While it is necessary to avoid an overly broad approach to consent, it is also necessary to recognize that *valid consents reinforce the principle of individual autonomy which underlies the rights set out in the Charter* ….. Individuals are free to define their own privacy interests and to yield those interests when so inclined. In recognizing that a valid consent must be an answer to any subsequent claim of a s. 8 violation, our law recognizes that autonomy …..
>
> When one consents to the police taking something that they otherwise have no right to take, one relinquishes one's right to be left alone by the state and removes the reasonableness barrier imposed by s. 8 of the *Charter*. The force of the consent given must be commensurate with the significant effect which it produces.
>
> [emphasis added – citations omitted]

[41] Somewhat similarly, and more recently, in *R. v. Roy*, 2010 BCCA 448, 261 C.C.C. (3d) 62, the British Columbia Court of Appeal, in a judgment by Lowry J.A., distinguished, at para. 21, *et seq.*, between circumstances in which: (1) the accused has *abandoned* a reasonable expectation of privacy; and (2) the accused has *waived* his right to be free from unreasonable search and seizure. Lowry J.A. held that, in the first case, the accused has, through his own actions, altered the scope of his expectation of privacy; whereas in the second case, the accused has entirely waived his right to be free from unreasonable search and seizure and has, thereby, permitted, by his consent, an otherwise unreasonable search or seizure. Further, Lowry J.A. stated, at para. 31, that as "long as the police act in accordance with the express invitation" of the accused, "they cannot be said to intrude upon the privacy interests" of the accused. In my view, this analysis by Lowry J.A. in *R. v. Roy* is entirely consistent with the approach proposed by Doherty J.A. in *R. v. Wills*.

[42] Applying that approach in the factual circumstances of the present case, the accused has *not* effectively and entirely waived all of his rights under s. 8 of the *Charter of Rights*, in that he was not expressly advised by the police, for example, of his right to refuse to permit the police to search his assigned locker. See *R. v. Wills*. However, the accused did *abandon* his reasonable expectation of privacy in his assigned locker, by repeatedly and expressly asking the police to secure (with the assistance of the employees of Seaton House if necessary) the contents of his assigned locker. This was *not* a situation where the police asked the accused if he would consent to a search of his locker, and he then acquiesced, or did not object, to such a procedure. Rather, the accused took it upon himself to expressly ask the police, repeatedly, to seize all of the property in his locker at Seaton House. This was an idea that originated with the accused, not the police. In the result, by his express and voluntary consent, the accused *abandoned* his reasonable expectation of privacy in his assigned locker. Accordingly, the police did *not* violate the s. 8 *Charter* rights of the accused, by doing as he repeatedly asked, and by securing his property from that locker with the assistance of the employees of Seaton House.

[43] Accordingly, applying the principles articulated in *R. v. Buhay* and/or *R. v. Wills* and *R. v. Roy*, the police did *not* violate the s. 8 *Charter* rights of the accused in securing the property located in the accused's assigned locker, when the police attended at the locker, which was already unlocked and opened by the non-state actor, civilian employees of Seaton House, and by removing the accused's property from that locker pursuant to his express and repeated requests.

4. The Admissibility of the Evidence Under s. 24(2) of the Charter of Rights

a. Introduction

[44] In any event, I would *not* exclude the evidence obtained by the police pursuant to s. 24(2) of the *Charter*. In other words, had I concluded that the actions of the police were entirely in violation of s. 8 of the *Charter*, instead of merely in technical breach of the section (by virtue of acting on the warrantless search incident to arrest power), I would still have *admitted* the evidence under s. 24(2) of the *Charter*.

[45] According to the governing three-part legal test, the court must assess and balance the effect of admitting the evidence on society's confidence in the justice system, having regard to all of the circumstances of the case, including: (1) the seriousness of the *Charter*-infringing state conduct; (2) the impact of the breach on the *Charter*-protected interests of the accused; and (3)

society's interest in the adjudication of the case on its merits. See *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at para. 45-48.

b. The Seriousness of the State Conduct

[46] With respect to the first prong of the test, namely, the seriousness of the state conduct, in my view the conduct of the investigating police officers cannot properly be described as "misconduct" at all. They thought that they had the right to seize the property in the locker that had been assigned to the accused, just as the accused repeatedly and expressly asked them to do.

[47] While the police may, ultimately, have been in error as to the legal scope of their warrantless search powers, and may have wrongly thought that they were entitled to seize the property pursuant to their warrantless search incident to arrest powers, they were nevertheless *correct* in their conclusion that they had the right to search the locker and seize the property located within without first obtaining a judicially authorized search warrant. Accordingly, at "worst" the police misunderstood the proper scope of their warrantless search powers and acted upon a warrantless search power that did not properly apply in the circumstances, instead of the warrantless search power that did properly apply in the circumstances.

[48] In these circumstances, however, s. 24(2) of the *Charter of Rights* should not operate as some sort of "law school exam" for police officers. For the purposes of s. 24(2) of the *Charter of Rights*, it makes little difference to an accused whether the police correctly exercised the right legal warrantless search power, provided that the police had the legal authority to exercise the warrantless search power they did – however properly described. Moreover, the police did not misunderstand some long and well-settled legal principle that they should clearly have understood. Their legal analytical abilities should not be on trial in these circumstances – but rather whether they acted lawfully and constitutionally in exercising the investigative powers they did. See, for example: *R. v. Le*, 2009 BCCA 14, [2009] B.C.J. No. 99, at paras. 28-38; *R. v. Harflett*, 2016 ONCA 248, 336 C.C.C. (3d) 102, at paras. 32-45; *R. v. Paterson*, 2017 SCC 15, [2017] 1 S.C.R. 202, at paras. 44-47. In these circumstances it is worthwhile recalling that police officers who exercise such powers often do so – and did so in this case – with little time for considered reflection, and without any helpful legal advice from someone well-trained in this difficult and complex area of the law.

[49] Moreover, in this case there is simply no evidence suggesting that the police acted recklessly, or negligently, or in ignorance of any statutory or *Charter* requirements. Rather, the accused, a fully-functioning adult male, was perfectly entitled to ask the police, following his arrest, to gather his property from his Seaton House locker (with the assistance of the Seaton House staff, if necessary) – and the police were, correspondingly, perfectly entitled to act on that unequivocal and repeated request, just as they did.

[50] Accordingly, in my view this first prong of the governing s. 24(2) analysis favours the admissibility of the blue winter jacket that the police seized from the Seaton House locker that had been assigned to the accused.

c. The Impact of the Charter Violation

[51] As to second prong of the governing test, namely, the impact of the *Charter* violation on the accused, there is no doubt that the police seizure of his property from his assigned Seaton House locker had *some, limited* impact on the constitutionally protected interests of the accused.

[52] However, given that Seaton House maintained a key to open to the locker, with the clear knowledge of the accused, who expressly asked the police, repeatedly, to enlist the assistance of the Seaton Hall staff to open the locker if necessary, the actual impact of the police entry into the opened locker must be viewed as *slight* in all of the circumstances. The police simply did as the accused expressly requested, on multiple occasions. The accused could not have imagined the police entering the locker assigned to him by Seaton House, at his request, in order to gather his personal belongings, just as he requested, without seeing and seizing his blue winter jacket, pursuant to his express requests.

[53] Accordingly, any potential violation of s. 8 of the *Charter* in these circumstances must be viewed as technical and slight. Therefore, the second factor in the governing s. 24(2) analysis, also significantly favours the admission of the evidence.

d. The Truth-Finding Function of the Trial

[54] As to the third prong of analysis, namely, whether the truth-seeking function of the trial is better served by the admission or exclusion of the evidence, there is no doubt that this part of the test strongly favours the admission of the evidence.

[55] There is no gainsaying the fact that the blue winter jacket found by the police in the accused's assigned Seaton House locker is an inherently reliable and objective piece of evidence that is critical to the merits of this case.

[56] Whoever attacked the victim in this case was wearing a blue winter jacket. This is crystal clear from the CCTV video recordings of the attack in the Hair Salon. Proving that the accused possessed an *identical* blue winter jacket at a time proximate to the attack is crucial to the Crown's case. If this evidence was excluded, it would be a serious blow to the Crown's case against the accused in relation to this brazen, violent, public attack on this seemingly innocent victim. If the evidence is admitted, however, the Crown would appear to be able to establish that the accused had the *same* blue winter jacket as the one worn by the attacker. In short, the accused's blue winter jacket is a crucial piece of objectively reliable evidence in this case.

[57] Society's interest in the adjudication of a criminal trial on its merits would be seriously prejudiced if this kind of highly reliable and critical evidence were excluded. Accordingly, as I have indicated, this third aspect of the governing s. 24(2) analysis clearly favours the admission of the evidence.

e. Conclusion

[58] There is no "overarching rule" that governs how the balance of these three factors should be struck in any particular case. Mathematical precision is obviously not possible. Nevertheless, consideration of these three general factors provides a helpful and flexible type of "decision tree."

See *R. v. Grant*, at para. 86. As I have already indicated, in balancing all three of these key considerations, in light of *all* of the circumstances of this case, I have concluded that the evidence of the police seizure of the accused's property (including his blue winter jacket), from locker 31 at Seaton House, must be *admitted*.

[59] *All three* of the important considerations point towards to the *admission* of the evidence. The police acted professionally, honestly and in good faith throughout the course of their investigation in this case. While they may not have fully understood the legal scope of their warrantless search powers in all of the circumstances of this case, there is no gainsaying the fact that they seized the accused's property from his assigned Seaton House locker just as the accused repeatedly asked them to do. In any event, any potential breach of the accused's rights under s. 8 of the *Charter* was slight and technical. However, the police obtained objective evidence of undisputed reliability that is critical to a just determination of this case on its merits. Excluding such evidence would, in my view, have a very negative effect on the repute of the administration of justice. Accordingly, I have no hesitation in concluding that, regardless of whether (and how) the police may have technically violated the constitutional rights of the accused under s. 8 of the *Charter*, the evidence seized by the police was still admissible under s. 24(2) of the *Charter*.

D. CONCLUSION

[60] In summary, as I have already advised the parties, the evidence seized by the police from the accused's assigned locker at Seaton House, including his blue winter jacket, is admissible in evidence in this case under s. 24(2) of the *Charter*. Accordingly, the application brought on behalf of the accused to exclude this evidence must be dismissed.

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Kenneth L. Campbell J.

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ONTARIO

SUPERIOR COURT OF JUSTICE

HER MAJESTY THE QUEEN

- and -

BARRINGTON BROOKS

PRE-TRIAL RULING
ADMISSIBILITY OF PROPERTY FROM LOCKER

K.L. Campbell J.

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