R v Grant: Psychological Detention and the Exclusion of Evidence

Introduction

An 18 year old is stopped by police on a busy Toronto street. He is detained and searched in violation of his *Charter* rights. The police find a gun as a result of the search and charge him with several criminal offences. The Court finds that the police had no right to detain and search the young man. Regardless, they allow the gun to be entered as evidence against him and the young man is convicted.

How can this happen?

The Supreme Court of Canada dealt with the above scenario in *R v Grant*, decided on July 17, 2009. *R v Grant* clarified two aspects of constitutional law: arbitrary detention, and the exclusion of evidence. The Court provided a test for whether non-physical police action against a member of the public might amount to a "psychological detention", and it also outlined a three-part test for determining whether evidence found in violation of a person's rights under the *Canadian Charter of Rights and Freedoms*[1] could still be used at trial.

Facts of the case

On November 17th, 2003 two Toronto police officers on an undercover patrol in a high-crime area noticed the defendant, Donnohue Grant, a young black man, walking along the road. The officers thought Mr. Grant was behaving "suspiciously" and asked a uniformed officer who was also in the area to speak to him.[2] Cst. Gomes approached Mr. Grant, asking for his name and identification. At some point in the conversation, Mr. Grant adjusted his coat, causing Cst. Gomes to ask him to "keep his hands in front of him".[3] Soon after, the two undercover officers, concerned for Cst. Gomes' safety, joined him. The officers flashed their badges and stood behind Cst. Gomes blocking Mr. Grant's way forward.[4] Cst. Gomes continued to question Mr. Grant, who eventually admitted that he was carrying a gun. The officers arrested Mr. Grant and read him his legal rights, including his right to speak to a lawyer.

Procedural history

At trial, Mr. Grant was convicted of five firearm offences. The Court did not find that Mr. Grant's *Charter* rights had been breached and therefore rejected his argument that the gun could not be used as evidence in the trial.[5]

The Ontario Court of Appeal found that the police had violated Mr. Grant's *Charter* rights,[6] specifically under section 9, the right to be free from arbitrary detention. Despite this finding, the gun was admitted as evidence and the convictions were

upheld.[7]

Issues:

Mr. Grant appealed his conviction to the Supreme Court of Canada. Before the SCC were three key constitutional issues:[8]

1. Was Mr. Grant arbitrarily detained by the police in violation of his section 9 *Charter* rights?

    i. What is the nature of detention in Canadian law?

    ii. What does it mean to be "psychologically detained"?

    iii. Was Mr. Grant psychologically, and therefore, arbitrarily detained?

2. Did the police violate Mr. Grant's right to speak to a lawyer under section 10(b) of the *Charter*?

3. If Mr. Grant's rights were violated, should the evidence acquired as a result of that violation be excluded from trial as per section 24(2) of the *Charter*?

Decision:

The Supreme Court ruled that Mr. Grant had been arbitrarily detained by police in violation of s 9 of the *Charter*; furthermore, it ruled that his right to speak to a lawyer had also been breached in violation of s 10(b). Despite these two breaches of his *Charter* rights, the Supreme Court allowed the gun to be admitted as evidence and dismissed Mr. Grant's appeal.[9]

Reasons of the Supreme Court:

1. Was Mr. Grant arbitrarily detained by the police in violation of his s.9 *Charter* rights?

The SCC first examined the moment of Mr. Grant's detention by police. This was a crucial determination because detention triggers two important *Charter* rights: first, the right not to be detained arbitrarily, under s 9; and second, the right to retain a lawyer, under s 10(b). The Crown argued that the detention began when Mr. Grant was arrested.[10] Mr. Grant argued that his detention began when Cst. Gomes told him to keep his hands in front of him.[11] The SCC agreed with Mr. Grant.[12]

i. What is the nature of detention in Canadian law?

In *Grant*, the SCC tried to strike a balance in its definition of 'detention', one which would allow the police to effectively do their jobs while also protecting the rights of individuals from state interference.[13]

Detention consists of a police intrusion on an individual's physical or psychological

liberty.[14] Where a person is physically restrained by the police, the moment of detention is self-evident.[15] Psychological detention is more difficult to determine. The police do not need to have committed an act of physical control over an individual in order to detain him or her.[16] It is crucial to consider whether the individual had a reasonable choice to walk away from the police in the situation.[17]

ii. What does it mean to be "psychologically detained"?

Following *R v Therens*[18], a previous Supreme Court case, the Court concluded that people can be psychologically detained in two situations:

> 1. When they are under a true legal obligation not to walk away from a police officer or other agent of the state (explicit indication from the police such as "stay here – you can't leave"); and
>
> 2. When they reasonably believe that they have no option to walk away from a police officer or other agent of the state (implicit indication from the police such as several officers blocking the only exit from an area).[19]

Courts must look at the specific facts of each case through the eyes of a reasonable person in the place of the accused individual. The Supreme Court outlined the following factors to be considered:

> 1. The circumstances as reasonably perceived by the individual, including the conduct that gave rise to the encounter with the police and whether or not the individual was singled out;
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> 2. The police conduct, with specific attention to the use of tactics, length, tone, and content of the interaction between the police and the accused individual; and
>
> 3. The characteristics of the individual actually stopped, including his or her stature, age, visible minority status and level of sophistication.[20]

In setting out these factors, the Supreme Court recognized that police officers must be able to carry on with their everyday functions without worrying about detaining members of the public by accident.[21] The Supreme Court reaffirmed that normal interactions with the police and the public will not give rise to psychological detentions, since this would trigger constant requirements of the right to counsel.

iii. Was Mr. Grant psychologically, and therefore, arbitrarily detained?

When the officers began to talk to Mr. Grant, they were asking general questions; a reasonable person would not have felt compelled to cooperate with the police. However, as the discussion continued, several factors caused the relationship between the police and Mr. Grant to change: [22] first, Cst. Gomes instructed Mr. Grant to "keep his hands in front of him;"[23] second, two more officers joined Cst. Gomes, potentially creating a much more intimidating situation for Mr. Grant;[24] and finally, the questions changed from general

inquiries to personal questions directed at Mr. Grant.

Considering these facts in light of Mr. Grant's age, and the fact that he is a member of a visible minority group, the Court found that a reasonable person would no longer have felt he had the choice to 'walk away' from the situation. Therefore, the Court determined that Mr. Grant was "psychologically detained" at that point in the conversation.

In order to balance the interests of individuals to be free from unreasonable search and seizure and the interests of the state in investigating crime, there are constitutional limits placed on the ability of the police to detain an individual. A detention will only be justifiable if the police have 'reasonable and probable grounds' to believe an individual is participating in criminal activity.[25] If the police lack such reasonable and probable grounds and still detain an individual, that detention is considered arbitrary and in violation of section 9 of the *Charter*.[26]

The police in this case admitted they had no reasonable grounds to detain Mr. Grant, therefore the Court found that the detention was arbitrary and a violation of section 9 of the *Charter*[27].

2. Did the police violate Mr. Grant's right to speak to a lawyer under s 10(b) of the *Charter*?

When detained by police, an individual has the right to contact a lawyer and to be informed of that right.[28] In *R v Suberu*,[29], a case which was heard at the same time as *Grant*, the Court held that these two aspects of the "right to counsel" are triggered *immediately* upon detention, whether or not the detention is merely for investigative purposes.[30]

The police officers in this case provided Mr. Grant with an opportunity to contact a lawyer only after they formally arrested him. Following the *Suberu* case, the Court found that since Mr. Grant had not been given a chance to speak to a lawyer after being psychologically detained, his 10(b) *Charter* rights had been violated.[31]

3. If Mr. Grant's rights were violated, should the evidence acquired as a result of that violation be excluded from trial as per s 24(2) of the *Charter*?

a. The purpose of section 24(2):

When the police breach an individual's *Charter* rights, they sometimes obtain evidence they would not have otherwise. In this case, the evidence discovered as a result of Mr. Grant's detention, was his gun. In order to limit the advantages available to the police, and therefore the state, when evidence is discovered as a result of a breach of an individual's *Charter* rights, s 24(2) of the *Charter* prevents the use of that evidence when it "would bring the administration of justice into disrepute."[32]

Judges must ensure that *Charter* rights provide individuals with meaningful protection, but at the same time, they cannot appear to let obviously guilty people go free without reason. The tension between these two goals of the justice system grounds the purpose of s 24(2).

b. The three-part test for the exclusion of evidence under s 24(2):

In *Grant,* the Supreme Court articulated three avenues of inquiry to assist a court with determining whether evidence should be excluded. Courts must consider:

> 1) the seriousness of the *Charter*-infringing state conduct (admission of the evidence may send the message the justice system condones serious state misconduct);
>
> 2) the impact of the breach on the *Charter* protected interests of the accused (admission of the evidence may send the message that individual rights count for little); and,
>
> 3) society's interest in the adjudication of the case on its merits[33].

These three lines of inquiry allow a court to balance and assess the effect of admitting evidence on society's confidence in the justice system. They are not intended to provide a final answer; rather, they allow consideration of the many factors which lead to a decision about excluding or including evidence. They are looked at in more detail below:

1) The seriousness of the breach

Courts must examine how seriously the police breached the individual's *Charter* rights.[34] In order to uphold public confidence in the administration of justice, courts must not appear to support serious violations of individual rights. Flagrant and wilful disregard for *Charter* rights will almost always lead to exclusion of evidence while minor or inadvertent violations committed in good faith may not.[35]

2) The impact on the individual's interests

Courts must consider how seriously the conduct in question impacted the individual's interests.[36] The courts must always seek to uphold the public's interest in respecting the fundamental dignity of individuals when dealing with *Charter* breaches. Invasive searches or excessive deprivation of rights will weigh towards exclusion while momentary delays or inconveniences will not.[37]

3) Society's interests

Courts must take into account society's interests in the use or exclusion of the evidence at trial.[38] The public has an interest in a justice system based on finding out the truth, so it may be important to include useful or reliable evidence even if it is found as the result of a *Charter* breach.[39] The more useful or reliable the evidence is—for example when there exists no other evidence to support a charge—the more persuasive the argument to include it will be. This is especially the case with physical evidence which is relevant and reliable as opposed to evidence such as verbal statements compelled from a suspect which would not be considered reliable.[40]

c. Should the gun be admitted as evidence at trial?

The Court analysed Mr. Grant's situation in light of the three lines of inquiry and

determined that the evidence in question, in this case the gun, should not be excluded from the trial.

With respect to seriousness of the breach, the Court ruled that while the officers did violate sections 9 and 10(b) of the *Charter,* the violations were not considered flagrant.[41] In other words, the officers in this case acted "in good faith" and there was no indication that they had specifically targeted Mr. Grant or wilfully disregarded his *Charter* rights.[42]

In terms of Mr. Grant's individual interests, the Court found that the gun would not have been discovered had the police not searched him. This search was in violation of Mr. Grant's rights as it was the result of a statement made by Mr. Grant after he was arbitrarily detained. Furthermore, by not telling Mr. Grant that he had a right to speak to a lawyer, the police denied him something he was entitled to and needed at the time. The Court considered these breaches to be significant, weighing towards exclusion of the evidence.[43]

Lastly, considering society's interests in the justice system, the Court noted that the gun was highly reliable physical evidence and was essential to Mr. Grant's subsequent conviction for various weapons offences. Since society has an interest in punishing and preventing gun-related crime, in this case, the public interest in the truth seeking function of the justice system weighed heavily against exclusion of the evidence and in favour of a trial adjudicated on its merits.[44]

The Court concluded that the gun should be admitted as evidence.[45] Consequently, the Court dismissed Mr. Grant's appeal and upheld his conviction.[46]

Contributions and impacts of *Grant*: Looking forward

Grant has done away with the previously rigid system for the exclusion of evidence based on *Charter* breaches. Notably, the SCC has moved away from its previous approach which led to automatically excluding bodily evidence such as blood samples or breathalyzer results obtained through such breaches.[47] The practical result has been the admission of previously excluded evidence, especially in drunk-driving cases.

Grant was delivered together with *R v Suberu* and *R v Harrison*.[48] All three cases have important implications for police officers. In *Suberu*, the SCC applied the *Grant* test for "psychological detention", holding that exploratory questioning will not amount to a detention.[49] *Suberu* clarified that the s 10(b) right to counsel takes effect as soon as a detention begins.[50]

In *Harrison*, the Court explained that their new approach to the exclusion of evidence could not be taken as simply "a contest between the misdeeds of the police and those of the accused."[51] Instead, courts expect that the police will now be more cautious about potential violations of *Charter* rights. In other words, the police are now expected to live up to a "higher standard"[52] and cannot simply argue that their actions were less serious than those of the person arrested.

Further Reading:

Dawe, Jonathan and Heather McArthur. “Charter detention and the exclusion of evidence after *Grant, Harrison* and *Suberu*” (2010) 51 Sup Ct L Rev 381.

Madden, Mike. “Empirical Data on Section 24(2) under *R. v. Grant*” (2010) 78 Criminal Reports (6) 278.

Penney, Steven and James Stribopoulos. “ ‘Detention’ Under the *Charter* after *R. v. Grant* and *R. v. Suberu*” (2010) 51 Sup Ct L Rev 440.

Woollcombe, Jennifer. “*Grant, Suberu* and *Harrison*: Detention, the Right to Counsel and a New Analysis under Section 24(2): Some Practical Impacts” (2010) 51 Sup Ct L Rev 480.

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[1] *Canadian Charter of Rights and Freedoms* [Charter] Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

[2] *R v Grant,* 2009 SCC 32 at para 4, [2009] 2 S.C.R 353.

[3] *Ibid* at para 5.

[4] *Ibid* at para 7

[5] *Ibid* at para 9.

[6] *Ibid* at para 10.

[7] *Ibid.*

[8] Grant, *supra* note 2 at para 2. An interpretative issue with respect to the relevant *Criminal Code* provision was also raised. See para 141.

[9] *Ibid* at para 140.

[10] *Ibid* at para 14.

[11] *Ibid* at para 13.

[12] *Ibid* at para 18.

[13] *Ibid* at para 39.

[14] *Ibid* at para 20.

[15] *Ibid* at para 30.

[16] *Ibid* at paras 24-26.

[17] *Ibid* at para 28.

[18] *R v Therens*, [1985] 1 SCR 613 at para 57, 18 DLR (4th) 655 .

[19] Grant, *supra,* note 2 at para 44.

[20] *Ibid* at para 44.

[21] *Ibid* at paras 36-38.

[22] *Ibid* at para 47.

[23] *Ibid* at para 48.

[24] *Ibid* at para 50.

[25] *Ibid* at para 55. A lesser standard is in place for the police to justify a temporary detention in the course of an investigation. In this case, police merely require a 'reasonable suspicion' of the individual's criminal activity.

[26] *Ibid* at paras 53-56.

[27] *Ibid* at para 57.

[28] *Charter, supra* note 1 s 10(b).

[29] *R v Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460 .

[30] Ibid at para 21.

[31] *Grant*, *supra* note 2 at para 58.

[32] *Charter, supra* note 1 s 24.

[33] *Grant*, *supra* note 2 at para 71.

[34] *Ibid* at para 72.

[35] *Ibid* at para 74

[36] *Ibid* at para 76.

[37] *Ibid* at para 77.

[38] *Ibid* at para 79.

[39] *Ibid* at paras 80-81.

[40] *Ibid* at para 81.

[41] *Ibid* at para 133.

[42] *Ibid* at para 133.

[43] *Ibid* at para 138.

[44] *Ibid* at para 139.

[45] *Ibid* at para 140.

[46] *Ibid* at para 140.

[47] *Ibid* at para 63-66.

[48] *Suberu, supra* note 32, and *R v Harrison*, 2009 SCC 34, [2009] 2 SCR 494.

[49] *Suberu, supra* note 32 at para 45.

[50] *Ibid* at para 42.

[51] *Harrison, supra* note 51 at para 41.

[52] *Ibid*.