2007 CarswellOnt 4900, 74 W.C.B. (2d) 521

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R. v. Egonu

HER MAJESTY THE QUEEN and SAMUEL EGONU (Defendant)

Ontario Superior Court of Justice

Murray J.

Heard: July 24-27, 2007
Judgment: July 31, 2007
Docket: CRIMJ(P)1721/07

Counsel: Paul Renwick for Crown

Jason E. Bogle, Selwyn Pieters for Defendant

Subject: Criminal; Constitutional; Public

Criminal law --- Charter of Rights and Freedoms — Unreasonable search and seizure [s. 8] — Authorized by law.

Criminal law --- Charter of Rights and Freedoms — Unreasonable search and seizure [s. 8] — Reasonable grounds.

Criminal law --- Charter of Rights and Freedoms — Arbitrary detention or imprisonment [s. 9].

Criminal law --- Charter of Rights and Freedoms — Arrest or detention [s. 10] — Right to counsel [s. 10(b)] — Right to retain and instruct counsel without delay.

Criminal law --- Charter of Rights and Freedoms — Charter remedies [s. 24] — Exclusion of evidence.

Cases considered by *Murray J.*:

Brown v. Durham Regional Police Force (1998), 39 M.V.R. (3d) 133, 131 C.C.C. (3d) 1, 116 O.A.C. 126, *(*sub nom. *Brown v. Durham (Regional Municipality) Police Service Board)* 59 C.R.R. (2d) 5, 43 O.R. (3d) 223, 21 C.R. (5th) 1, 167 D.L.R. (4th) 672, 1998 CarswellOnt 5020 (Ont. C.A.) — considered

R. v. Baril (1999), 128 O.A.C. 396, 1999 CarswellOnt 3259 (Ont. C.A.) — considered

R. v. Calderon (2004), 122 C.R.R. (2d) 304, 188 C.C.C. (3d) 481, 23 C.R. (6th) 1, 2004 CarswellOnt 3405 (Ont. C.A.) — referred to

R. v. Caslake (1998), 48 C.R.R. (2d) 189, [1998] 1 S.C.R. 51, 123 Man. R. (2d) 208, 159 W.A.C. 208, [1999] 4 W.W.R. 303, 121 C.C.C. (3d) 97, 1998 CarswellMan 1, 1998 CarswellMan 2, 155 D.L.R. (4th) 19, 221 N.R. 281, 13 C.R. (5th) 1 (S.C.C.) — distinguished

R. v. Jacques (1996), 202 N.R. 49, 110 C.C.C. (3d) 1, [1996] 3 S.C.R. 312, 139 D.L.R. (4th) 223, 38 C.R.R. (2d) 189, 1 C.R. (5th) 229, 180 N.B.R. (2d) 161, 458 A.P.R. 161, 24 M.V.R. (3d) 1, 1996 CarswellNB 469, 1996 CarswellNB 470 (S.C.C.) — considered

R. v. Ladouceur (1990), 21 M.V.R. (2d) 165, [1990] 1 S.C.R. 1257, 40 O.A.C. 1, 48 C.R.R. 112, 108 N.R. 171, 56 C.C.C. (3d) 22, 77 C.R. (3d) 110, 1990 CarswellOnt 96, 73 O.R. (2d) 736 (note), 1990 CarswellOnt 997 (S.C.C.) — considered

R. v. Mellenthin (1992), 16 C.R. (4th) 273, 76 C.C.C. (3d) 481, 144 N.R. 50, 40 M.V.R. (2d) 204, 5 Alta. L.R. (3d) 232, [1993] 1 W.W.R. 193, 135 A.R. 1, 33 W.A.C. 1, 12 C.R.R. (2d) 65, [1992] 3 S.C.R. 615, 1992 CarswellAlta 149, 1992 CarswellAlta 474 (S.C.C.) — considered

R. v. Milne (1996), 18 M.V.R. (3d) 161, 48 C.R. (4th) 182, 28 O.R. (3d) 577, 107 C.C.C. (3d) 118, 90 O.A.C. 348, 35 C.R.R. (2d) 257, 1996 CarswellOnt 1627 (Ont. C.A.) — considered

R. v. Nicolosi (1998), 17 C.R. (5th) 134, 127 C.C.C. (3d) 176, 40 O.R. (3d) 417, 1998 CarswellOnt 2476, 110 O.A.C. 189, 36 M.V.R. (3d) 125, 52 C.R.R. (2d) 265 (Ont. C.A.) — considered

R. v. Orbanski (2005), *(*sub nom. *R. v. Elias)* 196 C.C.C. (3d) 481, *(*sub nom. *R. v. Elias)* 253 D.L.R. (4th) 385, 29 C.R. (6th) 205, [2005] 2 S.C.R. 3, 195 Man. R. (2d) 161, 351 W.A.C. 161, 2005 SCC 37, 2005 CarswellMan 190, 2005 CarswellMan 191, 19 M.V.R. (5th) 23, 335 N.R. 342, [2005] 9 W.W.R. 203, 132 C.R.R. (2d) 117 (S.C.C.) — considered

R. v. S. (R.D.) (1997), 161 N.S.R. (2d) 241, 477 A.P.R. 241, 151 D.L.R. (4th) 193, 118 C.C.C. (3d) 353, 1997 CarswellNS 301, 1997 CarswellNS 302, 10 C.R. (5th) 1, 218 N.R. 1, 1 Admin. L.R. (3d) 74, [1997] 3 S.C.R. 484 (S.C.C.) — considered

R. v. Simpson (1993), 1993 CarswellOnt 83, 43 M.V.R. (2d) 1, 79 C.C.C. (3d) 482, 60 O.A.C. 327, 20 C.R. (4th) 1, 12 O.R. (3d) 182, 14 C.R.R. (2d) 338 (Ont. C.A.) — referred to

R. v. Woods (2005), 29 C.R. (6th) 240, [2005] 2 S.C.R. 205, 195 Man. R. (2d) 131, 351 W.A.C. 131, 2005 SCC 42, 2005 CarswellMan 205, 2005 CarswellMan 206, 254 D.L.R. (4th) 385, 197 C.C.C. (3d) 353, 19 M.V.R. (5th) 1, [2006] 1 W.W.R. 1, 336 N.R. 1, 132 C.R.R. (2d) 168 (S.C.C.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 1 — referred to

s. 8 — considered

s. 9 — considered

s. 10(b) — considered

s. 24(2) — considered

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

s. 254 — referred to

s. 254(2) — considered

s. 254(5) — considered

Highway Traffic Act, R.S.O. 1980, c. 198

s. 189a(1) [en. 1981, c. 72, s. 2] — referred to

Highway Traffic Act, R.S.O. 1990, c. H.8

Generally — referred to

s. 48(1) — considered

s. 48(12) — considered

s. 216(1) — considered

s. 217(4) — considered

s. 221(1) — referred to

Police Act, R.S.O. 1980, c. 381

s. 1 — considered

***Murray J.*:**

1 Mr. Samuel Egonu stands charged with various firearms offences. In this pre-trial application, Mr. Egonu alleges various violations of his constitutional rights under the *Charter of Rights and Freedoms* and asks this Court pursuant to s.24(2) of the *Charter* to exclude from evidence at trial a handgun seized by the police when they searched the trunk of his automobile.

Overview

2 Mr. Egonu was the driver of a Honda Accord in the early morning of March 26, 2006. His passenger at the time was Mr. Tyrone Edwards. Both are young black men. Mr. Egonu's vehicle was pulled over by Officer Glenn Leonardo of the Peel Regional Police for speeding and unsafe driving. Based on Officer Leonardo's observations and Mr. Egonu's admission that he had been drinking earlier that evening, Officer Leonardo asked him to provide a breath sample to enable an analysis to be made by means of an approved screening device. This demand for a breath sample was made pursuant to s. 254(2) of the Criminal Code. Mr. Egonu refused to accompany Officer Leonardo to his vehicle to enable a sample of breath to be taken. He was arrested pursuant to s. 254(5) of the Code for having failed to comply. Subsequent to the arrest, the police conducted an inventory search of the vehicle prior to it being towed from the roadside and impounded. During the search of the vehicle, the police discovered a loaded handgun in the trunk. As a result, Mr. Egonu is charged with various firearms offences.

The Position of Mr. Egonu

3 Mr. Egonu asserts that his initial detention was a result of racial profiling by Officer Leonardo and that, as a result, his detention was arbitrary and contrary to s. 9 of the *Charter* and further that the "inventory search" of the trunk of his vehicle violated his rights under s. 8 of the *Charter*. He also alleges that he was denied his rights to counsel under s. 10(b) of the *Charter*. He asks that

this court exercise its discretion pursuant to s. 24(2) of the *Charter* and exclude the handgun seized by the police from evidence at trial.

The Position of the Crown

4 The Crown takes the position that Mr. Egonu's vehicle was properly pulled over by the police for speeding and unsafe driving while Mr. Egonu was proceeding westbound on Highway 401, that Mr. Egonu was properly detained, and that in the circumstances the demand for a breath sample was reasonable and appropriate. The Crown denies that Mr. Egonu was stopped because of his race. The Crown further submits that once Mr. Egonu and his passenger were arrested, the seizure of Mr. Egonu's vehicle and the subsequent inventory search of his vehicle (including a search of the trunk) prior to it being impounded were lawful. The Crown argues that Mr. Egonu's *Charter* rights have not been violated and that there is no reason to exclude the handgun from evidence at trial pursuant to s. 24(2) of the *Charter*.

The Evidence

5 Officer Glenn Leonardo is an experienced member of the Peel Breath Unit of the Peel Regional Police. His duties include enforcing the *Highway Traffic Act* and the enforcement of the provisions of the *Criminal Code* relating to drinking and driving. He has made hundreds of stops pursuant to the provisions of the *Highway Traffic Act* and hundreds of stops involving drinking and driving offences. He is also familiar with the issue of racial profiling and some of the police literature on the subject. Prior to becoming a policeman, at his previous place of employment, he participated as a facilitator in a diversity program sponsored by his employer.

6 In the early morning of Sunday, March 26, 2006 Officer Leonardo was in uniform and driving an unmarked police vehicle. The vehicle was equipped with lights in the front and in the back which flash alternately red and white. Shortly after the end of his shift at 3 a.m., Officer Leonardo was driving westbound along highway 401 towards the Dixie Road exit en route to the airport division of the Peel Police located at 180 Derry Rd. Officer Leonardo described the traffic as being moderate to heavy. He testified that the flow of traffic was moving between 120 and 140 kph.

7 While driving westbound on Highway 401, Officer Leonardo was following four to five car lengths behind a pick-up truck travelling at approximately 140 km per hour. While following the pick-up, Officer Leonardo testified that he became aware of two vehicles six to eight car lengths ahead of the pick-up which suddenly accelerated. According to Officer Leonardo, he could both hear and see the automobiles. He estimated the speed of vehicles reached approximately 160 km per hour based on their rate of acceleration away from his vehicle which was moving at the speed of 140 kph. He testified that he observed both vehicles weaving in and out of traffic and that when he was approximately 400 yards from the Dixie Road off-ramp, he saw them make a quick "sharp" exit onto the Dixie off-ramp. He concluded that the drivers were driving at an unsafe speed and that he thought they might roll over when they exited on the Dixie Road off-ramp. Officer Leo-

nardo exited off Highway 401 on to the Dixie Road off-ramp and caught up to the two vehicles which were stopped at a stop light at the intersection of the off-ramp and Dixie Road. The two vehicles were stopped beside each other on the off-ramp and were occupying the two left turn lanes waiting to turn left to proceed southbound on Dixie Road.

8 Officer Leonardo's police vehicle approached the intersection in the right hand turn lane and pulled up alongside both vehicles. Both vehicles had their front driver side and passenger windows down and both vehicles were occupied by a driver and one passenger. Officer Leonardo had a clear view of the occupants. The car next to him in the center lane contained a male driver and a female passenger. Two males (Mr. Egonu and Mr. Edwards) were in the other vehicle in the left hand lane. All the occupants of the vehicles were black. The occupants of the two cars were conversing with each other. Officer Leonardo, who remained in his police vehicle while stopped at the intersection, told both drivers that he wanted them to stop after they turned on to Dixie Road. His evidence was that he told them that he wanted to speak to them with regards to their driving. The traffic light turned green and both vehicles made left turns. One vehicle immediately pulled over but the other vehicle operated by Mr. Egonu continued southbound on Dixie Road at a slow rate of speed. Officer Leonardo testified that he pulled up beside the car that had stopped and told the driver that he was going to stop the other car and instructed the driver of the stopped the vehicle to follow him. Officer Leonardo then activated his flashing lights and proceeded to stop Mr. Egonu's vehicle on Dixie Road just north of the intersection of Aerowood Rd. It was a 3:23 a.m. on Sunday, March 26, 2006.

9 Officer Leonardo testified that immediately after stopping Mr. Egonu, he told Mr. Egonu that he was concerned about erratic driving and the possibility of alcohol being involved. When asked if he had been drinking, Mr. Egonu responded that he had a beer at approximately midnight. Officer Leonardo testified that he could smell alcohol and that Mr. Egonu's eyes were bloodshot and watery. Officer Leonardo then demanded that Mr. Egonu provide him with a breath sample and read to Mr. Egonu an approved screening device breath sample demand from his notebook as follows:

> I demand that you provide forthwith a sample of your breath suitable to enable a proper analysis to be made to determine the presence, if any, of alcohol in your blood, by means of an approved screening device and that you accompany me for the purpose of enabling such a sample of your breath to be taken.

10 Mr. Egonu refused to leave his vehicle for purposes of providing a breath sample. He refused to accompany Officer Leonardo to the police vehicle. Officer Leonardo explained to Mr. Egonu the consequences of refusing to accompany him to provide a breath sample including the fact that he would lose his license for 90 days if he failed to provide the sample. Officer Leonardo made it clear to Mr. Egonu that Mr. Egonu had to accompany him to his police car in order to provide the breath sample. At 3:27 a.m., Officer Leonardo requested that a Sergeant attend at the scene. He testified that his intention in calling for a Sergeant was to assist in getting Mr. Egonu to come to his car to provide a breath sample. He thought that perhaps a Sergeant would be better able

to explain to Mr. Egonu the necessity of exiting his vehicle and of accompanying Officer Leonardo to the police vehicle to provide a breath sample.

11 When Sergeant Canapini arrived, Officer Leonardo explained to him that Mr. Egonu admitted drinking, that he had given Mr. Egonu an ASD demand and that Mr. Egonu would not exit his vehicle and would not accompany him to his police cruiser for purposes of providing a breath sample. According to Officer Leonardo, the Sergeant then tried to persuade Mr. Egonu to leave the vehicle and to provide the sample but still Mr. Egonu refused. Mr. Egonu was then told that he would be removed from the vehicle and that he was under arrest for failing to comply with the demand to provide a breath sample.

12 Mr. Egonu had his seatbelt buckled and refused to remove it. Officer Leonardo tried to reach across Mr. Egonu and undo the seatbelt and, in doing so, Mr. Edwards held onto the seatbelt trying to prevent Officer Leonardo from undoing Mr. Egonu's seatbelt. Mr. Egonu was then forcibly removed from his vehicle. By 3:58 a.m. Mr. Egonu had been arrested and placed in the back of Officer Leonardo's police cruiser. Mr. Edwards was also physically removed from the vehicle and was arrested for obstructing police.

13 Officer Leonardo testified that the driver of the second vehicle (who was never identified) did not do as instructed, i.e., the driver did not stop his vehicle and wait behind Officer Leonardo's police cruiser during the time when Officer Leonardo was engaged with Mr. Egonu and, at some point when Officer Leonardo was focused on Mr. Egonu, the driver of the other vehicle left the scene. Officer Leonardo had no specific identifying information about the vehicle or its passengers and did not initiate any follow-up investigation or other police action with respect to the other vehicle. During Officer Leonardo's cross-examination, it was suggested by defence counsel that there was no second vehicle. That there was a second vehicle is confirmed by the affidavit evidence and the testimony of Mr. Egonu and by the testimony of the passenger, Mr. Tyrone Edwards, who was called as a witness.

14 Officer Karen MacGregor also testified. On the evening of March 26 she was working in the area of Dixie Road and Aerowood and was asked to assist Officer Leonardo with respect to a traffic stop at 3:41 a.m. When she arrived, Sergeant Canapini was already on the scene. Her involvement with Mr. Egonu at the scene was minimal. She did assist in the arrest of Mr. Egonu. She confirmed that after both Mr. Edwards and Mr. Egonu had been arrested, his vehicle was left in a "live" traffic lane on Dixie Road and that at 3:57 a.m. she contacted the dispatcher to have a tow truck remove the vehicle. When she contacted the dispatcher to arrange for the vehicle to be removed, she was the only police officer left at the scene.

15 While waiting for the tow truck she did an inventory search of the vehicle to check for valuables. She opened the locked trunk with the ignition key and while performing her inventory search, she discovered a loaded handgun in the trunk of Mr. Egonu's car. The handgun was subsequently identified as a .44 Magnum Colt Anaconda serial number MM72331. On locating the handgun, she discontinued her search and immediately notified Sergeant Canapini that she had

found a handgun. Sergeant Canapini re-attended at the scene.

16 Officer MacGregor's evidence was that while she looked in the trunk, she did not dismantle any part of the car in order to conduct her inventory search for valuables. She testified that in performing her search she did not remove door panels or trunk panels or lift the backseat of the automobile. I accept her evidence as to the manner in which she conducted her search. It is clear from the evidence that some time after the vehicle was seized, while it was in police custody, a very aggressive search was made in which panels were removed and the backseat was lifted. There was no evidence about who did this or when it happened. As far as the Crown is concerned, it remains a mystery.

17 Sergeant Canapini was called by the Crown in order to enable defence counsel to cross-examine him. He confirmed that when he attended the scene, he tried to persuade Mr. Egonu to provide a breath sample. Mr. Egonu continued to refuse to provide a sample. Sergeant Canapini testified that Mr. Edwards tried to prevent police from undoing Mr. Egonu's seatbelt and also that Mr. Edwards was holding on to Mr. Egonu's arm thereby interfering with police efforts to remove Mr. Egonu from his vehicle. Sergeant Canapini confirms that both Mr. Egonu and Mr. Edwards were arrested. Sergeant Canapini confirmed that after Mr. Egonu and Mr. Edwards were arrested and removed to the police station, he left Officer MacGregor alone at the scene in order to look after the seizure of the vehicle.

18 Mr. Egonu filed a supporting affidavit and also testified.

19 In his affidavit, Mr. Egonu disputes that he was speeding and deposes that he was going within the speed limit which is 100 kph. He confirms that there was a second vehicle which stopped next to him at the intersection of the Dixie Road off-ramp and Dixie Road. He confirms that he was communicating with the occupants of the vehicle. He confirms that Officer Leonardo pulled up in the right-hand lane beside both vehicles. He confirms that Officer Leonardo pulled over the other vehicle after it had turned left on Dixie Road and that Officer Leonardo appeared to have abandoned the other vehicle at the time his vehicle was pulled over. In his affidavit he deposes that Officer Leonardo did not provide any reasons for stopping him. In his affidavit, he agrees that he advised Officer Leonardo that he had consumed one beer earlier in the evening. He confirms that he did not want to leave his vehicle to provide a breath sample stating that he was fearful about leaving his vehicle at that hour of the morning in the presence of an armed officer. He deposes that he was not allowed to contact his lawyer or his mother notwithstanding his request to the police that he be allowed to do so. He deposes that he was also denied a request to contact someone to take possession of his vehicle. He deposed that he was not allowed to contact legal counsel until several hours after his arrest after he was further charged with various firearm offences and therefore was not offered the opportunity to retain and instruct counsel without delay.

20 In his *viva voce* testimony Mr. Egonu stated that on March 26, 2006 he had been at the Club Paradise and after leaving there proceeded in his automobile west on Highway 401. He was accompanied by Mr. Tyrone Edwards. He denied that he was speeding or driving erratically by

changing lanes or by making a sharp cut off onto the Dixie off-ramp. He testified that after exiting from Highway 401, his vehicle and another vehicle were stopped beside each other at a traffic light intending to turn left on Dixie Road. Mr. Egonu testified that the occupants of the other vehicle were acquaintances of his and that they were also at the Club Paradise that evening.

21 Mr. Egonu testified that he was stopped and harassed by Officer Leonardo because he is a black person. In making this allegation, Mr. Egonu points to the fact that Officer Leonardo gave no reason why he was pulled over. Mr. Egonu considers this evidence that the traffic stop was racially motivated and arbitrary. Mr. Egonu recorded a significant portion of the discussion that took place between him and the police in the early morning of March 26, 2006, the time immediately preceding his arrest. The assertion by Mr. Egonu that Officer Leonardo provided Mr. Egonu with no reason or explanation for the traffic stop is conclusively rebutted by the tape recording. On that tape recording it is clear that, contrary to his testimony, Mr. Egonu was advised by Officer Leonardo that he was pulled over for speeding and for making a sharp cut-off from Highway 401 on to the Dixie Road off-ramp.

22 Although Mr. Egonu does not suggest there were any racist statements made by Officer Leonardo, he does state that Officer Leonardo's conduct suddenly changed from being very aggressive to being polite when Mr. Egonu announced that he was tape recording their conversation.

23 Mr. Edwards did not confirm Mr. Egonu's evidence that Officer Leonardo had been inappropriately aggressive. Mr. Edwards testified that the situation was not tense until other officers arrived on the scene. This evidence is consistent with that of Officer Leonardo.

24 It is also clear from his testimony and confirmed by the tape recording that Mr. Egonu refused to provide a breath sample and refused to accompany Officer Leonardo to the police vehicle in order to provide such sample. It is clear that prior to his being charged and arrested, Mr. Egonu firmly took the position that Officer Leonardo had no legal right to request a breath sample be provided. He would not be shaken from this position no matter what was said by the police to try to encourage him to provide a breath sample and to avoid the consequences of refusal. Even testifying at the hearing of the application, Mr. Egonu remained adamant that he knew his rights and that he did not have to exit the vehicle to provide a breath sample.

25 Finally, Mr. Egonu testified that it was some hours after his arrest before he was charged with the firearm offence and read his rights to counsel.

Findings of Fact

26 I find as a fact that Officer Leonardo did observe Mr. Egonu and the driver of another vehicle speeding, weaving in and out of traffic on Highway 401 while driving westbound and further that he observed the drivers of both vehicles make an abrupt turn off the highway onto the Dixie Rd. off-ramp. I accept his evidence that he had decided to stop these vehicles before he drove up next to them on the Dixie Road off-ramp.

27 I find as a fact that Officer Leonardo did not know that the drivers and the occupants of the two vehicles were black until he drove up beside them at which time he had his first close-up view of them. Notwithstanding this finding, I reject the suggestion that his decision to stop the vehicles was informed in whole or in part by the race of the occupants of the vehicles. I also accept Officer Leonardo's evidence that he told Mr. Egonu reasons for his detention at the time he was pulled over the, that is, for speeding and making an abrupt turn from Highway 401 onto the Dixie Road off-ramp. As is noted below, the evidence of Mr. Egonu that no reason for the traffic stop was given by Officer Leonardo is conclusively rebutted by the tape recording made by Mr. Egonu.

28 I accept the evidence of Officer Leonardo that after he stopped Mr. Egonu he smelled alcohol on Mr. Egonu's breath and that his eyes appeared bloodshot and watery. During this application, Mr. Egonu was asked to approach Officer Leonardo while Officer Leonardo was giving testimony. Officer Leonardo agreed that Mr. Egonu's eyes appeared to be bloodshot. I assume that this exercise was designed to demonstrate that Mr. Egonu's bloodshot eyes on the evening of March 26 were not evidence of alcohol consumption. It may be that Mr. Egonu's eyes were bloodshot for reasons other than drink. What this demonstration confirmed is the likelihood that Officer Leonardo's observations were accurate. Officer Leonardo testified that his observations (including smelling alcohol on Mr. Egonu's breath) were consistent with alcohol consumption and consistent with Mr. Egonu's admission that he had been drinking. I accept Officer Leonardo's evidence with respect to his observations which were substantially confirmed by the evidence of Mr. Egonu.

29 As noted already, part of the interaction between the police and Mr. Egonu was tape-recorded by Mr. Egonu. Having heard the tape which was introduced into evidence and having read the transcript, it is clear that Officer Leonardo acted reasonably in attempting to persuade Mr. Egonu to provide a breath sample. He advised him clearly of the consequences of failing to provide a breath sample, i.e. that he would be arrested. It is clear that Mr. Egonu admitted drinking earlier in the evening. It is also clear that Mr. Egonu felt he did not have to leave his vehicle to provide a breath sample and continuously refused to do so.

30 The tape recording establishes that Officer Leonardo told Mr. Egonu that if he passed the test he would be able to go home. He said: "If you blow under, you go home." From his notebook, in an effort to persuade Mr. Egonu to provide the sample, Officer Leonardo showed Mr. Egonu the text of the demand for a breath sample which he had earlier read to him. He tried to persuade Mr. Egonu that his legal obligation was to provide a breath sample. He instructed Mr. Egonu that he had to accompany him to his police cruiser in order to provide the sample. Mr. Egonu was advised that he would be arrested if he failed to provide a sample. The consequences of failure to provide a sample were clearly spelled out to him. It is also clear that either Officer Leonardo or Sgt. Canapini tried to convince Mr. Edwards to have Mr. Egonu provide a breath sample. The recording establishes conclusively that Mr. Egonu was insistent throughout that he had no legal obligation to provide such a sample and that he refused to provide such a sample.

31 Contrary to Mr. Egonu's affidavit and his sworn testimony, the tape recording also makes it clear that Officer Leonardo did tell Mr. Egonu that he had been stopped because of speeding and his sharp cut off onto the Dixie Road off-ramp.

32 Mr. Egonu stated in his evidence that, as a young black male, he felt vulnerable getting out of his automobile and that he told Officer Leonardo that he felt vulnerable. Although the tape recording does not purport to be a tape recording of the totality of the interaction between the police and Mr. Egonu, the recording establishes that when Mr. Edwards stated that as young black men they felt vulnerable once they step out of the car, Mr. Egonu said: "If I broke any law then I'll gladly step out of the car. But I haven't...." In other words, Mr. Egonu was not asserting his perceived vulnerability as a reason not to get out of his vehicle but rather was relying on his belief that he was not required to exit the vehicle to provide a breath sample because he had broken no law.

33 The tape recording demonstrates that Officer Leonardo exhibited patience and courtesy in the face of Mr. Egonu's determination not to exit the vehicle and not to provide a breath sample. I accept the testimony of Officer Leonardo and Mr. Edwards that Officer Leonardo conducted himself in a professional manner and reject the evidence of Mr. Egonu that Officer Leonardo was gratuitously aggressive prior to the commencement of the tape recording.

34 The recording indicates that Sergeant Canapini explained to him that he was under arrest for failing to provide a sample. Mr. Egonu continued to refuse to step out of his vehicle and refused to accompany Officer Leonardo to provide a breath sample. Eventually Mr. Egonu did agree to provide a breath sample if the screening device was brought to the car. It is also clear that Mr. Egonu refused to exit the car after he was told he was under arrest for refusing to provide a breath sample. (On this point, I note that in the case of *R. v. Woods*, [2005] S.C.J. No. 42 (S.C.C.), the Supreme Court of Canada stated at para 45: "Drivers upon whom ASD demands are made are bound by s. 254(2) to comply and immediately and not later, at the time of their choosing, when they have decided to stop refusing!"

35 Officer Leonardo did not have a battery operated portable screening device with him. The approved screening device plugged into an outlet in his police vehicle. There was no portable screening device available that night. No police officer called for a portable screening device to be brought to the scene. Officer Leonardo explained in this evidence that he would not take a breath sample by standing next to the driver's side door even if he had a portable screening device. While at the side of the road, it is his practice to require the driver in appropriate circumstances to accompany him to his police vehicle for purposes of providing a breath sample. In his experience, the stopping of another vehicle by a police cruiser can be a distraction to other drivers particularly those who are impaired. He is also aware of the potential of flight. His evidence was that by placing the driver in the rear of his cruiser he secures the safety both of himself and of the person who is stopped. I accept that this practice enhances the safety of those involved. (On this point, I note that the Ontario Court of Appeal in *R. v. Baril*, [1999] O.J. No. 4012 (Ont. C.A.), in dismissing an appeal, concluded that there was evidence to support the trial judges conclusion that it was necessary for the appellant to accompany the officer to his car in order to provide a breath

sample because the officer was concerned about officer safety.)

The Issues

36 Was Mr. Egonu arbitrarily detained in contravention of s. 9 of the *Charter*?

37 Was Mr. Egonu's vehicle the subject of unreasonable search in violation of s. 8 of the *Charter*?

38 Was there a violation of Mr. Egonu's rights under s. 10(b) of the *Charter* to retain and instruct counsel without delay and to be informed of that right ?

39 Should the firearm seized by the police in the inventory search made of Mr. Egonu's vehicle be excluded from evidence at trial pursuant to s. 24(2) of the *Charter*?

Analysis

Was Mr. Egonu arbitrarily detained by Officer Leonardo?

40 At the heart of the applicant's case is the allegation that Mr. Egonu was initially detained because of his race. This is a very serious allegation and one that this court takes seriously.

41 Generally speaking racial profiling will exist when the members of a particular racial group become subject to greater justice surveillance than the average or typical citizen. The Ontario Human Rights Commission defines racial profiling as follows:

> Any action undertaken for reasons of safety, security or public protection, that relies on stereotypes about race, color, ethnicity, ancestry, religion, or place of origin, or a combination of these, rather than on reasonable suspicion, to single out an individual for greater scrutiny or different treatment. Profiling can occur because of a combination of factors and age and/or gender can also be factors in racial profiling.

42 No single definition of racial profiling may be entirely satisfactory. All definitions are designed to strike at the impropriety of action informed by race and/or other improper motives that leads to an individual being singled out for greater scrutiny or different treatment.

43 In approaching this question of whether racial profiling exists in this case, I am aware of judicial commentary on the need for judges to be aware of the nature of the community in which we serve and of the history of discrimination in the community. As Justices L'Heureux-Dube and McLachlin stated in *R. v. S. (R.D.)* (1997), 118 C.C.C. (3d) 353 (S.C.C.) at paragraph 46:

> The reasonable person must be taken to be aware of the history of discrimination faced by disadvantaged groups in Canadian society protected by the *Charter*'s equality provisions.

> These are matters of which judicial notice may be taken. In *Parks*, supra, at page 342, Doherty J.A., did just this, stating: Racism, and in particular anti-black racism, is a part of our community's psyche. A significant segment of our community holds overtly racist views. A much larger segment subconsciously operates on the basis of negative racial stereotypes. Furthermore, our institutions, including the criminal justice system, reflect and perpetuate those negative stereotypes.

44 I acknowledge that overtly racist conduct by the police will be rare. A conclusion that race has in whole or in part motivated police action will most often be inferred from the facts of the case.

45 If Mr. Egonu had been traveling on Highway 401 with the flow of traffic and had been stopped by the police, one might have wondered why his vehicle was selected. This was not the case. At approximately 3:20 a.m. in the morning of March 26, 2006 Mr. Egonu's vehicle and another vehicle were observed by Officer Leonardo going faster than the flow of traffic, weaving in and out of traffic and making an abrupt cut off at the Dixie Road off-ramp which was described by the officer as being unsafe (careless or dangerous). In short, Mr. Egonu's vehicle and another vehicle engaged in conduct which distinguished them from others using the highway and provided Officer Leonardo with a reason to single out Mr. Egonu and the driver of the other vehicle for greater scrutiny.

46 Stopping a car for speeding, for making an unsafe lane change or for driving carelessly is a legitimate police function connected to highway safety concerns. However, valid highway safety concerns may not be used by law-enforcement authorities to mask an improper motive. In *Brown v. Durham Regional Police Force* (1998), 131 C.C.C. (3d) 1 (Ont. C.A.) Justice Doherty stated as follows at paras 38-39,:

> While I can find no sound reason for invalidating an otherwise proper stop because the police used the opportunity afforded by that stop to further some other legitimate interest, ***I do see strong policy reasons for invalidating a stop where the police have an additional improper purpose. Highway safety concerns are important, but they should not provide the police with a means to pursue objects which are themselves an abuse of the police power or are otherwise improper. For example, it would be unacceptable to allow a police Constable who has valid highway safety concerns to give effect to those concerns by stopping only vehicles driven by persons of colour. S. 216(1) of the H.T.A. does not, in my view, authorize discriminatory stops even where there is a highway safety purpose behind those stops.*** (emphasis added)
>
> When I refer to improper police purposes I include purposes which are illegal, purposes which involve the infringement of a person's constitutional rights and purposes which have nothing to do with the execution of a police Constable's public duty. ***Constables who stop persons intending to conduct unauthorized searches, or who select persons to be stopped based on their sex or colour, or who stop someone to vent their personal animosity toward that per-***

son, all act for an improper purpose. They cannot rely on s. 216(1) of the H.T.A. even if they also have highway safety concerns when making the stop.

(emphasis added)

47 S. 216(1) of the *HTA* provides the lawful authority for the initial stop of Mr. Egonu. That section states:

> 216(1) A police Officer, in the lawful execution of his or her duties and responsibilities, may require the driver of a motor vehicle to stop and the driver of a motor vehicle, when signalled or requested to stop by a police constable who is readily identifiable as such, shall immediately come to a safe stop.

48 In describing the scope of this section's predecessor (s. 189(a)(i), R.S.O. 1980, c. 198), Cory J., in *R. v. Ladouceur*, [1990] 1 S.C.R. 1257 (S.C.C.) said, at p. 1287:

> Constables can stop persons only for legal reasons, in this case reasons related to driving a car such as checking the driver's licence and insurance, the sobriety of the driver and the mechanical fitness of the vehicle. Once stopped the only questions that may justifiably be asked are those related to driving offences. Any further, more intrusive procedures could only be undertaken based upon reasonable and probable grounds.

49 In *R. v. Ladouceur*, (*supra*), the Ontario Court of Appeal had occasion to deal with random stops by the police under the authority of the *HTA*. In the course of giving judgment for the majority, Justice Tarnopolsky observed as follows:

> If no articulable cause is required, on what basis is the choice made as to whom to stop? S. 189a (now s. 216(1) of the *Highway Traffic Act*), without a requirement of reasonable and probable cause, or some lesser, but still articulable cause, gives a discretion so wide that some police Constables can use it to choose the younger driver over the older, the less sartorially acceptable over the more sartorially respectable, the owner of an older or cheaper car over the one who drives a more expensive or a more commonly driven car, even a person obviously visible as being of a minority group over one who is more clearly of the majority. I do not want to be taken as suggesting that most, or even many police Constables would so act. I do, however, fear that s. 189a is capable of being so used by some.

50 In *Brown v. Durham Regional Police Force*, supra, at para. 51-55, Justice Doherty states as follows:

> A stop made under s. 216(1) will not result in an arbitrary detention if the decision to stop is made pursuant to some standard or standards which promote the legislative purpose underlying the statutory authorization for the stop: *R. v. Jones*, [1986] 2 S.C.R. 284 at 303. If the police exercise their power to stop and detain under s. 216(1) based on criteria which are relevant to

highway safety concerns, they do not act arbitrarily. Those criteria are sometimes referred to as "articulable cause", e.g. *R. v. Wilson*, [1990] 1 S.C.R. 1291, per Cory J. at p. 1297, per Sopinka J. (dissent) at p. 1293.

The phrase "articulable cause" has been used in two different ways in the s. 9 jurisprudence. The phrase has been used in cases where "articulable cause" is said, when considered in combination with other factors, to supply the legal justification for detention. In *Simpson*, supra, at p. 501, articulable cause as a factor justifying detention was described as:

> ... a constellation of objectively discernable facts which give the detaining Officer reasonable cause to suspect that the detainee is criminally implicated in the activity under investigation ....

51 This description was approved by the majority of the court in *R. v. Jacques* (1996), 110 C.C.C. (3d) 1 (S.C.C.) at 11.

The phrase "articulable cause" used in connection with stops made under s. 216(1) does not refer to factors which standing alone would justify interference with the liberty of the subject, but rather refers to the reasons behind the exercise of the statutory power to stop and detain. Articulable cause exists under s. 216(1) if the police have a reason for stopping the vehicle which is legitimately connected to highway safety concerns. In this context, articulable cause is used only to distinguish between those lawful stops which are random and, therefore, arbitrary and those lawful stops which are selective and not arbitrary.

When articulable cause is used in reference to a stop under s. 216(1), it may refer to a stop flowing from a reasonable suspicion that a driver is violating some law pertaining to highway regulation and safety. It may also refer to more generalized safety concerns as in the case of the Constable who stops trucks because experience teaches that trucks are more likely to be unsafe. Since the lawfulness of the stop does not depend on the existence of articulable cause, it is unnecessary to connect that cause to a specific person, offence or investigation as long as that cause is legitimately connected to legitimate highway safety concerns.

As indicated above, the trial judge's findings provide a firm basis grounded in legitimate highway safety concerns for the stopping and subsequent detention of the appellants. As such, the stops furthered the policy underlying s. 216(1) of the H.T.A. and cannot be characterized as arbitrary.

52 I have concluded that Mr. Egonu was pulled over for the reasons stated by Officer Leonardo and those reasons were connected to legitimate highway safety concerns. There is no credible basis on which to infer that the alleged *HTA* violations are simply an *ex post facto* attempt to justify initial detention based on an improper or unlawful motive.

53 Objectively, there was a "constellation of discernible facts" giving rise to articulable cause

to detain the applicant for investigation. As stated in *Brown v. Durham Regional Police Force*, *(supra)*, the investigative detention power recognized in *R. v. Simpson* [1993 CarswellOnt 83 (Ont. C.A.)], (*supra*), is a reactive power dependent upon a reasonable belief that the detained person is implicated in a prior criminal act. There is a link in this case. Officer Leonardo smelled alcohol in the breath of Mr. Egonu. His eyes appeared bloodshot and watery. Mr. Egonu admitted drinking earlier in the evening albeit he admitted only drinking one beer.

54 A police officer who smells alcohol on the breath of a driver who has been observed speeding and driving unsafely and who admits to having consumed alcohol, has a constellation of discernible facts on which to form a reasonable belief that the individual may have alcohol in his blood beyond the legal limit. It is also reasonable that an officer's right to investigate cannot be terminated based on the self-serving statement of a driver about the amount of alcohol consumed even where, as in this case, there is no evidence of impairment. Therefore, I conclude that immediately after Mr. Egonu's vehicle had been stopped, the detention of Mr. Egonu became a *bona fide* detention for investigative purposes and, as such, was not arbitrary and did not violate his constitutional rights. In my view, this conclusion is also completely consistent with the provisions of s. 254(2) of the *Criminal Code of Canada* which provides:

> Where a peace Officer reasonably suspects that a person who is operating a motor vehicle... has alcohol in the person's body, the peace Officer may, by demand made to that person, require the person to provide forth with such a sample of breath as in the opinion of the peace Officer is necessary to enable a proper analysis of the breath to be made by means of an approved screening device and, where necessary, to accompany the peace Officer for the purpose of enabling such a sample of breath to be taken.

55 In this case, Officer Leonardo reasonably suspected that Mr. Egonu who was operating a motor vehicle had alcohol in his body and the request to provide a sample of breath to enable an analysis to be made by means of an approved screening device was reasonable and authorized by law as was the detention of Mr. Egonu which was for the purpose of enabling Officer Leonardo to obtain such a sample.

56 Therefore, Mr. Egonu's s. 9 rights were not violated.

Was Mr. Egonu's vehicle the subject of unreasonable search in violation of s. 8 of the Charter?

57 The Crown accepts that it bears the burden on the balance of probabilities to show a warrantless search is reasonable. A warrantless search, to be reasonable, must meet the following criteria:

1. A search must be authorized by a specific statute or common law rule;

2. The law itself must be reasonable; and

3. The search must be carried out in a reasonable manner.

58 It is not contested in this case that the police exceeded any limited right to make a visual examination of the interior of the vehicle to ensure their own safety. Indeed, the police in this case do not justify their search of the vehicle pursuant to any common law right to search incidental to arrest. Therefore, in this case is distinguishable from *R. v. Caslake* (1998), 121 C.C.C. (3d) 97 (S.C.C.).

59 The Crown says that the search of the vehicle for purposes of taking an inventory of any valuables contained in the vehicle is an administrative and not an investigative procedure that is authorized by statute, that the law is reasonable and that the search was carried out in a reasonable manner.

60 Is a search of the vehicle seized by the police for purposes of taking an inventory of valuables authorized by statute? In asserting that the search of Mr. Egonu's his vehicle was authorized by statute, the Crown relies on a number of statutory provisions as providing authority to conduct an inventory search of Mr. Egonu's vehicle.

61 Firstly, the Crown asserts that authority to conduct an inventory search is to be found in s.1 of the *Police Services Act*. S.1 is entitled Declaration of Principles and states that:

> Police services shall be provided throughout Ontario in accordance with the following principles:
>
> 1. the need to ensure the safety and security of all persons and property in Ontario.

62 This section is a general section that underscores that the provision of police services in Ontario should respond to the need to ensure the safety of persons and property. In my respectful opinion, s.1 of the *Police Services Act* does not explicitly or by necessary implication authorize an inventory search in circumstances where a vehicle has been seized by the police. I reject the suggestion that this section of the *Police Services Act* is statutory authorization to allow the police to conduct inventory searches of vehicles in any circumstances.

63 Secondly, Officer Leonardo, when asked in cross-examination for the basis of the legal authority to seize and search Mr. Egonu's vehicle, relied on s. 217(4) of the *Highway Traffic Act* which provides as follows:

> A police Officer ... making an arrest without warrant, may detain a motor vehicle with which the offence was committed until the final disposition of any prosecution under this Act or under the *Criminal Code* (Canada), but the motor vehicle may be released on security for its production being given to the satisfaction of a justice of the peace or judge.

64 The case at bar does not involve detaining a motor vehicle with which an offence was

committed within the meaning of s. 217(4). In my opinion, s. 217(4) applies to situations where a vehicle was used in the commission of an offence for which an arrest is made and where the vehicle is evidence or where seizure will prevent the continuance or re-commission of the offence. I am of the opinion that this section of the *Highway Traffic Act* has no application in this case.

65 Finally, the Crown relies on subsection 48(12) of the *Highway Traffic Act* which provides as follows:

> If the motor vehicle of a person whose license is suspended under this section is at a location from which, in the opinion of a police Officer, it should be removed and there is no person available who may lawfully remove the vehicle, the Officer may *remove and store the vehicle or cause it to be removed and stored*, in which case the Officer shall notify the person of the location of the storage. (emphasis added)

66 I agree that if any section of the Highway Traffic Act authorizes an inventory search of a vehicle, it is s. 48(12) of the Highway Traffic Act.

67 An important question raised by s. 48(12) of the HTA is: what is the nature of the authority given to a police Officer to *remove and store the vehicle or cause it to be removed and stored*? An answer to this question requires a review the case of *R. v. Nicolosi*, [1998] O.J. No. 2554 (Ont. C.A.) a decision of the Court of Appeal Ontario (also reported at (1998), 40 O.R. (3d) 417 (Ont. C.A.)).

68 The *Nicolosi* case involved a conviction on a charge of possession of an unregistered firearm. The gun was found in the accused's car during a routine search after the car was impounded by police. The Court of Appeal in *Nicolosi* considered the implications of s. 221(1) of the *Highway Traffic Act* which authorizes a police Officer who discovers a vehicle without proper number plates to "take the vehicle into the custody of the law and may cause it to be taken to and stored in a suitable place." The court held that statutory authorization to remove unlicensed vehicles from the roadway is a fundamental component of any scheme which purports to regulate the use of motor vehicles and concluded that there was nothing arbitrary or unreasonable in a statute authorizing the police to regulate use of public roadways by removing vehicles which have no business on those roadways in the first place. The Court also said that the power to impound improperly licensed vehicles can be abused but the possibility of abuse does not make the statute unreasonable. Potential abuse can be addressed by considering the specific exercise of the impounding power and the circumstances of each case. That is, the Court of Appeal directs the inquiry to the constitutionality of the conduct of the police and not the constitutionality of the statute. In *Nicolosi*, the Court of Appeal found that the seizure of the vehicle by the police was consistent with s. 221(1) of the *HTA* and that the power to remove improperly licensed vehicles from the roadway was not unreasonable.

69 S. 48(12) of the *HTA* is not restricted to situations where a hazard may be created for other users of the road. The authority to remove and store a vehicle is given to the police when a vehicle

is at a location from which, in the opinion of a police officer, it should be removed and there is no person available who may lawfully remove the vehicle. There could be a myriad of circumstances in which it would be reasonable for a police officer to determine that a vehicle is in a location from which it should be removed. It is easy to imagine circumstances where to leave the vehicle unattended would create a risk to the vehicle and/or its contents or where the vehicle may create a hazard for other users of the road or where the vehicle may interfere with snow removal or other road maintenance work. To authorize the police to remove and store a vehicle in such circumstances is reasonable. It is also reasonable for the police to have the authority to remove and store a vehicle where there is no owner or licensed operator authorized by the owner available to remove the vehicle. I conclude that s. 48(12) is reasonable.

70 When a police officer decides to remove and store a vehicle pursuant to the authority given to the police under s. 48(12), such a decision must be in good faith, must be reasonable and must be rationally based in fact. As was stated in *Nicolosi*, potential abuse of police authority can be addressed by considering the specific exercise of the impounding power in the circumstances of each case.

71 In this case, I am of the opinion that the police conduct in seizing and impounding Mr. Egonu's vehicle was reasonable. At the time of the seizure of the vehicle, it was situated in a live traffic lane on Dixie Road. In my view, it was reasonable for the police to conclude that the vehicle should be removed from a traffic lane on a busy public street.

72 When Mr. Egonu refused to provide a breath sample pursuant to Officer Leonardo's demand, his driver's license was immediately suspended by operation of the *Highway Traffic Act*. Mr. Egonu was arrested pursuant to s. 254(5) of the *Criminal Code*. The only other person in the car at the time of Mr. Egonu's arrest, Mr. Edwards, was also arrested at the time for obstructing a peace officer in the execution of his duty. Therefore neither Mr. Egonu nor Mr. Edwards was in a position to remove the vehicle. Neither Mr. Egonu nor Mr. Edwards was available to remove the vehicle.

73 Was there any person "available" who could lawfully remove the vehicle? The Shorter Oxford Dictionary defines "available" as meaning: "capable of producing a desired result; able to be used or turned into account; at one's disposal; within one's reach". It was approximately 3:50 a.m. on March 26, 2007. The persons in the second vehicle which had been stopped by Officer Leonardo and who were acquaintances of Mr. Egonu had vanished. It was reasonable for the police to conclude that there was no one at Mr. Egonu's disposal who was in a position to lawfully remove the vehicle. That is, it was reasonable for the police to conclude that there was no person "available" within the meaning of s. 48(12) who could lawfully remove the vehicle. It would be unreasonable in circumstances such as these to impose on the police an obligation to wait for Mr. Egonu to try to contact someone to see if he could arrange to have a person attend at the scene to remove the vehicle. It would be unreasonable to impose on the police a further obligation to wait for someone contacted by Mr. Egonu to attend at the scene for purposes of removing the vehicle. These additional police obligations are not contemplated by the statute and would interfere with

sensible policing and the sensible allocation of police resources.

74 I therefore conclude that the seizure of the vehicle did not violate s. 8 of the *Charter*.

75 I now turn to the question of whether the search of vehicle violated Mr. Egonu's s. 8 rights.

76 In *Nicolosi*, the court said at paragraphs 20 and 21 as follows:

> The determination of whether an accused had a reasonable expectation of privacy is made by reference to the totality of the circumstances: *R. v. Edwards*, supra, at p. 146; *R. v. Belnavis*, supra, at pp. 417-19. In this case, two circumstances are particularly significant. The appellant was under arrest and the police had assumed lawful custody of his vehicle for the purpose of removing it from the road, taking it to a storage area, and storing it in a suitable place. Both factors significantly reduced the already relatively modest reasonable expectation of privacy that the appellant had with respect to his motor vehicle.
>
> In my opinion, no one in the position of the appellant could reasonably expect that the police or their authorized agents would not enter the vehicle on one or more occasions while the vehicle was in "the custody of the law." For example, it could be reasonably expected that the police or their agents would enter the vehicle to move it from the roadside, or to ensure that it could be safely towed without doing damage to the vehicle or its contents, or to safely secure the vehicle and its contents at a storage facility. Absent a reasonable expectation that the police or their agents would not enter the vehicle while it was in their custody, I do not see how the appellant can establish a reasonable expectation of privacy with respect to any of the contents of the vehicle which were plainly visible upon entering the vehicle. Constable Bishop's actions did not infringe the appellant's reasonable expectation of privacy and could not constitute a violation of s. 8.

77 The case at bar does not deal with the recovery of contents of the vehicle which were plainly visible upon entering the vehicle. The evidence of Constable MacGregor was that she entered the trunk of the car using the ignition key. It was in the trunk that she discovered the firearm.

78 In the circumstances of this case, for the reasons given in *Nicolosi*, no one in Mr. Egonu's position could establish a reasonable expectation with respect to contents of the vehicle which were plainly visible. It could be reasonably expected that the police or their agents would enter the vehicle to move it from the roadside or to ensure that it could be safely towed without doing damage to the vehicle or its contents or to safely secure the vehicle and its contents at a storage facility.

79 However, the search by the police in this case included a search of the trunk of Mr. Egonu's vehicle. Did Mr. Egonu have a greater expectation of privacy in the trunk of his car? See *R. v. Calderon* [2004 CarswellOnt 3405 (Ont. C.A.)], (supra) which is support for the proposition that

in some circumstances there is a greater expectation of privacy with respect to the trunk of an automobile than there is in the passenger compartment.

80 It should be noted that in this case the evidence established that the Peel Regional Police have issued a Directive which deals with seizure and release of vehicles. Where a vehicle is ceased the Directive provides as follows:

> Where a vehicle is seized:
>
> (a) the investigating Officer shall:
>
> (i) check the vehicle for any valuables, noting same in the Officer's notebook and ensuring proper provision is made for their safe keeping, as required;
>
> (ii) have a contract tow for that area dispatched to the scene;

81 The Directive also provides, *inter alia*, that where a vehicle is seized the registered owner shall be notified of the seizure as soon as possible. The Directive makes no distinction between checking for and listing valuables which may be in plain view and valuables which are contained in the trunk. Although the police have issued a general procedural Directive purporting to authorize the search of a vehicle for valuables after seizure, a police directive or policy is not legal authority to justify the search of a vehicle if such search is not otherwise justified by law. The fact that Officer MacGregor acted in a fashion consistent with a police Directive may be evidence of good faith which can be taken into account when considering whether to exclude evidence pursuant to s. 24(2) of the *Charter*.

82 The question therefore remains is the search of Mr. Egonu's trunk in the circumstances of this case authorized by law and, if so, is the law reasonable and is the search itself reasonable? The Crown asserts that s. 48(12) of the *HTA* is the legal justification for the right to search the trunk of a vehicle seized in circumstances such as occurred in this case. I find that the purpose of the search was not to investigate a possible crime. Officer MacGregor was listing the valuables pursuant to the Directive and pursuant to her understanding of the reasons for the directive. No one gave her any information that would allow her to suspect Mr. Egonu was engaged in any criminal activity. No one gave her any specific instruction with respect to the vehicle. She just did what she has done on other occasions when a vehicle has been seized and it has been left in her care. She arranged for the vehicle to be towed and she conducted an inventory search. There is no evidence that she was investigating a possible crime on her behalf or on behalf of any other police officer involved in the events of March 26, 2006. The purpose of the search in this case was to list the valuables contained in a vehicle that the police had decided they would seize and store or cause to be stored.

83 As was said by the Court of Appeal in *Nicolosi*, taking a vehicle into the custody of the law entails more than simply assuming possession and control of the vehicle. It involves the preservation and safekeeping of the vehicle while in the care and control of the police. Justice Doherty

did not make any distinction between the vehicle and its contents when a vehicle is impounded. Both are equally in the custody of the law. With the responsibility to keep the impounded property safe comes the ability to take reasonable steps to achieve that end. Justice Doherty made it clear that to enter the vehicle for the purpose of itemizing "visible property" was consistent with the responsibility to safeguard the vehicle and its contents while they are in the custody of the law and that the police conduct in taking an inventory was squarely within this authority. Justice Doherty did not decide whether the power to safeguard the vehicle and its contents authorized the search of the trunk of a vehicle which has been lawfully seized. That issue must be addressed in this case.

84 In this case Mr. Egonu and his passenger were arrested and the police had assumed lawful custody of his vehicle for the purpose of removing it from the road and storing it. In these circumstances, as in *Nicolosi*, these factors reduce whatever expectation of privacy Mr. Egonu may have had with respect to the contents of the trunk of his car.

85 In *Nicolosi*, Justice Doherty stated (at para 25) that the standard applied to searches or seizures which occur in the course of the investigation of criminal offenses has no application in the regulatory context. The reasonableness of a police search conducted to protect property must be judged with that purpose in mind and not according to the standard which would apply if the conduct was motivated by investigative purposes. The concept of a reasonableness will vary depending on the purpose of the search. The Court of Appeal stated at paragraph 26 of its decision:

> Concepts like a reasonable and probable grounds, articulable cause and prior judicial authorization, which are the touchstones a reasonableness in the investigative context, will have less and perhaps no relevance where a search or seizure occurs in an entirely different context.

86 I have found that the search of the automobile by Officer MacGregor was not related to the investigation of a possible crime. As in *Nicolosi*, the evidence in this case is clear that Officer MacGregor's sole purpose in unlocking and entering the trunk of the seized vehicle was to create a written record of items with apparent value.

87 There can be little doubt after the decision in *Nicolosi* that when the police take custody of a vehicle and cause it to be taken to a storage facility, they have a duty to preserve and safeguard the vehicle and its contents. The search in this case was not intended to serve criminal law objectives and was not a search for investigative purposes.

88 In my opinion s. 48(12) by necessary implication authorizes not only the entry of an impounded vehicle but also the examination of the contents of its trunk for purposes of itemizing contents which are of apparent value. It is obvious that it will be a common occurrence for individuals who carry valuables in their automobile to keep those valuables in the trunk or in other areas, like a glove box, which hide those valuables from plain view. The obligation to safeguard the vehicle and its contents is a duty imposed on the police when they have authority to seize a vehicle and take it into custody. It follows that the itemizing of possessions in the trunk of a vehicle serves the interest of any person who has an interest in the property and who looks to the police to

safeguard that property while it is in police custody. It is also a sensible thing to do if the police are interested in avoiding civil liability. As Justice Doherty said in *Nicolosi*, reasonable steps to avoid claims relating to property and to properly resolve those claims should they arise is very much in the public interest and does justify some modest intrusion into a motorist's privacy.

89 In my view, any person who has his vehicle seized by the police in circumstances where the police have a duty to safeguard the vehicle and its contents, has no privacy interest in the trunk of his car when the police conduct an authorized administrative search for the purpose of making an inventory of valuables contained in the car.

90 In this case, as I have said, the search of the trunk by Officer MacGregor was *bona fide.* It was not intended to camouflage an investigative search. Officer MacGregor did not conduct the search in an unreasonable fashion.

91 There is no doubt that after Officer MacGregor searched the vehicle and discovered the handgun, some other person or persons engaged in conduct which is unreasonable. There is no dispute that on a subsequent occasion, the backseat of the car was removed as were various side panels and other panels including panels in the trunk. If this were shown to be a further search by police or some other agent of the state, I would have no difficulty concluding that the subsequent search was conducted in an unreasonable manner. However, I accept Officer MacGregor's evidence that she was not responsible for this intrusive and unreasonable search which occurred after she conducted her search and without her knowledge. She did no damage. She believed she was conducting her search pursuant to a police procedural Directive. I find that Officer MacGregor's search was conducted in a reasonable manner.

Was there a violation of Mr. Egonu's Charter rights under s. 10(b) Charter of the to retain and instruct counsel without delay and to be informed of that right ?

92 The relationship between s. 48(1) of the Highway Traffic Act and s. 10 (b) of the *Charter* were canvassed in *R. v. Milne* (1996), 28 O.R. (3d) 577 (Ont. C.A.). S. 48(1) states as follows:

> A police officer, readily identifiable as such, may require the driver of a motor vehicle or operator of a vessel to stop for the purpose of determining whether or not there is evidence to justify making a demand under s. 254 of the *Criminal Code* (Canada). R.S.O. 1990, c. H.8, s. 48 (1); 2006, c. 20, s. 3 (1).

93 In *Milne*, the Ontario Court of Appeal considered the s.10(b) constitutional issue where a motorist suspected of drinking and driving was required to perform a road side co-ordination test. In *Milne*, Justice Moldaver held that the denial of the detained motorists right to counsel, arising by necessary implication in s. 48(1), is not justifiable under s. 1 of the *Charter* unless the evidence resulting from the roadside tests is restricted to the particular use prescribed by that provision, namely, "for the purpose of determining whether or not there is evidence to justify making a demand under s. 254 of the *Criminal Code*". Justice Moldaver held that if the state were permitted to

use the results of those tests at trial to incriminate the motorist on a charge of impaired driving, s. 48(1) would not withstand scrutiny under s. 1 of the *Charter*. On the other hand, if the use of test results are limited to the purposes set out in s. 48 (1), that is, to justify the officer making a demand under s. 254 of the *Criminal Code*, then the provisions of s. 48(1) constitute a reasonable limit on s. 10(b) *Charter* rights. The Supreme Court of Canada has now dealt with this issue in *R. v. Orbanski*, [2005] 2 S.C.R. 3 (S.C.C.). In my view, the headnote accurately summarizes the court's decision on this point. It reads as follows:

> The limit on s. 10(b) is justified under s. 1 of the *Charter*. The objective of reducing the carnage caused by impaired driving constitutes a compelling state objective; the use of reasonable screening methods is rationally connected to the objective; the infringement of the right to counsel was no more than necessary to meet the objective; and, in light of the limited use that can be made of the compelled evidence collected during the screening process, there was proportionality between the deleterious and the salutary effects of the screening measures.

94 I conclude therefore that Mr. Egonu's 10(b) *Charter* rights were violated because the police did not allow him to contact his solicitor at the time they made a demand on Mr. Egonu to provide a breath sample by means of an approved screening device. However, consistent with *Orbanski*, and with the recent Supreme Court of Canada case of *R. v. Woods*, [2005] S.C.J. No. 42 (S.C.C.), the absence of the opportunity to retain counsel in these circumstances is a reasonable limit prescribed by law.

95 The other allegation of a violation of Mr. Egonu's s. 10(b) *Charter* rights is based on a brief delay in advising Mr. Egonu of his rights after he was arrested and taken back to the police station. Mr. Egonu asserts that this delay could have been as long as a couple of hours. There is no evidence of any incriminating conversation with the accused after he was arrested for refusing to provide a breath sample. There is no suggestion that the police tried to obtain incriminating evidence from the accused before he had an opportunity to speak with counsel. Certainly there is no evidence that Mr. Egonu was prejudiced by this brief delay. There is no evidence that after his arrest he requested the right to call counsel and was denied. Mr. Egonu was arrested at 3:50 a.m. on Sunday morning of March 26, 2006. In these circumstances, a minor delay before he was informed of his s. 10(b) *Charter* rights was of little or no consequence. I do not believe that his constitutional rights pursuant to s. 10(b) of the *Charter* were violated. But if I am wrong in this conclusion, the violation is technical and minor and was not prejudicial to Mr. Egonu.

Should the evidence found in Mr. Egonu's vehicle be excluded pursuant to s. 24(2) of the Charter?

96 Both the Crown and counsel for the accused are in agreement that the admission of evidence would not affect the fairness of the trial unless the initial detention of Mr. Egonu was motivated by race or by racial profiling. If I were to make such a finding, the Crown agrees that the evidence seized from Mr. Egonu's trunk should be excluded.

97 I have found that Officer Leonardo's decision to detain Mr. Egonu was not based in whole or in part based on improper motives. Had I found to the contrary, I agree that the evidence seized would affect trial fairness if admitted. In my opinion, this conclusion would be consistent with *R. v. Mellenthin* [1992 CarswellAlta 149 (S.C.C.)], (*supra)*, in which Justice Cory stated at page 617:

> The unreasonable search carried out in this case is the very kind which the Court wished to make clear is unacceptable. A check stop does not and cannot constitute a general search warrant for searching every vehicle, driver and passenger that is pulled over. Unless there are reasonable and probable grounds for conducting the search, or drugs, alcohol or weapons are in plain view in the interior of the vehicle, the evidence flowing from such a search should not be admitted.
>
> It would surely affect the fairness of the trial should check stops be accepted as a basis for warrantless searches and the evidence derived from them was to be automatically admitted. To admit evidence obtained in an unreasonable and unjustified search carried out while a motorist was detained in a check stop would adversely and unfairly affect the trial process and most surely bring the administration of justice into disrepute.

98 The evidence obtained in this case was not obtained as a result of a detention based on race or racial profiling or other prohibited motive. The evidence obtained is non-conscriptive. The admission of the evidence seized will not affect trial fairness.

99 At the second stage of the s. 24(2) inquiry, the seriousness of the constitutional violation is considered. In considering the seriousness of the breach I must consider a number of factors including whether the breach was committed in good or bad faith, the obtrusiveness of the search, the individual's expectation of privacy in the area searched and the existence of reasonable grounds. Based on my analysis of *Nicolosi*, I have concluded that Mr. Egonu in the circumstances of this case had no reasonable expectation of privacy in the area searched. In this case, if I am wrong, I am of the view that Mr. Egonu's expectation of privacy in the trunk of his vehicle was minimal and significantly reduced from what it would otherwise have been in the case of an unwarranted investigative search.

100 In conducting their search, the police acted in good faith in performing an administrative inventory search in a manner consistent with the governing procedural Directive issued by the Peel Regional Police.

101 The demand for a breath sample to be provided and tested by an approved screening device is a *prima facie* a violation of Mr. Egonu's s. 10(b) rights but the statutory authority for demanding a breath sample in the circumstances of this case is a reasonable limitation on Mr. Egonu's s. 10(b) *Charter* rights and is therefore saved by s. 1.

102 A minor delay after his arrest and before he was informed of his s. 10(b) *Charter* rights at the police station was of no prejudice to Mr. Egonu. In the circumstances of this case, I have

concluded that his constitutional rights pursuant to s. 10(b) of the *Charter* were not violated by such delay. If I am wrong in this conclusion, the violation is technical and minor and was not prejudicial to Mr. Egonu. There is no evidence of police misconduct or conduct which sought to take advantage of Mr. Egonu before he was fully informed of his rights to counsel. There is no evidence of police bad faith.

103 I have concluded that Mr. Egonu's constitutional rights were not violated and to the extent that they were, the violation is saved by s.1. I have concluded that there is no evidence of police bad faith. I further conclude that if there are constitutional violations, they are minor and technical not serious.

104 What is the effect of the admission of evidence on the repute of the administration of justice? It has often been observed that the more serious the *Charter* breach, the more likely it will be that the admission of evidence will bring the administration of justice into disrepute. In this case, as I have already concluded, the breaches of Mr. Egonu's constitutional rights, if any, were of a minor or technical nature.

105 I am mindful that the evidence seized from Mr. Egonu's vehicle is essential to the prosecution of the criminal charge against him. In these circumstances, the exclusion of critical evidence in a case involving a serious criminal charge weighs in favour of admission.

106 Having regard to all the circumstances, I conclude that the admission of evidence seized from Mr. Egonu's vehicle will not bring the administration of justice into disrepute.

107 I therefore conclude that the evidence obtained from the search of Mr. Egonu's trunk by Officer MacGregor is admissible at trial.

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