

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v*. Loewen, 2011 SCC 21, [2011] 2 S.C.R. 167 | **Date:** 20110505  **Docket:** 33914 |

**Between:**

**Derek James Loewen**

Appellant

and

**Her Majesty The Queen**

Respondent

**Coram:** McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron and Rothstein JJ.

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| **Reasons for Judgment:**  (paras. 1 to 14): | The Court |

**Appeal heard and judgment rendered:** April 12, 2011

**Reasons delivered:** May 5, 2011

R. *v.* Loewen, 2011 SCC 21, [2011] 2 S.C.R. 167

**Derek James Loewen** *Appellant*

*v.*

**Her Majesty The Queen** *Respondent*

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2011 SCC 21

File No.: 33914.

Hearing and Judgment: April 12, 2011.

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Present: McLachlin C.J. and Binnie, LeBel, Fish, Abella, Charron and Rothstein JJ.

on appeal from the court of appeal for alberta

*Constitutional Law — Charter of Rights — Search and seizure — Arbitrary detention — Whether arrest of accused and search of his vehicle was lawful and reasonable — Whether evidence of cocaine seized during search was admissible — Canadian Charter of Rights and Freedoms, ss. 8, 9, 24(2) — Criminal Code, R.S.C. 1985, c. C‑46, s. 495(1)(a).*

After stopping the accused for speeding, a police officer smelled freshly burnt marijuana coming from the vehicle and found $5,410 in the accused’s pocket. He arrested the accused for possession of a controlled substance, searched the vehicle, and found 100 grams of crack cocaine. The trial judge admitted the evidence of cocaine. The accused was convicted of possession of cocaine for the purpose of trafficking. A majority of the Court of Appeal upheld the conviction.

*Held*: The appeal should be dismissed.

The arrest and the search of the vehicle did not violate the *Canadian Charter of Rights and Freedoms* and the evidence of cocaine was admissible. The police officer had reasonable grounds to believe that the accused was in possession of sufficient marijuana to constitute an indictable offence. The accused was not wrongfully detained. The arrest was lawful and the search was properly incidental to the arrest. Even if a breach of the *Charter* had been found, the evidence would be admissible under s. 24(2) of the *Charter*.

**Cases Cited**

**Referred to:***R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 8, 9, 24(2).

*Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 4.

*Criminal Code*, R.S.C. 1985, c. C‑46, s. 495(1).

APPEAL from a judgment of the Alberta Court of Appeal (Hunt, Berger and Slatter JJ.A.), 2010 ABCA 255, 32 Alta. L.R. (5th) 203, 260 C.C.C. (3d) 296, 490 A.R. 72, [2011] 2 W.W.R. 15, [2010] A.J. No. 980 (QL), 2010 CarswellAlta 1721, affirming a decision of Ross J., 2008 ABQB 660, 461 A.R. 193, [2008] A.J. No. 1187 (QL), 2008 CarswellAlta 1637. Appeal dismissed.

Paul L. Moreau and Darin Slaferek, for the appellant.

Monique Dion and Ronald C. Reimer, for the respondent.

The judgment of the Court was delivered by

1. The Chief Justice — Mr. Loewen was pulled over for speeding by Sergeant Topham.  At the roadside, the officer smelled freshly burnt marijuana coming from inside the vehicle, and found $5,410 in cash in Mr. Loewen’s pocket.  Sergeant Topham placed Mr. Loewen under arrest for possession of a controlled substance. He then searched Mr. Loewen’s vehicle and found 100 grams of crack cocaine.
2. The issue in this case is whether the arrest and search of the vehicle violated the *Canadian Charter of Rights and Freedoms*, and if so, whether the evidence of the cocaine should be excluded under s. 24(2) of the *Charter*. The trial judge and a majority of the Alberta Court of Appeal held that there was no *Charter* violation, and in the alternative, that the evidence should be admitted under s. 24(2) of the *Charter*. Berger J.A. dissented, holding that the arrest of Mr. Loewen was unlawful under s. 495(1) of the *Criminal Code*, R.S.C. 1985, c. C-46; that the search was unrelated to the arrest; and that the evidence thereby obtained was inadmissible under s. 24(2) of the *Charter*.

1. Lawfulness of the Arrest Under Section 495(1)(*a*) of the *Criminal Code*

1. If the arrest was unlawful, the detention of Mr. Loewen violates s. 9 of the *Charter*. In that case, the search cannot have been incidental to arrest, and hence would violate s. 8 of the *Charter*. The first question is therefore whether the arrest was unlawful.
2. The trial judge, Ross J., held that the arrest of Mr. Loewen was lawfully made pursuant to s. 495(1)(*a*), which allows the officer to arrest an individual whom he believes on reasonable grounds has committed an *indictable* offence (2008 ABQB 660, 461 A.R. 193). In the case of marijuana, possession in excess of 30 grams is required to constitute an indictable offence: *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 4. The trial judge held that Sergeant Topham had reasonable grounds to believe that Mr. Loewen was in possession of sufficient marijuana to constitute an indictable offence, having regard to the totality of the evidence, including the smell of burnt marijuana in the car and the sum of $5,410 found in Mr. Loewen’s pocket, mostly in $20 bills, which suggested that he was involved in the drug trade.
3. Like the majority in the Court of Appeal, we find no error in the reasons of the trial judge on this point. Both Slatter and Hunt JJ.A. correctly upheld the arrest under s. 495(1)(*a*) (2010 ABCA 255, 32 Alta. L.R. (5th) 203). (The correctness of this conclusion is not affected by the fact that Slatter J.A. mistakenly held that the requirement of “reasonable grounds” in s. 495(1)(*a*) is different from the requirement of “reasonable and probable grounds”.)
4. Berger J.A., dissenting, took the view that the evidence did not support the trial judge’s inference that under s. 495(1)(*a*) it was reasonable to believe that more than 30 grams of marijuana were in the car. He noted the absence of testimony as to the amount of marijuana Sergeant Topham believed was in the car.
5. We see no error in the conclusion of the trial judge that Sergeant Topham had reasonable grounds to arrest Mr. Loewen for possession of a controlled substance under s. 495(1)(*a*). The evidence was sufficient to support her inference that the necessary grounds for arrest existed. The trial judge stated:

The large amount of cash was evidence that might have persuaded the sergeant to believe that he was dealing with something beyond 30 grams of marijuana.  The sergeant was not examined or cross-examined on exactly this point, but he was clear that in his view he did not have reasonable grounds based on the smell alone, but he did as soon as he became aware of the cash.  What the cash adds to the smell is an indication of buying or selling drugs in a relatively large quantity. . . .

. . .

. . . Based on . . . the smell, the precise nature of it and where it came from, how that smell was associated with the accused and the accused alone, and the cash on the accused’s person, the officer came to the conclusion that the accused was currently in possession of marijuana, arrested him for this, and searched for evidence in a search incident to that arrest. The sergeant’s subjective belief in the ground is not in doubt, and in my view that subjective belief was objectively reasonable in the circumstances. [paras. 23 and 26]

1. In our view, the evidence supports these conclusions, and the arrest under s. 495(1)(*a*) was lawful. It follows that the arrest did not violate the *Charter*’s protections against wrongful detention.
2. In view of this conclusion, it is unnecessary to consider s. 495(1)(*b*), which was not fully argued on appeal.

2. Lawfulness of the Search Incident to Arrest

1. The trial judge noted that “[t]he connection of the search to the arrest is not disputed” (para. 27). Notwithstanding Berger J.A.’s view to the contrary, we conclude that the trial judge made no error in concluding that the search was properly incidental to arrest, and did not violate s. 8 of the *Charter*.

3. Section 24(2)

1. Since we have found no *Charter* violation, it is not necessary to consider whether the evidence should be admitted under s. 24(2). However, were it necessary to consider this issue, we would have rejected this ground of appeal.
2. The trial judge concluded that even if a breach of the *Charter* had been found, the evidence obtained by the search would be admissible under s. 24(2) of the *Charter*:

. . . even if I had found a violation of s. 8, I would have admitted the evidence under s. 24(2) of the *Charter*. The admission of the real evidence obtained by the search would not render the trial unfair. That is conceded. I do not view the *Charter* breach as serious. The officer, in my view, acted in good faith. The accused had a reduced privacy interest in the vehicle, both because a vehicle was searched as opposed to a home, and because the accused was not the owner of the vehicle. [para. 28]

On appeal, Berger J.A., dissenting, would have excluded the evidence.

1. We see no error in the trial judge’s reasoning or conclusions on this point. Although her decision predated this Court’s decision in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, she considered and weighed the relevant factors. As the majority stated in *Grant*, at para. 86, “[w]here the trial judge has considered the proper factors, appellate courts should accord considerable deference to his or her ultimate determination.”

4. Conclusion

1. The appeal is dismissed.

*Appeal dismissed.*

Solicitors for the appellant:  Moreau & Company, Edmonton.

Solicitor for the respondent:  Public Prosecution Service of Canada, Edmonton.