Indexed as:

R. v. Malik

IN THE MATTER OF the Highway Traffic Act, R.S.O. 1990,
c. H.8
AND IN THE MATTER OF City of Toronto By-Law No. 20-85

Between
Her Majesty the Queen, and
Mahboob A. Malik, defendant

[2001] O.J. No. 4547

Ontario Court of Justice
Toronto, Ontario
Quon J.P.

Heard: April 5, June 12 and June 28, 2001.
Judgment: September 11, 2001. Released: November 21, 2001.
(78 paras.)

Charges: Taxicab driver fail to give identification — S. 33(3) Highway Traffic Act — Taxicab interfere with traffic — S. 170(12) Highway Traffic Act — Cab owner fail to keep trip record — S. 28(1) of Sch. 8 of By-law 20-85 — Cab driver fail to be civil and well behaved - S. 52 of Sch. 8 of By-law 20-85 — Cab driver no license - S. 2(9) of Sch. 8 of By-law 20-85.

Application by defendant for stay of charges for violation of s. 9 Charter right not to be arbitrarily detained and s. 10(b) Charter right to counsel

Cases Considered or Referred to:

Bartle v. The Queen (1994), 92 C.C.C. (3d) 289 (S.C.C.)
Burlingham v. The Queen (1995), 97 C.C.C. (3d) 385 (S.C.C.), reversing 85 C.C.C. (3d) 343
D.W. v. The Queen (1991), 63 C.C.C. (3d) 397 (S.C.C.)
Moore v. The Queen (1978), 43 C.C.C. (2d) 83 (S.C.C.)
Prosper v. The Queen (1994), 92 C.C.C. (3d) 353 (S.C.C.)
R. v. Boyko, [1997] S.J. No. 209, 154 Sask. R. 173, 28 M.V.R. (3d) 55 (Q.B.), Dawson J.
R. v. Bugaeva, [1999] O.J. No. 2738 (O.C.J.), per Harris J.
R. v. Duguay, Murphy and Sevigny (1985), 18 C.C.C. (3d) 289 (O.C.A.), affirmed 46 C.C.C. (3d) 1 (S.C.C.), per MacKinnon A.C.J.O.
R. v. O'Connor (1995), 103 C.C.C. (3d) 1 (S.C.C.).
R. v. Power (1994), 89 C.C.C. (3d) 1 (S.C.C.), reversing 81 C.C.C. (3d) 1.
R. v. Strachan, [1998] 2 S.C.R. 980, S.C.J. No. 94 (S.C.C.).
R. v. Tricker (1995), 96 C.C.C. (3d) 198 (O.C.A.), per Galligan, Weiler and Austin JJ.A., leave to appeal refused (1996), 103 C.C.C. (3d) vi (note) (S.C.C.)
Storrey v. The Queen (1990),53 C.C.C. (3d) 316 (S.C.C.)

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, Part 2 of the Constitution Act, 1982, Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, R.S.C. 1985, App. II, ss. 9, 10(b), 24(1).
Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 33(1), 33(3), 170(12), 216(1), 217(2).
Provincial Offences Act, R.S.O. 1990, c. P.33, s. 145.

By-laws Cited:

City of Toronto By-Law No. 20-85, ss. 2(9), 28(1) of Sched. 8, 52 of Sched. 8.

Reference Materials and Textbooks Cited:

Drinkwalter and Ewart, Ontario Provincial Offences Procedure (Toronto, Canada: The Carswell Company Limited, 1980), p. 411, 412.
Stewart and Macey on Provincial Offences Procedure in Ontario (Toronto, Canada: Earlscourt Legal Press, Inc., 1998), p. 75.

Exhibits Entered:

Exhibit # 1 - notice filed with Federal Crown
Exhibit # 2 - notice filed with Provincial Prosecutor's office
Exhibit # 3 - letter from Attorney General of Canada
Exhibit # 4 - photocopies of taxi cab owner's license
Exhibit # 5 - diagram drawn by Mr. Azar Malik depicting position of cars
Exhibit # 6 - photocopy of the defendant Mahboob Malik's trip run sheet for May 27-28, 2000

Counsel:

A. Ross, for the City of Toronto.
N. Trbojevic, Provincial Prosecutor.
J.D. Gorrell, Q.C., for the defendant.

QUON J.P.: —

1. INTRODUCTION

¶ 1 The defendant, a taxicab driver, has been charged with Highway Traffic Act and municipal by-law offences. The prosecution claims the defendant initially attracted the attention of two undercover police officers when the taxicab driven by the defendant was partially blocking a vehicular traffic lane while waiting for a fare. As a result of the defendant not immediately moving his taxicab, failing to identify himself, and acting in an uncivil manner to the officers, the prosecution submits he was then arrested and handcuffed by the police. However, the defendant contends that the police had violated two of his constitutional rights during this episode. Primarily the defence argues that the police violated s. 9 of the Charter when the defendant was arbitrarily and improperly detained. The defence also contend the police breached the defendant's s. 10(b) right to counsel after the defendant was arrested and not given the opportunity to speak immediately to his counsel after the defendant had made such a request.

¶ 2 If either of the defendant's s. 9 or s. 10(b) rights have been violated then the defendant seeks a stay of proceedings as a remedy under s. 24 of the Charter. Alternatively, if there is no finding of a Charter breach, then the defendant seeks a dismissal of the charges as the defendant contends he has offered reliable contrary evidence.

¶ 3 The defendant was also charged with failing to keep a trip record for his taxicab and for failing to have a taxicab driver's license. The prosecution conceded that the defendant is licensed as a Toronto taxicab driver and a dismissal was entered on that charge.

¶ 4 The primary issue in this case is whether the police had made a lawful arrest. The defence called two witnesses who render a different version of events then that attested to by one of the arresting officers. The defence contends that the evidence from the two witnesses is the key in knowing what occurred that night. They submit the police overstepped their duties and arbitrarily detained the defendant for an improper purpose. The prosecution however argues that the perspective and duration to observe by the two witnesses is flawed and does not contradict the officer's version of the events leading to the arrest of the defendant.

¶ 5 If the defendant had been arbitrarily detained or had been denied his right to counsel after his arrest then the appropriate remedy under s. 24 of the Charter will have to be considered. If the defendant's rights under the Charter were not violated on a balance of probabilities then a determination will have to be made if the prosecution has proven its charges against the defendant beyond a reasonable doubt.

¶ 6 The trial was held on April 5, June 12 and June 28, 2001. The matter was then adjourned for judgment to be rendered on September 11, 2001. Subsequently, the matter was adjourned to November 21, 2001.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

¶ 7 The defendant has been charged for committing five offences on May 28, 2000 at 1:06 a.m. on Adelaide Street West at Duncan Street in the City of Toronto. Two of the offences fall under the Highway Traffic Act R.S.O. 1990, c. H.8 ("H.T.A."), and three of the offences were laid under the City of Toronto By-law 20-85.

¶ 8 He was charged for being a driver of a motor vehicle who had failed to identify himself to a police officer on demand contrary to s. 33(3) of the H.T.A., for interfering with traffic with taxicab under s. 170(12) of the H.T.A., for being a taxicab owner who failed to keep a trip record under s. 28(1) of Schedule 8 of By-law 20-85, for being a taxicab driver who failed to be civil and well behaved under s. 52 of Schedule 8 of By-law 20-85 and for being a taxicab driver without having a licence to drive taxicabs in Toronto under s. 2(9) of By-law 20-85.

¶ 9 On the April 5, 2001 trial date, the provincial prosecutor speaking with the consent of the counsel for the City of Toronto stated he was not offering evidence on the taxicab driver with no licence charge as the City of Toronto records indicated that he was properly licensed. This charged was then dismissed. Only four of the five charges remain for the court to decide on.

¶ 10 On May 28, 2000, Officers Greenaway and LaFrance were on duty in an unmarked vehicle. Neither was in police uniform but dressed in plain clothes. Officer Greenaway was driving a grey-green Chevrolet vehicle eastward on Adelaide Street in the City of Toronto in the bar district of Toronto, immediately east of Duncan Street.

¶ 11 Adelaide Street West is a four laned one-way street going east. The lanes are clearly demarcated with intermittent hash lines. Duncan Street is a north-south road that intersects Adelaide Street West. The intersection of Duncan and Adelaide Street West is controlled with traffic signals.

¶ 12 The most northerly lane of traffic immediately west of Duncan Street on Adelaide Street West is a left turn only lane.

¶ 13 The most northerly lane of Adelaide Street West east of Duncan Street is the curb lane and has parking for vehicles controlled by parking meters. This lane for reference purposes will be labelled Lane #1. The lane immediately south of the northern curb lane will be labelled Lane #2. Lane #2 is a through lane. The lane south of Lane #2 is also a through lane and will be labelled Lane #3.

¶ 14 The events surrounding the charges against the defendant occurred just east of Duncan Street on Adelaide Street West. This area is in downtown Toronto.

¶ 15 The defendant was in his taxicab bearing Ontario license plate number AEET 478. He is the owner of this taxicab. The taxicab is equipped with a meter, a roof sign, and a City of Toronto taxi license plate.

¶ 16 The trial started on April 5, 2001. Officer Greenaway testified on that day. His version of the events is that the defendant's cab was partially obstructing lane #2 with the rear of his cab on May 28, 2000 at 1:06 a.m. The defendant was yelling and gesturing at two pedestrians to enter his cab. Greenaway was immediately behind the defendant's cab. The defendant did not move into lane #1 or move forward when Greenaway honked his horn. The defendant responded with a wave of his hand indicating for Greenaway to drive past the cab. Greenaway continued honking his horn. At that point, Greenaway observed the defendant gestured with an upright middle finger in his direction. Greenaway said he then pulled alongside the defendant's passenger side window and held out his badge and warrant card to the defendant. The defendant did not move his cab. Greenaway then said he drove his vehicle to the front of the defendant's cab and parked. Then both he and Officer LaFrance exited and approached the defendant's cab. Greenaway went to the passenger side and LaFrance had gone to the driver's side of the cab. Greenaway said he put his badge and warrant card in the open window of the passenger side and identified himself verbally as a police officer. Greenaway said he asked for the defendant's driver's license but the defendant refused to surrender it and questioned Greenaway why he should. Greenaway said that the defendant was yelling and swearing. Greenaway said he then warned the defendant if he did not identify himself to a police officer he could be arrested. When it appeared to Greenaway that the defendant was not going to surrender his driver's license Greenaway went to the driver's side and pulled the defendant out. He then told the defendant he was under arrest for failing to identify himself to a police officer. Greenaway also said he informed the defendant of his rights immediately after the pronouncement of the arrest. Greenaway described the defendant as going berserk and continuing on with his diatribe. The defendant was then handcuffed and taken back to Greenaway's vehicle. The defendant did not calm down until he was placed in the rear seat of the unmarked police vehicle. Officer Greenaway had the defendant's wallet. The defendant indicated to Greenaway where his driver's license was in the wallet. Greenaway then uncuffed the defendant once he had the defendant's driver's license. Greenaway then issued the traffic and by-law tickets to the defendant. After Greenaway finished testifying, the trial was adjourned to June 12, 2001, a date agreed to by the defence and the prosecution.

¶ 17 At the resumption of the trial on June 12, 2001, the prosecution sought an adjournment as Officer LaFrance was on holidays. The motion for adjournment was denied as the defence had two civilian witnesses present and were ready to proceed. Furthermore, it was ruled that the prosecution had failed to bring the motion to adjourn the trial at the first opportunity since the prosecution should have known at a much earlier time that Officer LaFrance's holidays would conflict with the trial date and that the prosecution had consented to the June 12 trial date on April 5, 2001. After the adjournment request was denied, the prosecution rested its case.

¶ 18 The defendant then presented its defence on June 12, 2001. This consisted of testimony from the defendant and from two witnesses who were near the defendant's cab during the arrest. Abdul Mujeep Asar Malik was a taxicab driver seated in a parked cab just east of the defendant's cab and Linda Masse was a passenger who was just entering the rear of the defendant's cab at the time the defendant was approached by the undercover officers. The evidence from Asar Malik, Masse and the defendant contradicted Officer Greenaway's version of the events. After the defence closed its case, the matter was adjourned for argument to be heard on June 28, 2001.

¶ 19 The provincial prosecution relied on Bartle v. The Queen (1994), 92 C.C.C. (3d) 289 (S.C.C.), R. v. O'Connor (1995), 103 C.C.C. (3d) 1 (S.C.C.), R. v. Strachan [1988] 2 S.C.R. 980, S.C.J. No. 94 (S.C.C.), D.W. v. The Queen (1991), 63 C.C.C. (3d) 397 (S.C.C.), Prosper v. The Queen (1994), 92 C.C.C. (3d) 353 (S.C.C.), Burlingham v. The Queen (1995), 97 C.C.C. (3d) 385 (S.C.C.), and R. v. Power (1994), 89 C.C.C. (3d) 1 (S.C.C.), to support its argument that the defendant's right to counsel is only relevant if an incriminating statement is being submitted as evidence.

¶ 20 After the arguments were completed the matter was adjourned until September 11, 2001 for judgment on the s. 9 and s. 10(b) Charter applications and on the underlying charges. The court was not prepared to render its judgment on September 11, 2001 and the matter then was rescheduled until November 21, 2001.

3. ISSUES

¶ 21

Did Officer Greenaway comply with s. 33(3) of the Highway Traffic Act before he arrested the defendant?
Did Officer Greenaway make a lawful arrest under s. 217(2) of the Highway Traffic Act?
Were there reasonable and probable grounds for arresting the defendant?
Was the arrest or detention of the defendant arbitrarily made?

4. ANALYSIS OF FACTS AND LAW

¶ 22 The first matters to be decided are whether the defendant's rights under the Charter have been violated. In view of the trial on the charges having been completed, there is a factual basis to adjudge whether the defendant's rights under s. 9 and s. 10(b) of the Charter have been infringed. If there had been a Charter breach then an appropriate remedy has to be fashioned. If not, then it has to be decided if the prosecution has proven its case beyond a reasonable doubt.

¶ 23 Since the defendant's right to counsel would only be available after the defendant had been arrested or detained, a determination of whether a s. 10(b) breach had occurred is only necessary if the arrest or detention of the defendant is determined not to have been arbitrarily made. Therefore, it is expedient and essential to begin with the Charter argument under s. 9.

(a) Section 9 -- right not to be arbitrarily detained

¶ 24 The defence submits that the police did not have reasonable grounds to stop the defendant for a traffic violation. Even if they did, the prosecution submits the evidence shows that the police acted unduly, improperly and capriciously during the episode leading up to the defendant's arrest and handcuffing. Therefore the defence argues, the defendant's detention or arrest was not justified and violated his right not to be arbitrarily detained. On the other hand, the prosecution argues that the police had reasonable grounds to stop the defendant's vehicle and investigate as the defendant's cab had been obstructing traffic. Moreover, the arrest was justified, they argued, because the defendant had refused to identify himself, and was behaving irrationally toward the police, therefore necessitating the police to secure and handcuff the defendant.

¶ 25 Section 9 of the Charter states:

Everyone has the right not to be arbitrarily detained or imprisoned.
Did Officer Greenaway have lawful authority to arrest the defendant?

¶ 26 Stewart and Macey in Provincial Offences Procedure in Ontario (Toronto, Canada: Earlscourt Legal Press, Inc., 1998) at page 75 discuss the power to arrest under the Provincial Offences Act [emphasis is mine below]:

> No general power of arrest exists under the Provincial Offences Act. The Act clearly establishes a distinction between provincial offences and criminal matters, particularly by limiting powers of arrest in Part VIII. Part VIII, s. 145 of the Act, provides for arrest without warrant, but limits the authority to circumstances where the arrest is concurrent to the commission of the offence. Specifically, the arrest is only authorized where the offender is in the process of escaping from and is being freshly pursued by a police officer. More important, however, the arrest is only authorized where the police officer has lawful authority to arrest for the offence. Therefore, unless the specific statute that creates the offence allows the defendant to be arrested, the arrest provisions in the Provincial Offences Act do not apply. For example, s. 217(2) of the Highway Traffic Act authorizes a police officer to arrest a person who the police officer believes has committed an offence listed in that section, and the police officer must take the person before a justice of the peace or judge to be dealt with according to law. If the offence is not listed in that section, the police officer has no authority to arrest. ...

¶ 27 Section 145 of the Provincial Offences Act, R.S.O. 1990, c. P.33 provides:

> 145. Any person may arrest without warrant a person who he or she has reasonable and probable grounds to believe has committed an offence and is escaping from and freshly pursued by a police officer who has lawful authority to arrest that person, and, where the person who makes the arrest is not a police officer, shall forthwith deliver the person arrested to a police officer.

¶ 28 Arresting someone for a provincial offence was also considered by Drinkwalter and Ewart in their textbook, Ontario Provincial Offences Procedure (Toronto, Canada: The Carswell Company Limited, 1980), at p. 411. The authors write that [emphasis is mine below]:

> In interpreting the Provincial Offences Act, the Legislature's conscious refusal to create a general power of arrest is of some considerable importance. Because the Act does not contain a general arrest power, a person can be arrested for provincial offence only if the statute creating the offence specifically authorizes an arrest. Absent such a specific authorization, a person can commit the offence without risking an arrest. If arrest power is felt necessary in relation to a specific offence, the Legislature must be persuaded of that fact, and must create an arrest power for that individual offence.
> This marks a dramatic difference from criminal law, under which every offence is "arrestable". The difference lies in the nature of the conduct proscribed in each instance. Generally speaking, the criminal law sanctions conduct which carries with it some element of moral obloquy. Conversely, however, most provincial offences are intended to regulate conduct which is itself socially desirable and beneficial. In recognizing this difference, and in emphasizing that recognition by refusing to create a general power of arrest, the Legislature has clearly articulated its view that provincial offences are to be treated differently then criminal offences.

¶ 29 The Highway Traffic Act, R.S.O. 1990, c. H.8, comes into play on account of Officer Greenaway's observation that the defendant's cab had been obstructing a lane for vehicular traffic. The defendant was subsequently charged under s. 170(12) of that Act for interfering with traffic. That section provides:

> 170(12) Despite the other provisions of this section, no person shall park or stand a vehicle on a highway in such a manner as to interfere with the movement of traffic or the clearing of snow from the highway.

¶ 30 Did Greenaway have reasonable and probable cause to stop the defendant's vehicle or to investigate the defendant while he was in his cab? The Highway Traffic Act provides in s. 216(1) the power for a police officer to stop a vehicle. Section 216(1) provides that:

> 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 officer who is readily identifiable as such, shall immediately come to a safe stop.

¶ 31 Doherty J.A. writing for the Ontario Court of Appeal considered the ambit of s. 216(1) of the Highway Traffic Act in Brown v. Durham Regional Police Force (1998), 131 C.C.C. (3d) 1. At p. 17, his Lordship reasoned that stopping someone to vent their personal animosity toward that person is an improper police purpose. [emphasis is mine below]:

> 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 officer's public duty. Officers 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 person, all act for an improper purpose. They cannot rely on s. 216(1) of the HTA even if they also have highway safety concerns when making the stop.

¶ 32 The defence argues that the defendant was not obstructing lane #2 but that his cab was wholly within lane #1. The defendant and the witnesses Asar Malik and Masse all testified that the defendant's cab was in lane #1. Officer Greenaway had testified that he and Officer LaFrance were going to a prostitution sweep when he observed the defendant's vehicle partially blocking lane # 2. Based on the evidence of Officer Greenaway, the person in the best position to determine the position of the defendant's cab in relation to lanes #1 and #2, I find that the defendant's vehicle was partially obstructing lane #2. If it was not, there was no reason for Greenaway to stop his vehicle or to honk his horn. The police officers just would have driven on by and the situation would not have developed into the arrest and the handcuffing of the defendant.

¶ 33 I also find that Masse would not have been in a position to definitively observe whether any part of the defendant's cab had been in lane #2. Masse had testified that she had walked out the doors of the bar and moved toward the cab that was parked directly in front of the bar. She then said she walked over the sidewalk towards the cab and opened the cab door. From her vantage point, she would not have been able to see the rear end or passenger side of the cab and be able to observe if the rear end of the defendant's cab had been jutting out into lane #2. And, upon immediately entering the defendant's cab and having just sat down in the rear seat of the cab she had been whisked out of the cab by Officer La France and placed into Asar Malik's cab. Masse, therefore, would have only been in the defendant's cab for a very short time. As for Asar Malik's observations, he testified that he made all his observations through his rearview mirror or sideview mirrors as he was facing eastward in his cab. This second cab was parked east of the defendant's cab. Also, he would have been looking into the glare coming from the lights of eastbound vehicles and I find that his view using his mirrors while seated and facing east would not make his observations very accurate or convincing concerning the positioning of the defendant's cab. As for the defendant's ability to determine his cab's positioning on Adelaide Street while he was seated inside his cab, I find he would not have been in a position to know for sure whether the rear end of his cab was in lane #2 or not. As such, the only witness of the ones that had testified, who would have the requisite positioning to properly observe the location of the defendant's cab, would therefore be Officer Greenaway. On that basis, I find that the defendant's cab was partially in lane #2 and there were reasonable and probable grounds for Officer Greenaway to stop and investigate the defendant's vehicle for a traffic offence. However, did Officer Greenaway seeing the defendant contravene s. 170(12) by interfering with traffic, a provision under the Highway Traffic Act that gave Greenaway the authority to arrest the defendant?

¶ 34 Although the defendant has alluded that Officer Greenaway may have taken umbrage with the defendant showing Greenaway the middle finger salute and that it coloured Greenaway's judgment in approaching the defendant's cab, I find that Greenaway initially had reasonable grounds to stop and approach the defendant's cab because the cab had been immobile in Lane #2 and partially blocking it for through traffic.

¶ 35 The authority for a police officer to arrest someone in relation to a traffic violation or matter is found in s. 217(2) of the Highway Traffic Act, R.S.O. 1990, c. H.8. That section provides:

> 217(2) Any police officer who, on reasonable and probable grounds, believes that a contravention of any of the provisions of subsection 9 (1), subsection 12 (1), subsection 13 (1), subsection 33 (3), subsection 47 (5), (6), (7) or (8), section 51, 53, 130, 172 or 184, subsection 185 (3), clause 200 (1) (a) or subsection 216 (1) has been committed, may arrest, without warrant, the person he or she believes committed the contravention.

¶ 36 The offence of interfering with traffic under s. 170(12) is not listed in s. 217(2) of the Highway Traffic Act. Therefore, the defendant could not be arrested for interfering with traffic. However, s. 217(2) does allow a police officer to arrest without warrant someone who the officer on reasonable and probable grounds believes has contravened s. 33(3) of the Highway Traffic Act. Section 33(3) concerns the requirement of giving reasonable identification to a police officer when requested if a person is unable to provide or refuses to surrender his or her driver's license:

> 33(3) Every person who is unable or refuses to surrender his or her licence in accordance with subsection (1) or (2) shall, when requested by a police officer or officer appointed for carrying out the provisions of this Act, give reasonable identification of

himself or herself and, for the purposes of this subsection, the correct name and address of the person shall be deemed to be reasonable identification.

¶ 37 Drinkwalter and Ewart also reviewed the power of the police to arrest someone for refusing to provide identification at p. 412 in their textbook, Ontario Provincial Offences Procedure. The authors referred to the Supreme Court of Canada's decision in Moore v. The Queen (1978), 43 C.C.C. (2d) 83, but concluded that it does not apply in Ontario [emphasis is mine below]:

> The decision of the Supreme Court Canada in Moore v. R. is sometimes thought to establish the general proposition that a police officer can arrest a person suspected of committing a provincial offence if that person fails to adequately identify himself. While Moore v. R. does find this to be the law in British Columbia, it does not establish any general proposition of law which would be applicable in Ontario. In Ontario, a person suspected of having committed a provincial offence can only be arrested if the statute creating the offence itself creates an arrest power for that specific offence. Absent such a specific provision, a suspected offender can refuse to identify himself without risking being arrested for a provincial offence.

¶ 38 Spence J. for the majority in Moore v. The Queen (1978), 43 C.C.C. (2d) 83 (S.C.C.), at page 90 concluded that a citizen's freedom is not even minimally interfered with if a police officer simply requested a person's name and address who had been seen by the officer committing an offence:

> Therefore, for the reasons which I have outlined above, I am of the opinion that the officer was under a duty to attempt to identify the wrongdoer and the failure to identify himself by the wrongdoer did constitute an obstruction of the police officer in the performance of his duties.
> I add that in coming to this conclusion I have not forgotten the provisions of the Canadian Bill of Rights nor the topic of individual freedom generally but I am of the opinion that there is not even minimal interference with any freedom of a citizen who is seen committing an infraction by a police constable in the police constable simply requesting his name and address without any attempt to obtain from that person any admission of fault or any comment whatsoever. On the other hand, the refusal of a citizen to identify himself under such circumstances causes a major inconvenience and obstruction to the police in carrying out their proper duties. So that if anyone were engaged in any balancing of interest, there could be no doubt that the conclusion to which I have come would be that supported by the overwhelming public interest.

¶ 39 In R. v. Tricker (1995), 96 C.C.C. (3d) 198 (O.C.A.), leave to appeal refused, [1995] S.C.C.A. No. 87, (1996), 103 C.C.C. (3d) vi (note) (S.C.C.), Galligan J.A. for the court at p. 203 held that a police office may arrest without warrant for a contravention of s. 33(2) [now s. 33(3) of the Highway Traffic Act] for refusing to surrender a driver's license and for refusing to identify himself [emphasis is mine below]:

> A police officer may not arrest without warrant for an offence of speeding under the Highway Traffic Act, R.S.O. 1990, c. H.8. Pursuant to s. 217(2) of the Highway Traffic Act, however, a police officer may arrest without warrant if he believes on reasonable and probable grounds that a driver has contravened certain provisions of the Highway Traffic Act. One of the offences for which arrest without warrant may be made is set out in s. 33(2) [now s. 33(3)]: a driver who has refused to surrender his licence for inspection, and who has refused to identify himself when requested to do so, is guilty of an offence. There was evidence before the jury that the appellant believed that the deceased had committed an offence under s. 33(2) [now s. 33(3)] ...

¶ 40 The refusal of the defendant after a police request to surrender his driver's license and to give a police officer reasonable identification is the basis the prosecution submits for the police arresting the defendant. The evidence of Officer Greenaway was that he had identified himself to the defendant as a police officer verbally and by showing his badge and warrant card before asking for the defendant's driver's license. Greenaway testified that the defendant had refused to comply by saying, "No, I'm not going to give it to you, you tell me

why I have to." Greenaway states that the defendant then starts yelling and swearing and says, "What is the fucking problem?"

¶ 41 Greenaway then testified that he cautioned the defendant that he could be placed under arrest for failing to identify himself and as a driver he must identify himself to a police officer when requested to do so. Greenaway stated that the defendant continued to question why he should and why he has to. Greenaway at that point decided that the defendant could not be reasoned with and went over to the driver's side of the defendant's vehicle, opened the driver's door and pulled the defendant out of the car. Greenaway then said he told the defendant that he was under arrest for failing to give identification to a police officer under the powers of the Highway Traffic Act. At this point Greenaway testified that the defendant was almost berserk and continued screaming, yelling, swearing and drawing attention, such that a crowd of people was gathering on the sidewalk.

¶ 42 Greenaway then handcuffed the defendant. Greenaway then said he read the defendant his rights. The defendant ignored Greenaway and continued yelling and screaming as he was escorted to the unmarked police vehicle. Greenaway states that the defendant continued to say, "I don't have to show you my license, I don't have to show you F-all." It was not until the defendant was placed in the rear seat of the police vehicle that he suddenly stopped yelling and screaming. Greenaway had the defendant's wallet. The defendant then pointed to his driver's licence contained in the wallet. Once Greenaway had the defendant's driver's license, he uncuffed the defendant.

¶ 43 In contrast to Greenaway's testimony about the defendant's demeanour and behaviour, the defendant said he was the model citizen and that it was the police officers who were acting improperly and capriciously. The defendant also testified that a female passenger entered his cab before the car behind him started to honk its horn. Then he stated a man knocked on his passenger side window and said, "I'm a police officer". This is the point the defendant states that he "softly" insisted the police provide him with police identification before he would reciprocate with his. The defendant then states the male person pulled him out of the cab by his collar and that he still had not seen a badge or warrant card. He also said both the male and female at his car were screaming at him and saying they were going to take him to the police station. When the defendant was put into the rear of these two strangers' vehicle, he observed there was no police radio. He then testified that the male told him he was going to take the defendant to the police station. The defendant said in reply to the male, "Okay, take me police station. At least when you take me police station I can know these are the police." The defendant states he was not fighting, doing any yelling, swearing or giving anybody the middle finger. He also stated the officer did not ask him for his trip run sheet. He also said that he was afraid that the male and female at his car were not real police officers and that if the male person had shown him his badge and police identification then he would have surrendered his driver's license. In his testimony, the defendant equated his driver's license to being "I.D."

¶ 44 In his reference to the female officer, the defendant said that while he was talking she had been screaming at him and she was behaving just like a man, pushing him, showing him her eyes, and telling him bad things.

¶ 45 I however find the defendant's testimony to be confusing, somewhat exaggerated and ultimately self-serving. However, I will take into account that English is not the defendant's first language. The defendant repeatedly said that he did not know that Officer Greenaway was a police officer, and that more importantly, Greenaway had not shown the defendant any identification that he was a police officer. The defendant also stated he had a trip run sheet with him in his cab at the time. To support this submission, the defendant produces a photocopy of his run sheet but does not produce the original because it is being kept at home for tax purposes. I have concern with the failure of the defendant in not entering the original trip run sheet considering there appeared on the photocopy submitted as Exhibit #6 changes made to the date written on the document.

¶ 46 Therefore, based on the exaggerations and self-serving statements I find the defendant not credible in his recounting of the events. I find it implausible that at no time during the episode leading up to the summonses for the charges being served on the defendant that neither Greenaway or LaFrance had provided the defendant with police badges or identification. Greenaway and LaFrance were on their way to conduct a prostitution sweep in an undercover capacity. They would have been cognizant of the importance of immediately brandishing their

badges to the public and in identifying themselves as police officers since they were dressed in civilian attire. Moreover, in their encounter with the defendant, it would have been even a greater concern to produce their badges, since the defendant states that he had requested proof of police identity from the officers.

¶ 47 Section 33(1) is the provision in the Highway Traffic Act that requires a driver to surrender his driver's license for reasonable inspection to a police officer on demand. That section states:

> 33(1) Every driver of a motor vehicle or street car shall carry his or her licence with him or her at all times while he or she is in charge of a motor vehicle or street car and shall surrender the licence for reasonable inspection upon the demand of a police officer or officer appointed for carrying out the provisions of this Act.

¶ 48 Now, according to s. 217(2) of the Highway Traffic Act, a police officer may only arrest without warrant someone who the officer on reasonable and probable grounds believes has contravened one of the provisions of the Highway Traffic Act expressly contained in s. 217(2). It is a contravention of s. 33(3) and not s. 33(1) that rightfully allows Officer Greenaway to arrest the defendant. Section 33(1) is not listed in s. 217(2). Greenaway in his testimony continually referred to the refusal of the defendant to surrender his driver's licence, but at no time did Greenaway mention that he had made a verbal request of the defendant for the defendant's name or address. There had only been a warning of arrest if the defendant failed to identify himself. The defendant was not told that he could satisfy the reasonable identification requirement under s. 33(3) by giving his name and address. Nor is there evidence that the defendant had been asked or requested to give his name and address verbally or to provide some other form of identification.

¶ 49 Once more, s. 33(3) states that a person who refuses to surrender his driver's license shall when requested by a police officer give reasonable identification of himself. That section further provides that if the defendant gave his correct name and address he shall be deemed to have given reasonable identification.

¶ 50 On reading s. 33(3), the plain meaning of that provision specifies a two-stage process. First a police officer must make a demand for the driver's licence and if the driver of a vehicle who has been asked refuses, the officer then must make a request for reasonable identification from the driver. There is no evidence that Greenaway specifically asked or demanded from the defendant other identification documents or for the defendant to verbally state his name and address or to identify himself in some other manner. Greenaway only testified that he made a demand for the defendant's driver's license and then after the defendant refused to hand over his driver's license, Greenaway stated he warned that the defendant he could be arrested for failing to identify himself to a police officer. Warning someone that he or she may be arrested for not identifying himself or herself is not the same as asking that person for his or her name and address or is it a request for other identification documents.

¶ 51 My interpretation that s. 33(3) is a two-stage process is supported by Harris J.'s decision in R. v. Bugaeva, [1999] O.J. No. 2738 (O.C.J.). Three of the five issues Harris J. considered at para. 5 were:

> (2) Did PC Corbett demand production of the accused's licence?
> (3) Did PC Corbett request the accused to provide identification of herself?
>
> ...
>
> (5) Did the accused refuse to comply with either request from PC Corbett?

¶ 52 The situation in R. v. Bugaeva is very similar to the case at bar. Bugaeva had refused to move her vehicle that was blocking traffic when asked by a police officer to do so. She then refused to surrender her driver's license when the police officer had requested it. The officer then asked for her name and she had refused to identify herself. Bugaeva was subsequently arrested and handcuffed. The defence argued that the police had no Highway Traffic Act purpose to detain or ask Bugaeva for identification and no legal requirement for her to respond. The defence submitted therefore the stop was unlawful and the detention of Bugaeva illegal. Harris J. found that the police officer did demand and request from Bugaeva her driver's license and to provide

identification of herself and that she had refused to comply with both police requests. Harris J. also considered at paras. 22-23 the police officer's reasonable belief that Bugaeva had been interfering with traffic under s. 170(12):

> I find the request to see her licence is still validly triggered by s. 170(12) of the H.T.A., because the way she positioned her car would have interfered with traffic that might reasonably be expected. I interpret this section to include not only traffic that built up behind the accused, but also, any traffic that might reasonably be expected. If the defence theory prevailed, it would be acceptable for the accused to remain in the position she was in for as long as she wanted, perhaps even hours or days, until other traffic built up behind her. This theory defies common sense.
> The police urged the accused to move her car on numerous occasions. When she refused to do so it was reasonable for them to believe she was interfering with traffic. In either case she was violating S. 170(12) of the H.T.A., and in furtherance of their investigation, the S. 33 right to request identification was triggered.

¶ 53 Therefore if Officer Greenaway did not fulfil the second stage requirement under s. 33(3) of asking the defendant for his name and address or for other identity documents then Greenaway did not have the basis to arrest the defendant under s. 217(2) of the Highway Traffic Act. That is, Officer Greenaway could not have logically believed on reasonable and probable grounds that a contravention of s. 33(3) had been committed by the defendant, if Greenaway, acting as a police officer, had not made a request of the defendant to give other reasonable identification after the defendant had refused to surrender his driver's license. The arrest of the defendant was therefore unlawful.

Was the arrest of the defendant arbitrarily made?

¶ 54 Nevertheless, was the unlawful arrest of the defendant an arbitrary or capricious detention? The courts have found that not all unlawful arrests are considered to be arbitrary detention if it can be determined that the police officer making the arrest, on an objective basis, had an honest belief that reasonable and probable grounds for the arrest existed. MacKinnon A.C.J.O writing for the majority of the Ontario Court of Appeal in R. v. Duguay, Murphy and Sevigny (1985), 18 C.C.C. (3d) 289 (O.C.A.), affirmed 46 C.C.C. (3d) 1 (S.C.C.), at page 296 reasoned that [emphasis is mine below]:

> It cannot be that every unlawful arrest necessarily falls within the words "arbitrarily detained". The grounds upon which an arrest was made may fall "just short" of constituting reasonable and probable cause. The person making the arrest may honestly, though mistakenly, believe that reasonable and probable grounds for the arrest exist and there may be some basis for that belief. In those circumstances the arrest, though subsequently found to be unlawful, could not be said to be capricious or arbitrary. On the other hand, the entire absence of reasonable and probable grounds for the arrest could support an inference that no reasonable person could have genuinely believed that such grounds existed. In such cases, the conclusion would be that the person arrested was arbitrarily detained. Between these two ends of the spectrum, shading from white to grey to black, the issue of whether an accused was arbitrarily detained will depend, basically, on two considerations: first, the particular facts of the case, and secondly, the view taken by the court with respect to the extent of the departure from the standard of reasonable and probable grounds and the honesty of the belief and basis for the belief in the existence of reasonable and probable grounds on the part of the person making the arrest.

¶ 55 The test therefore in determining whether a defendant has been arbitrarily detained consists of two considerations. For the first consideration, the court must consider the particular facts of the case. In the second consideration, the court must look at the extent of the departure from the standard of reasonable and probable grounds and the honesty of the belief and basis for the belief in the existence of reasonable and probable grounds on the part of the police officer making the arrest.

¶ 56 The Supreme Court of Canada in Storrey v. The Queen (1990), 53 C.C.C. (3d) 316 held that as a protection against arbitrary arrest the arresting officer must not only subjectively have reasonable and probable grounds on which to base the arrest but those grounds must in addition be justifiable from an objective point of view.

¶ 57 In R. v. Boyko [1997] S.J. No. 209, 154 Sask R. 173, 28 M.V.R. (3d) 55 (Q.B.), Dawson J. had to consider whether the accused had been arbitrarily detained. The court held that this depended on the extent of the departure from the standard of reasonable and probable grounds and the honesty of and the basis for the belief in existence of reasonable and probable grounds on the part of the officer. In the Boyko case, the police officer had made a breathalyser demand of the accused after the accused had failed an unapproved screening device. The officer's reasonable and probable grounds for requesting the accused partake in a breathalyser test had been based solely on the unapproved device. The result from the unapproved screening device was held not to be reliable. In considering the honesty and the basis for the officer's belief in the existence of reasonable and probable grounds, the court found that the officer had the benefit of the Criminal Code statute and regulations which stipulate what screening devices are approved for roadside tests. Therefore, the court held that the officer should have been aware of the Criminal Code requirements regarding which roadside screening devices were approved. As such, the court found the accused had been arbitrarily detained within the meaning of s. 9 of the Charter as the unapproved device could not provide the necessary and probable grounds for the officer to make the breathalyser demand.

¶ 58 Similarly to the Boyko case, Officer Greenaway, a seven-year veteran of traffic enforcement, had the benefit of the Highway Traffic Act, and should have been aware of its provisions regarding reasonable and probable grounds for arrest under that Act, especially s. 33(3) which requires that a police officer make a request from a motorist for reasonable identification, such as a name and address, after that motorist had refused the police request to surrender his or her driver's licence.

¶ 59 There has been a departure from the standard of reasonable and probable grounds in the present case. It appears Officer Greenaway subjectively concluded that because the defendant had refused to surrender his driver's license, the defendant had failed to identify himself to a police officer under the Highway Traffic Act. To reiterate, the failure or the refusal of the defendant in surrendering his driver's license upon demand from a police officer is not an arrestable offence contained in s. 217(2) of the Highway Traffic Act. In order for Officer Greenaway to have the requisite reasonable and probable grounds for making an arrest under the s. 33(3) provision for failing to give identification, Greenaway would have had to have made a request of the defendant to provide other identity documents or to have given verbally his name and address. If the defendant then would have refused to provide this reasonable identification, such as providing other identity documents or by verbally giving his name and address, after Greenaway's request for reasonable identification, then Greenaway would have had the requisite grounds to arrest the defendant.

¶ 60 Furthermore, in considering the honesty and the basis for the officer's belief in the existence of reasonable and probable grounds, Officer Greenaway should have know what was contained in s. 33(3) of the Highway Traffic Act. Since, the defendant was not given an opportunity to give reasonable identification after he had refused to surrender his driver's license, Greenaway could not have an honest belief there existed reasonable and probable grounds to arrest the defendant, especially when Greenaway had ignored completing the requirements of s. 33(3) by making a demand for reasonable identification other than a driver's license. On an objective basis, a reasonable man in the shoes of Officer Greenaway, who had served seven years in traffic enforcement and has knowledge of the Highway Traffic Act, could not have concluded there were reasonable and probable grounds to arrest the defendant for failing to give identification if the defendant had not been asked or given an opportunity to give reasonable identification after the defendant had refused to surrender his driver's license.

¶ 61 Now, considering the particular facts of this case on an objective basis, it appears that Officer Greenaway may have reacted too hastily in arresting the defendant after the defendant had refused to surrender his driver's license. The events leading to the arrest played out very quickly. Greenaway said that the defendant was being bellicose and defiant, even questioning the officer's reasons for requesting his driver's license. The witness Masse testified that she did not notice any abnormal behaviour or reaction from the defendant when she

approached the defendant's cab. Masse had give a nod to the defendant and the defendant had nodded back. It was only when Masse was in the cab that she had noticed something was happening with other people around the cab. Although Masse may not have been in a position to see whether the cab was partially in Lane #2, I find that if there had been a long and heated argument between the defendant and Officer Greenaway, surely Masse would have noticed this disturbance and would have been hesitant in approaching a potentially explosive scene. The fact that she was only in the cab for an instant before being pulled out objectively indicates the parlay between the defendant and Officer Greenaway lasted for only a short duration and the defendant was not as animated as had been depicted by Greenaway.

¶ 62 In summary then, Officer Greenaway lacked the requisite reasonable and probable grounds to arrest the defendant for failing to give identification under s. 33(3) of the Highway Traffic Act. Since the grounds for the arrest were absent, I therefore find the defendant's Charter rights have been infringed on a balance of probabilities, and that he was arbitrarily detained in contravention of s. 9 of the Charter.

Appropriate remedy for breach of s. 9

¶ 63 The defence seeks a judicial stay of proceedings for all charges as a remedy under s. 24(1) of the Charter if a breach of the defendant's Charter rights had been found. Section 24(1) provides that:

> 24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

¶ 64 In my view of the circumstances of the case at bar, I find it appropriate and just to grant the defence's request for a stay of proceedings as a remedy for the violation of the defendant's right not to be arbitrarily detained under s. 9 of the Charter.

(b) Section 10(b) -- right to counsel

¶ 65 As a consequence of the defendant being arbitrarily detained and the granting of a stay under s. 24, it is not necessary to consider the s. 10(b) Charter application.

5. CONCLUSION

¶ 66 This entire question of whether the defendant's s. 9 Charter right has been infringed has come down to one query. Had the second stage of s. 33(3) of the Highway Traffic Act been complied with by the police officer who arrested the defendant? That is, when a driver of a motor vehicle is stopped for a valid Highway Traffic Act purpose and is asked for his or her driver's license by a police officer, but the driver refuses to surrender that license, then the police officer must make a request for reasonable identification from that driver, such as the driver's name and address or other identity documents. If the police officer fails to make a demand for reasonable identification after the driver refuses to surrender his license then the grounds for charging someone for failing to give identification to a police officer has not been made out.

¶ 67 The Provincial Offences Act R.S.O. 1990, c. P.33, does not provide a police officer with a general power of arrest. As such, a provincial offence statue must expressly contain a provision that allows a police officer to arrest without warrant a person the officer observes contravening a provision of that statue. A police officer who wishes to arrest a driver of a motor vehicle that has contravened a provision of the Highway Traffic Act, R.S.O. 1990, c. H.8, can only do so if the offence committed is listed in s. 217(2). Section 217(2) provides that a police who, on reasonable and probable grounds, believes that the driver of a motor vehicle has contravened one of the provisions listed in that section, may arrest that driver without a warrant.

¶ 68 Although the defence has argued that Officer Greenaway may have had an improper purpose in stopping and approaching the defendant's taxicab, I find that at the time Greenaway had approached the defendant's cab, there were reasonable and probable grounds to stop or to investigate the driver of that cab as it had been obstructing or interfering with a lane of traffic contrary to section 170(12) of the Highway Traffic Act. Upon

observing a Highway Traffic Act infraction, Greenaway was entitled make a demand for the defendant's driver's licence under s. 33(1). However, neither interfering with traffic under s. 170(12) nor failure to surrender driver's license under s. 33(1) is listed as one of the arrestable offenses under s. 217(2).

¶ 69 The s. 33(3) offence of failing to give identification is one of the arrestable offences listed in s. 217(2). Thus, if a driver of a motor vehicle after refusing a police request for a drivers licence, then also refuses to give reasonable identification after a police demand, the driver is subject to arrest without warrant by the police. That section also provides that a driver giving his correct name and address would satisfy the requirement of giving reasonable identification to a police officer.

¶ 70 Therefore, a two-stage prerequisite in s. 33(3) has to be carried out before a police officer would have the grounds to execute an arrest. I base this on Harris J.'s decision in R. v. Bugaeva, [1999] O.J. No. 2738 (O.C.J.) where Bugaeva was convicted for failing to identify herself to a police officer who had made a request for a driver's license and for her name.

¶ 71 In the case at bar, I find that Officer Greenaway failed to ask or make a request for the defendant's name and address or for other identification besides a driver's license, after the defendant had refused to surrender his driver's license upon the initial police request. Without making a request for reasonable identification as required by s. 33(3) after the defendant's refusal to provide his license, Greenaway would not have fulfilled the conditions necessary before he would have had the grounds to arrest the defendant under s. 33(3). In which case, Greenaway unlawfully arrested the defendant.

¶ 72 As established in R. v. Duguay, Murphy and Sevigny (1985), 18 C.C.C. (3d) 289 (O.C.A.), affirmed 46 C.C.C. (3d) 1 (S.C.C.), not all unlawful arrests fall within the scope of an arbitrary detention. In order to determine whether the defendant had been arbitrarily detained, the Court of Appeal of Ontario in R. v. Duguay, Murphy and Sevigny established two considerations. First, the particular facts of the case have to be considered. Secondly, the court has to consider the extent of the departure from the standard of reasonable and probable grounds and the honesty of the belief and basis for the belief in the existence of reasonable and probable grounds on the part of the police officer making the arrest.

¶ 73 The Supreme Court of Canada in Storrey v. The Queen (1990), 53 C.C.C. (3d) 316, added an objective element in safeguarding persons from arbitrary arrests. It held that the arresting officer must not only subjectively have reasonable and probable grounds on which to base the arrest but those grounds must in addition be justifiable from an objective point of view.

¶ 74 Officer Greenaway in the present case should have know what was contained in s. 33(3) of the Highway Traffic Act and that he had to at least ask for the defendant's name and address before executing the arrest. Since, the defendant was not asked to give reasonable identification after he had refused to surrender his driver's license, Greenaway could not have formed an honest belief there existed reasonable and probable grounds to arrest the defendant under s. 33(3). On an objective basis, a reasonable man in the shoes of Officer Greenaway, who had served seven years in traffic enforcement and has knowledge of the Highway Traffic Act, could not have concluded there were reasonable and probable grounds to arrest the defendant for failing to give identification.

¶ 75 In conclusion, Greenaway lacked reasonable and probable grounds, on a subjective and objective basis, to arrest the defendant for failing to give identification under s. 33(3) of the Highway Traffic Act. Since the arrest was unlawful and inconsiderate, I find the defendant's Charter rights have been infringed on a balance of probabilities and that he was arbitrarily detained in contravention of s. 9 of the Charter.

¶ 76 I also find it appropriate and just to grant the defence's request for a stay of proceedings as a remedy under s. 24 of the Charter for the violation of the defendant's Charter right. Since I found the defendant was arbitrarily detained it is not necessary to consider the s. 10(b) Charter application.

6. ORDER

¶ 77 This application by the defendant Mahboob Malik to have his Highway Traffic Act and City of Toronto By-Law charges stayed for infringement of his right to not to be arbitrarily detained under section 9 of the Charter is granted. A stay of proceedings will be entered for all the May 28, 2000 charges against the defendant.

QUON J.P.

* * * * *

APPENDIX

Statutes, Regulations and Rules Cited

¶ 78

Canadian Charter of Rights and Freedoms, Part 2 of the Constitution Act, 1982, Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11, R.S.C. 1985, App. II, ss. 9, 10(b), 24(1).

Highway Traffic Act, R.S.O. 1990, c. H.8, ss. 33(1), 33(3), 170(12), 216(1), 217(2).

Provincial Offences Act, R.S.O. 1990, c. P.33, s. 145.

Exhibits Entered

Exhibit # 1 - notice filed with Federal Crown

Exhibit # 2 - notice filed with Provincial Prosecutor's office

Exhibit # 3 - letter from Attorney General of Canada

Exhibit # 4 - photocopies of taxi cab owner's license

Exhibit # 5 - diagram drawn by Mr. Azar Malik depicting position of cars

Exhibit # 6 - photocopy of the defendant Mahboob Malik's trip run sheet for May 27-28, 2000

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