

TOP FIVE 2019

Each year at OJEN's Toronto Summer Law Institute, a leading jurist identifies five cases that are of significance in the educational setting. The 2019 cases were selected and discussed by Mr. Justice Lorne Sossin of the Ontario Superior Court of Justice. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

R v LE, 2019 SCC 34 (CANLII), 375 CCC (3D) 431

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<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17804/index.do>

Facts

Late one evening, three police officers entered a fenced backyard of a townhouse and approached five young men without a warrant or their permission. The townhouse was in a subsidized housing complex in downtown Toronto that had a reputation as a place for drugs and gang activity.

The officers were looking for a man named N.D.-J.¹ The police had a tip that N.D.-J was in the general area and who was accused of violent crimes. As they approached the housing complex, they asked a security guard there if he recognized a photo of N.D.-J. The security guard told the officers that he had not seen this person, but that a different wanted individual, J.J., had been seen in L.D.'s backyard with members of a local gang. The security guard also said he suspected drug trafficking in that backyard.

The officers followed the small footpath that led to a number of properties, including L.D.'s backyard.

The officers saw five young men talking and relaxing while sitting on couches in an area that was enclosed by a two-foot fence, outside of which was a footpath which led to a common area. Each of the young men belonged to a racialized minority.

The officers did not know what J.J. looked like, so even when they could see all five men, they were unable to determine if J.J. was present. Without seeking a warrant or permission to enter, two of the three officers entered into the backyard through an opening in the fence. The third hopped over the fence.

The officers greeted the five men and began questioning them. They flashed their badges and two of the officers took adversarial tactical positions.

¹ The court uses initials for people whose names cannot lawfully be published, including cases involving people under the age of 18.



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Mr. Le was Asian-Canadian and 20 years old. He had been invited to the townhouse by his friend, L.D., then 17 years old, who lived there with his mother. Mr. Le began angling his body in a way to conceal something. The police officers began giving orders, patrolling the perimeter, and blocking possible exits.

Mr. Le was asked for his identification, and responded that he did not have any. Mr. Le was then questioned about the contents in his bag. He decided to run. The officers pursued and caught up to him. This led to a physical struggle between Mr. Le and one of the officers. During the struggle, Mr. Le attempted to reach into his bag, which contained a loaded handgun. The officer prevented him from getting the gun and subdued and arrested Mr. Le with the assistance of the other officers. Subsequent searches revealed that Mr. Le was in possession of cash and cocaine, in addition to the gun. Mr. Le was arrested and charged with offenses related to weapons and possession and trafficking of illegal drugs.

Mr. Le applied at trial to exclude the evidence of the firearm, drugs and cash under section 24(2) of the *Canadian Charter of Rights and Freedoms* ("the Charter"). He argued at trial that the police had no right to be in the backyard and that the police should have knocked on the front door in order to ask whether it would be possible to speak with the five men. He argued that the police conduct

breached his right to a reasonable expectation of privacy under s. 8 of the Charter. He also argued that during the interaction that followed, he was unlawfully detained by police, in violation of s. 9 of the Charter. He argued that the evidence should be excluded because, in the circumstances of this police conduct, admitting the evidence would bring the administration of justice into disrepute.

Issues

1. Did the encounter between Mr. Le and the police infringe his s. 9 Charter right to be free from arbitrary detention? If so, at what point in this interaction was Mr. Le detained? Were Mr. Le's s. 8 rights breached?
2. If Mr. Le's s. 9 Charter rights were breached, should the evidence be excluded under s. 24(2)?

Procedural History

The trial court found that the evidence should be admitted and convicted Mr. Le. A majority of the Court of Appeal dismissed his appeal. However, since the Court of Appeal decision included a dissenting opinion, Mr. Le had an automatic right to appeal to the Supreme Court of Canada ("SCC"), and he did.



Decision

The majority of the SCC judges held that Mr. Le's s. 9 Charter right against arbitrary detention was breached when the police entered the backyard and made contact with the young men. On an analysis under s. 24(2) of the Charter, the evidence of drugs, guns and cash were deemed inadmissible. Since the s. 9 finding was enough to show that Mr. Le's rights were infringed, the SCC did not need to consider his claims with respect to s. 8 of the Charter.

Ratio

Just because police interact with some communities more often than others, that doesn't mean they can enter a private residence in those communities without a warrant or permission. The larger social context of relationships between police and racialized communities must be considered when deciding whether and how a person's s. 9 Charter rights have been breached.

Reasons

The SCC considered the question of when, during his interaction with the police, Mr. Le was "detained". Under the law, detention can be either physical or psychological. Psychological detention

by the police occurs when (1) a person is legally required to comply with demands by the police, or (2) a reasonable person in the subject's position would feel obligated to comply with police demands and think that they were not free to leave.

The Court held that in applying this test, it was important to consider all the circumstances of the police encounter. Here, important factors included that coming over the fence to enter a private residence conveys a show of force. The tactic of three uniformed officers suddenly occupying the backyard would seem coercive and intimidating to a reasonable person. In addition, the fact that individuals from marginalized groups have different experiences and relationships with the police must be taken into consideration, because it has an impact on the perceptions of a reasonable person in Mr. Le's shoes.

Mr. Le was a member of a racialized community. He was also living in a low-income area. Somebody in Mr. Le's situation was more likely to have had negative interactions with the police. An ordinary person who had been stopped by the police many times before would think they had to do what the police said. The SCC also found that elements of the police conduct, such as the tone of their questions and the way they positioned themselves physically suggested that police were asserting legal



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authority in the interaction. For these reasons, the majority said that Mr. Le was detained the moment the officers entered the backyard.

The SCC then held that Mr. Le's detention was arbitrary, and infringed s. 9 of the Charter, because the police were not authorized to enter the residence and detain him. This was because they did not have reasonable grounds to suspect that Mr. Le was committing or had recently committed a crime. Mr. Le's presence in a so-called "high crime" area could not, without something more specific, give rise to a reasonable suspicion of criminal activity.

S. 24(2) of the Charter is for deciding whether evidence that was obtained in a manner that infringes a person's Charter rights should be admitted. The majority held that the evidence against Mr. Le (the gun, drugs, and cash) should be excluded. First, it was obtained through serious police misconduct. The majority noted that the officers came in without warning and obtained their evidence by walking into somebody's private residence. If this were allowed by law to happen in some neighbourhoods, because they were racialized and lower-income, but not others, people would lose their faith in the justice system.

This decision was not unanimous. Two of the five judges who decided this case dissented, meaning they disagreed

with the majority. They agreed that Mr. Le's detention was arbitrary but would have admitted the evidence against him under s. 24(2) of the Charter. They found that the police officers' conduct in this case was not egregious, because it was inadvertent and committed in the course of performing legitimate investigative duties. They also found that, on balance, the gravity of the social harms that drugs and gun violence have on communities outweighed the seriousness of the illegal actions taken by the police. They noted in particular that the police found a fully loaded, semi-automatic handgun on Mr. Le that could have ended the life of an innocent bystander or one of the police officers. The dissenting judges would have upheld the decisions of the lower courts and admitted the evidence against Mr. Le in trial.

DISCUSSION

1. What are the main Charter arguments raised in this case?
2. Why are there limits on what police officers can do when they are looking for evidence?
3. Do you agree with the SCC majority that the police did not have reasonable grounds to suspect that Mr. Le was committing or had recently committed a crime?
4. Do you think the evidence found on Le was serious enough that it should have been admitted into evidence?
5. How might police intervention affect somebody who had been stopped by the police 10 times versus somebody who had never been stopped?

