ONTARIO COURT OF JUSTICE
(TORONTO REGION)

03 016 038

BETWEEN

HER MAJESTY THE QUEEN

Respondent

and

SHELINA F. and JENNIFER L. (Young Persons)

Applicants

Appearances:

Tanya Kranjc for the applicant Shelina F.
Leslie Kaufman for the applicant Jennifer F.
Lareina Mazur for the Crown

Toronto Registry No:
Before Justice H.L. Katarynych

Decision: January 9, 2003

DECISION ON CHARTER APPLICATION

Issue and Context

Before me for adjudication is an application under s. 24(1) of the Canadian Charter of Rights and Freedoms brought by each of these youths, co-accused of the robbery of another youth in this community, in which each girl seeks a stay of that prosecution.

They allege that a strip search conducted of them on the day of their arrest and as part of the booking protocol of Toronto Police Services violated their right to be secure against unreasonable search under s. 8 of the Charter; their right under s. 7 to not be deprived of their liberty and security of the person except in accordance with the principles of fundamental justice; and their right under s. 12 to be shielded from cruel and unusual treatment.

The Crown takes the position that there was no Charter breach under these or any other grounds, and that their Charter application should be dismissed.

The decision has been on reserve until now.

Evidence in the Voir Dire

The defence case was constituted by the testimony of each youth.

The Crown's case was composed of the testimony of officers Reardon Andrade, Oliver Williams, Thomas Tighe, Philip Morin and Gladys Monkman, all of 55 Division of Toronto Police Services, court officer Angelo Meggo and policy and operational analyst officer Shawn Molloche.

Three exhibits made up the documentary evidence in the voir dire: the supplementary arrest record for Shelina F. relating to the search itself (Exh. 1), the arrest and release protocol of Toronto Police Services (Exh. 2) and a videotape of the booking of these two girls (Exh. 3).

Factual Findings

The evidence in the voir dire, considered in its entirety, yielded the following factual findings in relation to the circumstances of each girl at the time relevant to her arrest: -

1. On the morning of November 9, 2001 each girl came to 55 Division of Toronto Police Services, as requested by police, in relation to a robbery of another girl in the community alleged to have occurred on October 11, 2001.

2.Both girls had learned the night before, when police telephoned their home, that they were suspects in that robbery, and that police wanted them to turn themselves in.

3. Shelina was 17 years of age at the time.

4. Jennifer was then 15 years old.

5. Neither girl had a Youth Court record, had ever been arrested for an offence or had ever had been exposed to the procedures of police in relation to an investigation or arrest.

6. Neither girl was known to the police officers who dealt with them that day, although the investigating officer (Tighe) believed that they were part of a group known to prey on other youths. The evidence shed no light on the merits of his belief.

7. Each girl came to the police station with a parent; Jennifer, with her father and Shelina with her mother and her mother's friend.

8. After the investigating officer (Tighe) had given the girls, in the presence of their parents and the two officers who were to take them into custody (Williams and Andrade), the particulars of the charge and what was to happen next, both girls were placed under arrest for robbery, Jennifer by officer Williams, and Shelina by officer Andrade.

9. Neither girl takes issue with the lawfulness of her arrest.

10. Immediately after her arrest, each girl was separated from her parent to be paraded before the officer in charge of the station (Morin).

11. The arresting officers, relying on the investigating officer's stance, had decided that neither girl would be released from the station into the care of her parent, but rather held for a show cause hearing later that day in this courthouse. At no time did the police intend to seek a detention order for either girl. What they wanted was a surety bail, with conditions binding on each girl pending trial or other resolution of the charges.

12. It is part of police booking protocol, as these officers understood it, to lodge arrested persons being held for a show cause hearing in the station cells until they can be transported to the courthouse for the show cause hearing.

13. It is also part of police booking procedure, as these officers understood it, to take eyeglasses from a detained person, irrespective of the impact of that removal on that person's ability to see. Eyeglasses are considered by police to be instruments that can be converted to weapons.

14. In the name of safety, Jennifer was required to hand over her eyeglasses, even though she told the officer that she could not see without them, and went without her glasses for the remainder of her detention. She could have had her glasses restored to her in the courthouse cells, but it did not happen, either because she did not press for their return or she was not heard. The supervisor of the cells had no recollection of any such request made to her from either Jennifer or staff.

15. Jennifer has worn eyeglasses since infancy, cannot see without them and suffers dizziness and headaches when she is not wearing them.

16. Jennifer also has special learning needs and has spent the bulk of her school life in special education. What officers Tighe and Williams characterized as Jennifer's failure to react or respond much during the arrest and booking procedure appears on the videotape to be more accurately characterized as a young girl speaking only to confirm her identity and to protest the deprivation of her glasses, who then retreats into nods of her head and a concentrated attempt to do what she was told.

17. It is also part of police booking procedure, as these officers understood it, to conduct a "complete" search of detained persons before they are lodged in the station cells to

await transportation to the courthouse, irrespective of the length of time that lodging is needed.

18. Based on the nature of the charge and no reason to doubt the integrity of the investigation or the conduct of the arresting officers or the decision to detain each girl for a show cause, the officer in charge directed a complete search of each girl to ascertain whether either girl was secreting weapons or contraband on her person.

19. Each girl was told that the police "had to" do a complete search before she was placed in the station cells, although it is unclear how expansive the explanation was, and whether the videotape captured the whole of the interaction on this point. It is not clear on the evidence that either girl understood what made up a "complete" search until the search was underway. The information about the search emanated essentially from the matron's directions to each girl in the course of the search.

20. A "complete search" is police parlance for a "strip search". It stands midway between a frisk or pat down search (which does not require the removal of clothing) and a body cavity search (which involves a physical inspection of the detainee's genital or anal regions), and requires the detained person to expose the private parts of her body (genitals, buttocks, breasts and undergarments) to a police officer for inspection.

21. The parents, waiting in the reception area of the station, were not advised that their daughters were being strip searched as part of the booking procedure.

22. None of the officers in the station involved with these two girls saw any purpose to a pat-down search as an alternative or at least a prelude to the more intrusive strip search. They in fact viewed a patdown search, in light of the complete search that would be conducted anyway, an unnecessary intrusion on each girl. Consequently, no pat down search was conducted on either girl.

23. Neither girl resisted the strip search. The recollection of the officer who conducted each search (Monkman), was that Shelina was "very much against it", but the nature and extent of her protest is not in evidence. Jennifer said nothing.

24. The strip search of each girl was conducted by a female officer in an area of the station designed to provide a measure of privacy.

25. Each strip search took approximately 5 minutes.

26. As directed by the matron, each girl undressed herself to complete nakedness to expose her breasts, buttocks and genitalia for the matron's visual inspection. As part of the inspection, each girl was directed to spread her arms and do a deep knee bend. As part of the search, Shelina was required to cough, and when she did not cough loud enough, she was told to cough again. While each girl stood naked, her clothing was inspected, including the cuffs, seams and pockets of each item to check for weapons or

drugs. At an earlier point in the booking procedure each girl had removed her shoes so that the officers could then remove the insoles to check for weapons or contraband.

27. The process of the search was captured by the surveillance camera videotaping the entire booking procedure. That portion of the videotape of the strip search procedure itself shields part, but not all, of the naked body of each girl from the surveillance camera. Unbeknownst to either girl, the screen of the search area, intended to afford privacy to the person being searched, was not high enough to conceal the breast and upper body of either girl from the camera's eye as each dressed herself after the search.

27. Nothing was found on either girl as a result of the strip search.

28. After the strip search, each girl was lodged in a separate cell within the station to await transport to court.

29. Shortly before 2:00 p.m. both girls, handcuffed together, were transported in a police wagon to this courthouse and lodged in the courthouse cells to await their bail hearing.

30. Each girl underwent a patdown search at the courthouse before being lodged in the courthouse cells.

31. Once in the courthouse, each girl had opportunity to speak with duty counsel.

32. Each girl was released on a surety bail into the care of her parent later that day.

33. The humiliation of the strip search was still fresh in the memory of each girl at the time of the voir dire. There was still acute embarrassment at the recollection that they had been forced to expose the most intimate and private areas of their bodies to police for inspection. Shelina felt particularly degraded in being directed to cough, nor once, but twice, so that the matron could ascertain whether anything was ejected from her body by that coughing. Jennifer was so preoccupied by the memory and the distortion of her vision for so long a period, including her erroneous belief that she had actually been strip searched again in this courthouse, that she thinks about it every day.

ANALYSIS

In relation to the alleged violation of s. 8 of the Charter

It was common ground that the strip search of these two girls was undertaken without the authority of a warrant, and that there was a consequent burden on the Crown to show, on a balance of probabilities, that the search was not unreasonable within the standards required by the Charter.

It was also common ground that a warrantless strip search incident to an arrest is a valid exercise of police power only if the following prerequisites for and considerations surrounding the conduct of the search are met:

1. the police establish reasonable and probable grounds justifying the arrest;
2. the search is incident to the arrest; ie. Its purpose is to discover and retrieve evidence related to the alleged crime or weapons in the possession of the person arrested;
3. the police establish reasonable and probable grounds justifying the strip search; and
4. the strip search is conducted in a manner that does not infringe s. 8 of the Charter.

(See R. v. Golden (2001) 159 C.C.C.(3d) 449 (S.C.C.).

The Crown submitted that this court would not and could not find the search of either girl unreasonable if all the circumstances were properly considered, and careful attention was paid to distinguish the facts in this case from those that formed the underpinnings for the Supreme Court's pronouncements in the Golden decision.

This was the backdrop against which I approached this case, and the voir dire evidence yielded the following findings: -

On the Lawfulness of the Arrest

The lawfulness of the arrest was conceded by defence counsel.

On whether this Stripsearch was Incident to the Lawful Arrest

As a matter of law, police had the right to undertake a search of these two girls as an incident to their lawful arrest, provided the search, whatever its level of intrusiveness, was related to the reasons for the arrest itself, and had as its objective, either the recovery and preservation of evidence connected to the alleged crime or the discovery and removal of weapons found on their person (see Golden, supra, para. 92).

I kept in mind that the officer need not have reasonable grounds to believe that either such weapons or evidence will be found on the lawfully arrested person. It is the fact that the search of the person is made as incident to a lawful arrest whoch gives the peace officer the authority to search the person. (see Morrison (1987), 35 C.C.C. (3d) 437 Ont. C.A. per Dubin J.A.) at p. 442, referenced in Golden at para. 77).

This search did not have, as its objective, the recovery and preservation of any evidence connected to that alleged crime. The Crown conceded in argument that the need to retrieve and prevent disposal of evidence that might be secreted on either of these girls at the time of their arrest, almost a month after the alleged crime, was not a focus of this particular search.

The purpose of this search was the discovery and removal of weapons or contraband secreted on the person of either girl, in circumstances where they had been lawfully arrested for the alleged commission of a crime against another youth that is, by its nature, a crime of violence, and were now to be lodged in the station cells and then in the police wagon for transport to court.

It was, in short, a concern about safety; safety of the girls themselves while they were in detention, safety of others with whom they might come into contact, and the safety of the police themselves. It is obviously in the interests of police and of society as a whole to ensure that persons who are detained are not armed with items that can be used to harm themselves or others.

The information in the hands of the investigating officer bearing on the alleged robbery included allegations that the complainant had been injured in the robbery, that she had had lotion sprayed in her hair when her CD player was forcibly taken from her, that she was afraid of these girls, that the incident had occurred near a high school, that it had "gang" overtones, although it was not known definitively whether these two girls were members of a gang. If that information proved true, there was reason for the police to believe that each girl presented a risk of harm to the complainant and potentially to others in the community. That potential risk was, in fact, the reason underlying the decision of the investigating officer, accepted by the arresting officers and not questioned by the officer in charge, to seek a surety bail for each girl, one with a hefty penal sum and conditions governing them pending trial or other resolution of the charge.

In that sense, the objective of the search (discovery of weapons) was connected to the reason for the arrest (a violent crime).

<u>On the Reasonableness of this particular Search</u>

The heart of the defence case in the voir dire was the level of search selected by the police officers that day to satisfy their safety concerns. In the mind of defence counsel, their youthful clients were subjected to a level of body search that was grossly disproportionate to the need for it, and for reasons that failed to consider their particular circumstances.

In the end, and on the whole of the voir dire evidence, I came to the same conclusion, but not precisely for the reasons advanced by defence counsel.

The question about the reasonableness of the strip search in this case cannot be separated from a question about the reasonableness of the detention of either of these girls in the circumstances of this particular arrest.

This strip search was inextricably bound up with the decision of the officers to lodge these girls in the cells.

The single focus on the charge unleashed a chain of thinking that went something like this: - robbery charge means no release without a show cause hearing; no release means detention in the station cells; any person detained presents a risk that can only be contained by a strip search; therefore, lodging in the station cells requires strip search.

I accept, as a matter of common sense, that police cells and police paddy wagon transport are environments that need to be kept freed of weapons or contraband for the safety of those imprisoned, and those coming in contact with them, and that the safety issues are no less for a person detained waiting a bail hearing than they are for any other person in custody.

The difficulty in this case is that these two young girls were swept into a policy and attitude that took no meaningful account of whether their particular circumstances presented a level of risk at all.

On the evidence in this voir dire, I could find no justification for lodging these girls in the cells at all, and since it was that particular lodging that triggered the "need" for a strip search, nothing with which to reasonably ground a belief that a strip search needed of either girl to guarantee the safety of the police, the two girls themselves or others detained in the station or at the courthouse

I was frankly puzzled that the police officers detained these two girls in the station pending their court appearance on this charge. No authority was cited for the proposition that the charge of robbery created some sort of "reverse onus" situation for these youths that required them to displace a presumption that they would be detained.

These were two girls who had no record of crime or history with the police, in the company of parents who remained with them.

These two girls had responsible parents in the station to whom they could have been released. The parents had remained in the station to await information about their daughters and were readily available to the officers to provide information about what they themselves could provide to shield the complainant and any others from potential retaliation or risk creating behaviour of their daughters.

Had these girls been left with their parents in the station conference room or the reception area to pass the time until the afternoon sittings of the court, the strip search could have avoided altogether.

This was not a street arrest occurring hard on the heels of the alleged crime. It was one taking place in a police station, and almost a month after the incident giving rise to the charge. These parents had come with their daughters that morning to help them turn themselves in to the police, as had been requested of them. There was nothing in the interaction of either girl and her parent to suggest that the girls were not abiding the directions of either their parents or the police themselves.

The response of both the girls and their parents to the police officers had been respectful and deferential. There was nothing in the interaction between the girls, their parents and the police to suggest that the parents and the girls were not taking seriously the charge that had been laid.

Both girls and each parent had done precisely what the police had asked of them, beginning with the request that the girls turn themselves in at the station and save the police the time and trouble of effecting their arrest elsewhere.

If release to the care and supervision of their parents was not considered an adequate measure of control of the girls, then a further alternative, short of booking them into the cells, was available.

There was nothing to suggest that the police could not trust them to sit with their daughters in the station conference room or reception area until it was time for court. Had that been done, both girls could have gone from the police station directly to the courthouse, and in a cruiser rather than a police wagon, thereby reducing any risk inherent in lodging either girl in the station cells.

Had that been the route selected for them, the issue of strip searching them would not have arisen at all, even if they had stepped into custody in the courthouse. Strip searching a youth is not a prerequisite to being lodged in the courthouse cells. In the courthouse the patdown search is the level of choice, unless, as cell supervisor Meggo testified, there is "justifiable reason" to require a more intrusive search. Although she is aware that "usually [youths] get a "complete" search at the station, something that she was not certain was synonymous with a strip search, she did not ask nor had she been told what station search had been done on these two girls. For her the complete search at the station is "irrelevant". She trusts her staff, she testified, to do a proper pat down search.

In choosing the more onerous manner of detention, the officers knew that they had activated both the need to keep the cells safe from these girls and all the "rules" governing safety in custodial facilities. This was a safety issue that the police officers themselves created by their choice to bypass any less onerous method of bringing these girls before the court.

In sum, there was no justification for the strip search in this case because there was no justification for the detention that triggered it.

Even if there had been, this search veered outside the boundaries required by the common law for searches of this level of intrusion.

The common law requires reasonable and probable grounds for the level of search selected by the police. The more intrusive the search, the greater the degree of justification needed to hold it within the scope of s. 8 of the Charter (see Golden, supra at. para. 88ff).

The choice of strip search emerged from a deeply rooted belief on the part of all the station officers involved with these girls, including the officer in charge who had responsibility for the search decision, that it is the only reasonable and effective way to uncover weapons and contraband concealed on the person of detainees.

It was "red alert" and "worst case scenario" philosophy that fed the decision with regard to this particular search. The thoroughness of a search mattered to these officers. All of them acted in a genuinely held belief that a strip search was the only meaningful and responsible way to ensure their own safety, the safety of the girls themselves and others in custody with whom they would come in contact until their release.

All of the officers had formed that belief from their experience in policing; - an experience that was considerable. Two of the officers, including the officer in charge, had over two decades of experience in police service(Morin and Williams). The invesitating officer (Tighe) had almost three decades in policing. Officer Andrade had been in policing six years.

Officer Williams supported a strip search of Jennifer because "she could have had stuff on her". He himself had experienced apparently innocuous "stuff" being converted to weapons; for example, eyeglass rims being filed to create a shiv.

Officer Andrade admitted that he requires reasonable and probable grounds for any belief that he forms, but it appeared to be a theory that bore little relationship to the reality of his work. His sentiments were typical of the attitude of the other officers in the case. "I don't have reason to believe one way of the other....I don't know the mind of an accused, whether that accused is depressed, intent on escaping, a danger to others.... Prisoners can have any weapon on them, - knives, razor blades. Anything's possible. . I can't get into the mind of a person being detained.... I can't say for sure 100% that there will not be exigent circumstances...".

Shelina seemed "shaken", he testified, looked depressed, and "told me that she was scared and nervous". He admitted that her presentation did not cause him to identify any suicidal or mental health risk as a reason for the search, but "if there is a suicide attempt", he pointed out, "we're responsible.

For officer Tighe, who supported the complete search of these girls, although not directly involved in the booking procedure, "there is always a possibility of someone having weapons, - a nail file, a pin," – and, he pointed out, "Planes were hijacked with box cutters." "I can't assume anything in terms of how people will react, he testified, " I must assume contraband or weapons in every case with every person coming into the station".

This was also the thinking of officer Melloche whose current role is to review and revise as necessary the corporate policy on police search. "Lots of things are not discoverable through a pat down search, he testified from his base of 14 years experience

in police service, even when the search is undertaken almost a month after the alleged incident. "There is always urgency", he testified, pointing out the liability of the police if someone is injured as a result of an inadequate search of a person entering custody.

None of the officers considered it possible to make exceptions to the strip search "rule" to accommodate the particular circumstances of the detainee.

I got no sense that these officers were particularly motivated to consider any exception to the "rule" in any event; first, because their experience in the field had taught them to assume the worst, and second, because in their understanding of police protocol, exceptions were not to be considered when the issue was custodial safety.

All of the police witnesses supported their belief by reference to their understanding of the Toronto Police Services policy and protocol.

The officer in charge knew what choice had to be made as soon as he was informed of the charge. He had no reason, he testified, based on the reputation and experience of the investigating officers, not to believe in the integrity of the investigation and their grounds for charging the girls with robbery.

"My decision is already made," he continued, "once the charge is known". "On the weight of the charge, they're not going to be released (from the station) anyway", officer Morin testified. Once that is determined, "police regulation" requires a complete search before either girl could be lodged in the cells. He was certain that he had told the girls that they would undergo a complete search because "it is department policy". For him "policy" means "rule and regulation".

It is immaterial to him whether he has any information suggesting that the secreting of weapons or contraband is a live issue in the circumstances of either girl. "I had no information that she did not have weapons on her, he testified. Safety can be more than weapons, he added. It can be a handcuff key.

The fact that a person turns herself into police for arrest makes no difference to his decision (Officer Williams, who brought Jennifer to be paraded before him, did recall discussing with officer Morin that she was a "walk-in"; - police script to indicate that she had been called into the station). Whether the girls are lodged in separate cells is immaterial. It is important, he emphasized, "that everyone be treated the same", because it is unknown whether they will come into contact with others at some point during their detention.

What level of search is requested by the arresting officers is immaterial. Whether a pat-down search has been conducted or not is irrelevant. "Regardless of what the officer tells me", he testified, "they're going to have a complete search", because "force regulation says that I shall conduct a complete search".

Whether pat-down searches are utilized is up to the investigating officers, officer Morin testified, with the caution that a pat-down of a female arrestee by a male officer is a "definite No." Officer Andrade considered that once he had handcuffed Shelina and thus "had control of her", that there was "no need" to do a patdown search. "I've decided to strip search her, he testified, because at some point she's going to be put into a cell". Besides, he added, a pat down search by me is more intrusive than a complete search by a female matron".

There is no doubt, as all of the officers testified, that a strip search is far more effective in locating weapons and contraband than a frisk or patdown of the person's clothed body. Effectiveness is not, however, the only consideration that can be permitted to drive police thinking, when the issue is an intrusion of a person's privacy.

The nature of the offence with which an accused is charged is an important consideration, as the Crown properly points out. Safety in custodial facilities, whether station cell, transport wagon or courthouse cell is also an important consideration.

Yet an informed exercise of discretion cannot end there. A spectre of foreboding and fear cannot be allowed to overwhelm both the ability and the motivation of the officers to fix their attention on factors specific to the person upon whom their decision is to be visited.

The police stance that the safety of custody environments from weapons and contraband depends on a strip search of all detainees allows fear of the unknown to dictate police discretion. It defaults to an assumption that everyone and anyone stepping into custody is secreting instruments of harm on her person. There is no proportionality in that. The particular circumstances surrounding the arrest are material to the decision to exercise a strip search power.

It begins in this case with the need to keep in mind the age and stage of development of the individuals who will bear the brunt of the decision. These two female adolescents, one just fifteen, with both visual and cognitive impairment, and the other seventeen years old, attract the protection of not just the Charter but also the protections built into the scheme of the Young Offenders Act for youths of their age and stage of development.

There was, in fact, ample reason to ground a reasonable and probable belief that these girls had <u>not</u> come to the station that day with anything secreted on her body that could be used to harm herself or any other person. In addition to the factors identified elsewhere in these judgment reasons, the officers had the following factors, all of which needed to be brought to the scales to give a reasonable "read" on whether the strip search of these two girls was proportionate to the need for it: -

1. Officer Tighe, upon whom both of the arresting officers were relying for their own information about these girls on November 9, 2001, admitted in evidence that the circumstances of their arrest presented no exigent circumstances, and also acknowledged

that no exigent circumstances emerged during his involvement with the girls. His involvement with the girls that day ended when the arresting officers took them further into the station to parade them before the officer in charge.

2. The girls had done nothing after the departure of officer Tighe to give the arresting officers concern for their own or the safety of any other person in their presence.

3. Any lodging in the cells, if it was needed at all, was needed for only a brief time. Police had made arrangements to transport both girls to this courthouse for the afternoon sittings of the bail court. Bail court commences at 2:00 p.m. in this courthouse.

4. Prior to that day, neither of these girls had had any exposure to detention of any kind.

5. Both girls had managed their adolescence without being arrested for any crime.

6. Both girls had followed to the letter the directions given to them by the police in the course of their arrest and its aftermath. Jennifer worried aloud about the seizure of her eyeglasses, but when she went unheard, she made no further complaint. Shelina said that she was scared and nervous, but kept control of her emotions.

7. Both girls had responsible, interested and respectful parents with them that day.

8. Jennifer was both visually and cognitively challenged, and had already paid a high price for the police choices about her when she was required to relinquish her eyeglasses to them.

9. Police station policy for lodging in the cells differed from the policy for lodging in the courthouse cells. There was no expectation from the courthouse security staff that either girl be strip searched as a precondition to lodging her in the courthouse cells. If these girls had been permitted to step into detention at the courthouse, a pat down search would have sufficed for the staff in charge of the courthouse cells.

10. These girls could have been arrested much earlier than November 9, 2001 and were instead left in the community. The youth separately charged had implicated these two girls in the robbery on October 12, 2001. The police had known their identity, in the case of Jennifer, since at least October 18, 2001, and in the case of Shelina , since October 26, 2001. That delayed arrest occurred notwithstanding Officer Tighe's information that witnesses to the incident were too afraid to testify against them, that he "knew", although he did not provide the basis for his knowledge, that these two girls were part of a group, that the complainant's hair had been sprayed with lotion in the course of her CD player being forcibly removed from her.

11. Their time in the community after the alleged robbery had passed without incident. Police had no reason to believe that anyone, including the complainant, had come to any harm at the hands of either of them in the weeks after October 11, 2001. Whatever their other commitments, the police did not consider these two girls any meaningful risk to the

safety of the complainant, whether she had remained in the community or not, or the public safety.

12. No pitch was to be made to the court that afternoon to hold either girl in detention on any of the grounds permitted by the Criminal Code, including the circumstances of the alleged crime.

13. As part of the booking procedure the girls had already handed over items on their person that the police considered potential weapons; Shelina, her headband and lipstick, Jennifer, her eyeglasses. Their shoes had also been removed and searched.

14. There was nothing to suggest that a strip search was needed to ascertain whether either girl had marks on her body relevant for purposes of identifying the perpetrators of the crime.

15. Neither girl had given any attitude or behaviour to suggest that she might try to escape from police custody.

It is particularly concerning that the degree of Jennifer's visual and cognitive challenges went unnoticed by the officers that day. It is reasonable to expect officers who remove eyeglasses from a youth to weigh the cost to the youth of doing that. It is particularly important that an officer gain some understanding of the youth's ability to comprehend what is happening and the reasons for it. The evidence shed no light on whether he was asked to do that at any point in the booking of his daughter for the alleged crime.

Not to bring these factors to the scales is to say, in effect, that the circumstances of the arrested person are irrelevant in the weighing of safety concerns. Saying that an arrestee is afforded an individualized consideration on the issue of the level of search does not make it so.

To approach the task believing the worst of all persons detained, as the police officers did in this case, is to so tilt one's perspective in the direction of safety that any perspective on the right of the individual is suffocated. The Charter protections exist to guard against that sort of suffocation.

On all of the considerations relevant to their arrest, there is no reasonable and probable ground to believe that either girl presented any safety concern at the time of their arrest, or at any time subsequent to that arrest.

None of the officers who were part of the strip search decision that day had any information, apart from the circumstances alleged against them that had prompted their arrest, upon which to ground a reasonably belief that either girl presented any safety risk at all. The officers involved with these girls at the station admitted that they had no reason to believe that either of these girls had come to the police station with their parents

on November 9, 2002 with instruments on their person that could be used by them or anyone else to cause harm.

The issue, in their collective mind, was not whether the girls had anything secreted on them that could only be discovered through a strip search. For them, the issue was that they had no reason to believe that they did not. That is a spectre of danger. That is not a sufficient rationale in law for the choice that was made for these two girls.

It is precisely the sort of thinking that is prohibited by Golden. The court makes clear that the mere possibility that an individual may be concealing evidence or weapons upon his person is not sufficient to justify a strip search. Golden is also clear that strip searches cannot be carried out as a matter of routine police department policy applicable to all arrestees.

On whether this Strip Search was conducted in a Reasonable Manner

The common law as articulated in Golden also requires the Crown to show, on a balance of probabilities, that the manner of conducting that particular search was reasonable.

The fact that a strip search conducted as a matter of routine policy is carried out in a reasonable manner does not render the search reasonable within the meaning of s. 8 of the Charter. A "routine" strip search carried out in good faith and without violence will violate s. 8 (of the Charter) where there is no compelling reason for performing a strip search in the circumstances of the arrest (Golden, supra at para 95).

I have found on the whole of the circumstances of the arrest of these two girls no reason to subject them to a strip search, and no sensible reason at all to detain them. It is consequently unnecessary to address this particular prong of the Golden test for constitutionally sound search incident to an arrest.

For the benefit of all counsel, I did find that the manner in which this search was conducted fell short of what was required for these two young girls.

That breach resulted not so much from the failure of the police to pay close enough attention to their own protocol, but from the failure to give these girls the benefit of a pat down search before and as an alternative to the intrusiveness of a strip search, and from the failure of the police to shield these two girls sufficiently from the eye of the surveillance camera.

Officer in charge Morin bridled at questions during cross examination that suggested to him that the strip search was abusive, and accused counsel of "making it sound worse than it is". People are treated with dignity and respect, he insisted.

He missed two aspects in the manner of search that were abusive in their effect: -

1. it was inflicted on each girl without any meaningful regard to the sufficiency of the less intrusive pat down search to ascertain whether there was any need for the greater invasion of their privacy through the strip search; and
2. although some measure had been taken to provide privacy during the strip search, the naked breasts and upper body of both girls was captured on videotape.

Let me deal with each in turn.

1.The Absence of a Pat Down Search

The leap to strip search left both girls more vulnerable than they needed to be left in their circumstances. The police considered a frisking of the girls not only superfluous, but also an unnecessary intrusion on the privacy of the girls, in light of the decision that had already been taken to strip search them.

The Golden court had this to say about the value of a pat down search, when one's duty is to balance a detainee's right to privacy against law enforcement concerns: -

> .....[A] "frisk" or "pat down" search at the point of arrest will generally suffice for the purposes of determining if the accused has secreted weapons on his person. Only if a frisk search reveals a possible weapon secreted on the detainee's person or if the particular circumstances of the case raise the risk that a weapon is concealed on the detainee's person will a strip search be justified....(Golden, supra, para 94, underlining mine)

These girls paid the price for the disdain of these officers for a tool that in their collective mind was a poor substitute for a strip search. For all the reasons set out elsewhere in this judgment, it was neither "necessary" nor was it "reasonable" on the evidence in this voir dire to bypass a frisking of the girls to satisfy police concerns about secreting of evidence of weapons.

2.The Breach of Privacy that was the Result of Videotaping

Within the catalogue of considerations framed for the police by the majority in Golden to assist police in deciding how best to conduct a strip search incident to arrest in compliance with the Charter is the need to have the strip search be carried out in a private area such that no one other that the individuals engaged in the search can observe the search (Golden, supra, at para 101).

The majority in Golden also identified the need to ensure that the strip search be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time.

These girls were not given the option of partially undressing themselves. They were told to remove all their clothes at one time, and they did just that.

A portion of their nakedness was filmed, notwithstanding police protocol that prohibits videotaping of a strip search. No one appears to have known at the time that the camera has them in view once the matron leaves the camera's range to allow the girls to dress themselves. The breasts of these girls and their upper body, including their face, are captured on videotape because insufficient attention was given to ensuring that either the surveillance camera was turned off while the girls dressed themselves, or that the privacy screen reached high enough to shield their upper body from view as they dressed.

The existence of this film is an excruciating embarrassment to these girls. Their obvious question is how many persons have viewed their nakedness.

The level of casualness that crept into the manner in which these girls were searched resulted in unnecessary humiliation.

The majority in Golden had identified the need for the police to keep a proper record of the reasons for and the manner in which the strip search is conducted, and I took that into account.

The record made to document this search does not come close to that standard. However, the failure to comply with police policy did not concern me as much as the failure of the officers in this case to comply with both the letter and the spirit of the Golden decision.

Certainly the protocol was known to all of the officers except officer Andrade, who acknowledged that he should have known about it since both he and the policy had been around since the policy had been implemented some three years before this arrest.

The protocol is, in the evidence on Officer Melloche, a procedure to guide officers in their duties. It is not written for every eventuality. The policies, as amended from time to time, find their way to the frontline officers through routine orders of the Police Chief, published daily on the Intranet. It is the expectation that front line officers keep themselves apprised of those orders.

Officers are expected to follow the protocol, unless there are extenuating circumstances, and officers can justify deviations from the policy. Extenuating circumstances can and do encompass resource considerations; for example, the unavailability of a second female officer within a timeframe appropriate to the search.

Officer Monkman admitted that she was aware that the police protocol required that two female officers be present during a strip search of any female arrestee, that a strip search required exigent circumstances, and that the arrestee was entitled to a reason for the strip search.

Although defence counsel had a problem with a single female officer conducting the search, rather than the two envisaged by the police protocol, I did not. Given their age and stage of development, there is reason to believe on the evidence that these two girls

were grateful that they were not exposing their naked bodies to more than that single matron for inspection.

I was satisfied that at least Jennifer was given a reason for the strip search by at least one officer involved with her on that day. It was less clear that Shelina had had that benefit. In the course of the search the matron herself made it clear to them that it was part of the process. If the kids give me a hassle (and Shelina had, on her evidence,) "I tell them it's for everyone's good", the matron testified.

The officers all had a different idea of what constituted "exigent circumstances".

Concern about deficiencies in the documentation required by the protocol for the search, at least as it was contained in the Crown's disclosure (documents believed to have been completed by one officer had not in fact been completed by him, certain documents were unsigned, boxes that should have been checked off were not, and one box checked off left the impression, erroneously, that a "detention" order was the reason for the search) paled when set against the other concerns that this search raised. Officer Andrade admitted that he had ticked off "detention order" as the reason for the search of Shelina, even though the police were not seeking a detention order for her. He considered "our" decision to transport her to court encompassed within that reason. Nothing much turned on the deficiencies, according to the testimony of Officer Melloche, essentially because the search record is not an investigative, but rather a statistical document, created and maintained to report to the Toronto Police Services Board from time to time.
That evidence stood uncontradicted in the voir dire.

The manner of search was concerning, but not pivotal to the finding of Charter breach in this case.

What was pivotal was that this strip search was wholly unnecessary in the first place. The voir dire evidence did not establish that the police had reasonable and probable grounds for concluding that a strip search was necessary in the particular circumstances of this arrest. In not allowing their decision to be more fully informed, the police violated the right of each of these girls to be shielded from an excess of power and control, and specifically, unreasonable search of the private regions of their bodies.

The Crown properly points out that this was not the degree of strip search inflicted on Mr. Golden, nor was it a street search, nor was either girl physically injured by it, nor was it extensive in its duration. It was, however, a search wholly disproportionate to the need for it because, like Golden, not all of the circumstances that should have been considered, were considered.

Golden repeatedly references the duty of police to tie their response to an individual to the specific circumstances with which they are faced, to ensure that interference with the individual's physical and psychological integrity and safety is proportionate to the need for intervention. The failure to adequately use the particular circumstances of the arrest to inform the decision about the level of search left an

unacceptable imbalance between the privacy rights of these two girls and the realities and problems of law enforcement; - an imbalance that resulted in a contravention of the right of each girl under s. 8 of the Charter.

For all of these reasons, I concluded that there were no reasonable and probable grounds, on the whole of the evidence in this voir dire bearing on the circumstances of these two girls to require either of them to fully undress and expose their naked bodies to a matron for her visual inspection.

This strip search was an unreasonable search and an infringement of the right given to each girl under s. 8 of the Charter.

The Claims under s. 7 and 12 of the Charter

In view of my resolution of the s. 8 issue, it is unnecessary to address the applicant's other Charter arguments.

Mindful, however, that the Canadian Charter is not just an overarching law, but one whose protections are interrelated, the effect of the breach of s. 8 was a seepage into the protections given to these girls by both s. 7 and 12.

This particular strip search invaded the right of each girl to hold secure from view, the private and intimate parts of her body. In the inspection of her naked body, the police stripped each girl of her right to that security of her person. It was a state interference with the bodily integrity of each of them that was both unnecessary and unreasonable in the circumstances. That, in turn, fed a psychological stress of each of them that was also unnecessary and unreasonable. Both girls are in the midst of adolescence, a time in life where, as a matter of common sense and simple human experience, undesired exposure of private parts of one's body is a particularly acute discomfort. The security of their person fell prey to police fear of the unknown.

At the heart of fundamental justice is the duty to ensure that policies and protocols, whether correctly understood or not, are not implemented in a manner that blinds the decisionmaker to the person upon whom any decision is to be visited.

Effective application of the police duty to hold secure custodial settings, whether station cell or paddy wagon, did not depend on a strip search of these two girls.

A justifiable use of a police power derived from the common law requires the interference with liberty, whether it be detention or a body search, to be necessary for the carrying out of the particular police duty, and to be reasonable, having regard to the nature of the liberty interfered with and the importance of the public purpose served by the interference. Justice L'Heureux-Dube had made that point in Cloutier (see Cloutier v. Langlois (1990), 53 C.C.C. (3d) 257 at 274-5 (S.C.C.). Justice Le Dain had made the same point in Dedman (see R. v. Dedman, (1985) 20 C.C.C.(3d) 97).

The Supreme Court continues to make that point in Golden. Police decision-making is as much about individualization and proportionality under s. 7 as it is under s. 8 of the Charter.

In relation to s. 12 of the Charter, the strip search was not intended to be either "treatment" or "punishment", as those appellations are ordinarily understood by the public. That, however, was its effect. Both girls felt degraded by this stripsearch. Both were humiliated and embarrassed.

I kept in mind the reasoning of the Alberta Court of Appeal in Soenen, submitted by the Crown, that loss of privacy is an inherent incident of confinement, and that search designed to keep the place of confinement safe is not punishment (see Re Soenen and Thomas et al. (1983), 8 C.C.C.(3d) 224). I am not at all persuaded that this approach, dated by two decades, is any longer good law, when set against the principles articulated in Golden.

The treatment of these girls was not "unusual" in the eyes of the police either that day or in this voir dire. On the Crown's evidence, stripsearching is "standard practice" for any person, youth or adult, being detained for a bail hearing. Viewed objectively, that strip search was unusual in the circumstances of their arrest. It was also offensive, if one keeps in mind the presumption in law that both girls are innocent of the offence unless and until the Crown proves their guilt according to the criminal standard.

There was cruel and unusual treatment of Jennifer quite apart from the strip search of her. The decision to deprive Jennifer of her eyeglasses effectively deprived her of her ability to see. To have her effectively blinded throughout all but the first few moments that she spent in police custody distorted her world considerably. It was particularly cruel to do that in the face of her statements to the officer that she could not see without her glasses, and the ability to test the reliability of her statement through further inquiries of her father, still in the station.

On the Issue of Remedy for the Breach

This court's duty under s. 24(1) of the Charter is to ensure that any remedy imposed for this breach of Charter rights is "appropriate and just in the circumstances".

Defence counsel seek a stay of the prosecution against their clients. Let me move to the merits of that claim now.

I begin with the direction that not all interferences with a Charter right justifies a Charter protection. It is settled law that the Charter does not protect against trivial or insignificant breaches (Cunningham v. Canada SCC unreported No. 22451, judgment rendered April 22, 1993 and cited in Gladue).

I have also kept in mind, and it has weighed heavily, that a stay of a prosecution is a remedy that is appropriate only where no other remedy will reasonably suffice.

Criminal charges are laid and trials go forward to determine whether an accused is guilty or innocent on the merits of the prosecution itself. I have not yet heard the merits of the Crown's case against these girls on this charge of robbery.

Also in mind has been this court's obligation to protect rights set out in the Charter.

This particular strip search of these girls was not a trivial breach of their right to be secure from unnecessary and wholly unreasonable inspections of their body.

It was also not the most egregious in the repertoire of jurisprudence on that issue.

Was the strip search of these two girls a substantial deprivation of liberty or security of their person? Not in the sense of the Simpson case advanced by defence counsel, where the police had failed to heed the requirements of the Criminal Code in bringing the accused Simpson before a justice for a bail hearing (R. v. Simpson (1994) 88 C.C.C.(3D) 377 (Nfld. C.A.) at 401; reversed (1995), 95 C.C.C.(3d) 96 (S.C.C.). Not in the sense of the Gladue and Spannier cases, where wholly unnecessary and excessive physical handling of the accused persons resulted in physical assaults and consequent injuries to them (R. v. Gladue [1993] A.J. No.1045 (Alta. Prov. Ct.) and R. v. Spannier [1996] B.C.J. No 2525 B.C. Supreme Court).

It was, however, a forced and wholly unnecessary exposure of the most intimate regions of the bodies of these two adolescent girls for inspection by a police matron.

This is not a case like Flintoff or King (see R. v. King [1999] O.J. No. 565 Ont. Court (Gen Div), where a remedy under s. 24(2) was available to the court. Nothing of evidentiary value was found on either girl as a result of this search.

Defence counsel argue that to turn a blind eye to this particular police conduct by providing no remedy at all sends a message that such exercise of police power in the circumstances of these two girls is "no big deal", - something that this court tacitly approves, something that can be overlooked in the interests of evaluating the merits of the Crown's prosecution of them.

I accept that. It is wrong, in the eyes of the majority court in Golden, to downplay the intrusiveness of strip searches. Strip searches represent a significant invasion of privacy. Although the effects of a strip search can be minimized by the way in which they are carried out, even the most sensitively conducted strip search is highly intrusive (see Golden, supra, at para. 83). They are often a humiliating, degrading and traumatic experience for individuals subject to them. This strip search was just that for these two adolescents. They involve a "significant and very direct interference with personal privacy". They were just that for these two adolescents.

If I turn a blind eye to the strip search in this case, the rights given to these two girls by the Charter are, in substance, meaningless.

I do not undermine the difficulties facing police in their attempts to protect our community from crime.

I cannot undermine the rights of these two girls to be shielded from a police policy that has such casual disregard for their personal privacy. Golden reminds us that strip searching is one of the most intrusive manners of searching and also one of the most extreme exercises of police power. (see Golden para 89 citing at Flintoff, at p. 257).

It is because strip searches are inherently humiliating and degrading for detainees, the majority said in Golden, regardless of the manner in which they are carried out, that they cannot be carried out simply as a matter of routine police policy.

I cannot by any remedy today erase their experience of being strip searched. It is because of that lingering impact that the Supreme Court considered it particularly acute, in the context of strip searches, to prevent unjustified searches before they occur. (see Golden, supra, at para 89ff).

It's too late for these two girls. The whole point of s. 8 of the Charter is to protect individuals from unjustified state intrusions upon their privacy, and to do so, absent exceptional circumstances, before the intrusion occurs.

Robbery is a serious crime. It is no trivial business for the victim. Although use of a weapon is not specifically alleged against either girl, one officer involved in the investigation hinted in his voir dire evidence that a weapon may have been involved. Weapons are not infrequently tools of both intimidation and actual harm in the commission of that crime. The impact of being set upon by a gang of youths intent on doing harm is not something to be sloughed aside.

A charge of robbery is a significant circumstance in which to find oneself, whether youth or adult.

Justice Langdon in pointed out in Coulter that once lodged in custody, a prisoner awaiting a bail hearing, presumed innocent of the charge against him, is treated in exactly the same manner as any other prisoner. That does not make it right.

Nor is it right that police begin from the premise that everyone entering custody is secreting a weapon or contraband, and to lock into a mindset that justifies a strip search because the officers had no reason to believe that either girl was not secreting on her person something that might be used as a weapon.

I must keep in mind that these two adolescents take the special protections of the Young Offenders Act in relation to the manner in which they are handled by police and other persons in authority, whether police policy nor practice in relation to strip searches makes any distinction between youths and adults, any distinction between persons

charged and persons found guilty of an offence, or any distinction between a station cell, a transport wagon or a custodial institution.

Ms. Gladue was the victim of excessive force used against her when the circumstances did not call for the use of any force whatsoever. These two girls were the victims of a strip search done of them when the circumstances did not call for any strip search whatsoever, and did not even call for their detention.

Chief Justice Dixon, wrote this in Dedman, in the context of making clear that a police officer is not empowered to execute his or her duty by unlawful means; -

> The public interest in law enforcement cannot be allowed to override the fundamental principle that all public officials, including the police, are subject to the rule of law. To find that arbitrary police action is justified simply because it is directed at the fulfillment of police duties would be to sanction a dangerous exception to the supremacy of law....

I found that caution apt in the circumstances of this case.

In relation to the Authorities filed in the Case

Although I considered each of the cases contained in the book of authorities filed by both defence counsel and the Crown, in the end I concluded that a proper adjudication required the evidence to be tested against the standards articulated by the Supreme Court of Canada in Golden.

I paid particular attention in Golden to the court's mention of the distinctions to be drawn between a search immediately incidental to an arrest and a search related to safety issues in a custodial setting. The court drew that distinction in the context of making clear that the type of searching that may be appropriate before an individual is integrated into the prison population cannot be used as a means of justifying extensive strip searches on the street (as in Golden) or routine strip searches of individuals who are detained briefly by police (as in Coulter). Neither of those situations are the facts before me. Nonetheless, it was a valuable distinction to ponder in the case of these two girls because of these girls were being introduced into a custodial envionment.

The court took no issue with the need to ensure that individuals entering a prison population are not concealing weapons or illegal drugs on their persons prior to their entry into the prison environment, and that different considerations may apply. It made clear, however, that this, too, is a case by case determination.

The court said this, in relation to that a person in those particular circumstances: -

> Whereas strip searching could be justified when introducing an individual into the prison population to prevent an individual from bringing contraband or weapons into prison, different considerations arise where the individual is only being held

> for a short time in police cells and will not be mingling with the general prison population. While we recognize that police officers have legitimate concerns that short term detainees may conceal weapons that they could use to harm themselves or police officers, these concerns must be addressed on a case by case basis and cannot justify routine searches of all arrestees.... (Golden, supra at para. 97).

Concerns to be addressed on a case by case basis. Individualized decisionmaking. Precisely what did not happen in this case.

I paid particular attention to the decision of Justice Langdon in Coulter that when a decision is taken to lodge a prisoner in the cells, a warrantless strip search properly conducted cannot be said to be a violation of the prisoner's rights under s. 8 of the Charter. The prisoner in that case was an adult. The two girls before me are adolescents. One is learning disabled and virtually blind without the eyeglasses that were removed from her when she stepped into police custody. I cannot apply that reasoning to them, and pay any reasonable homage to the special considerations to which they are entitled by the Young Offenders Act because of their youth.

On the issue of remedy for the breach, I paid particular attention to the Ontario Court of Appeal's judgment in Flintoff.

Unlike the Flintoff case, the persons aggrieved in this case before me are adolescents. Unlike Flintoff, where the police had to detain the intoxicated Mr. Flintoff for breathalyzer testing before he could be released, in this case there was no reason to detain the girls at all in the police station or within the station cells. Unlike Flintoff, a remedy short of a stay was available to the court: exclusion of the breathalizer evidence.

It makes no common sense, if police are required before and as part of taking a decision to strip search a driver too intoxicated to be released from the police station after his arrest are required to weigh his particular circumstances, including that level of risk that he reasonably presents at the time, to relieve police of that obligation before and as part of a decision to detain and strip search two sober adolescent females presenting themselves at the police station in the circumstances of these girls.

Necessity and proportionality are as relevant to them as to any other citizen of our community. As Justice L"Heureux-Dube pointed out in Cloutier, a power to conduct a search at common law is not synonymous with a duty to exercise it (see Cloutier at p. 186).

An ordinary member of the public, looking at the situation in which these two girls found themselves, might reasonably conclude that whatever the presumption of innocence that is at the heart of our system of justice, these two young girls were accused, charged, convicted and punished for an alleged robbery through the medium of the strip search, - all at once and before they had ever appeared in a court to answer the charge.

All I can do is provide the only remedy available to me in these circumstances; stay the charge against them, and for all of the foregoing reasons, I have done precisely that.

The robbery charge against Jennifer L. and Shalina F. is stayed.

Right is reserved to edit this judgment on my own initiative or at the request of any of the counsel.

The decision is to form part of the record in the case, and is to be released to counsel this morning.

H.L. Katarynych

Dictated, not read.

25P