

R v Grant to *R v Le*: what has changed?

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R v Grant was a case that outlined how to determine psychological detention and changed the analysis of evidence exclusion based on section 24(2) of the *Charter*. The recent Supreme Court case *R v Le* considered similar issues. This blog will look at the two cases, consider the similarities, and determine why the two cases had different outcomes.

In *R v Le*, three police officers noticed four black men and one Asian man in the backyard of a townhouse, who appeared to be talking. The yard was surrounded by a waist high fence. Without warning or consent, two of the officers entered the yard and questioned the men, asking them to produce identification. Then a third officer, who had been patrolling the perimeter of the fence, entered the yard and yelled at one of the men to keep his hands visible. Le told the officers that he did not have any identification. The officer then asked Le about the bag he was carrying, at which point Le fled. Le was caught and arrested, and was found to be in possession of a firearm, drugs, and cash.¹ The Supreme Court found that Le's section 8 and 9 *Charter* rights had been violated by the arbitrary detention. The Court decided that the violation was sufficiently egregious that the evidence should be excluded under section 24(2) of the *Charter*.

In *R v Grant*, three police officers were on patrol near a school with a history of student assaults, robberies, and drug offences. Officers Worrell (W) and Forde (F), were dressed in plainclothes and driving an unmarked car. They were there to determine if there was anyone on school grounds who should not be there. The third officer, Gomes (G), was in uniform and driving a marked police car. He was there to establish a police presence. Grant was walking down a sidewalk

¹ *R v Le*, 2019 SCC 34 at paras 1-2 [*Le*].

when he was seen by W and F, who said that he stared at them intensely and fidgeted suspiciously with something in his pocket. W and F suggested that G approach Grant to see if there was any need for concern. G initiated a conversation with Grant, while standing on the sidewalk in Grant's path. G asked Grant what was going on and asked for his name and address. Grant produced a health card as identification. Appearing nervous, Grant adjusted his jacket, and G asked Grant to keep his hands in front of him. Observing nervous behaviour, W and F took up positions behind G and identified themselves as police officers. G asked Grant if he had anything he shouldn't, and Grant admitted to having a bag of weed. After several more questions, Grant admitted to having a gun. At this point, Grant was arrested and searched for the gun and weed, and advised of his right to counsel.² The Supreme Court decided that Grant's section 10(b) *Charter* rights had been violated, as he had not been informed of his right to counsel upon being detained, which happened when G told him to hold out his hands. However, the Court decided not to exclude the evidence that was found after the violation.

One difference between *R v Le* and *R v Grant* is the role of race. In *Grant*, the fact that Grant was black played no substantive role in the analysis of the court. In his partially concurring reasons, Binnie J acknowledged that visible minorities face higher risks of unjustified police interventions and that this may cause visible minorities to feel unable to walk away from police more than others.³ Binnie J recommended that serious weight should be given to the experience of the person actually stopped, and less to a hypothetical reasonable person, particularly where ethnicity may play a significant issue.⁴

² *R v Grant*, 2009 SCC 32 at paras 4-8.

³ *Ibid* at paras 154-155.

⁴ *Ibid* at para 176.

The majority did not deal with the ethnicity of Grant in its decision. In creating the test for determining psychological detention, the majority stated that a court may consider “particular characteristics or circumstances of the individual where relevant, including ... minority status”.⁵ Although the court did find that Grant had been psychologically detained before the police officers questioned him, it did not give any attention to the minority status of Grant. In its analysis of whether to exclude the evidence found after the breach of Grant’s section 9 and 10(b) *Charter* rights, the majority pointed out that there was no indication the Grant was racially profiled, thereby dispensing with the issue.⁶

In *Le*, the majority placed a much higher emphasis on race than in *Grant*. Using the *Grant* test to determine if a person has been psychologically detained, the majority specifically stated that the reasonable person must be appraised of the broader racial context in a given situation.⁷ The majority took issue with the fact that the trial judge had not sufficiently address the topic of race. Given a body of research indicating the prevalence of racial profiling in policing, it is likely that a group of five racialized men would feel targeted and compelled to comply with police.⁸ While the majority had concerns towards the police conduct, especially as towards racialized persons, it accepted the trial judge’s finding that there was no racial profiling on the part of the police officers in this case which would lead to a finding of bad faith.⁹ However, the majority decided that just because the police did not racially profile did not mean they were acting in good fail, as demonstrated by their trespass into the yard where the men, as the trial judge found, appeared to be

⁵ *Ibid* at para 44.

⁶ *Ibid* at para 133.

⁷ *Le, supra* note 1 at para 75.

⁸ *Ibid* at para 97.

⁹ *Ibid* at para 147.

doing nothing wrong.¹⁰ For these reasons, the majority found the violation of the Le's right to be particularly egregious, and opted to exclude the evidence as a remedy.

The minority in *Le* characterised the police action in a very different light, agreeing with the trial judge's finding that the police were not "motivated by anything other than a genuine desire to perform their investigatory duties, maintain peace and order, and protect the residents of a neighbourhood".¹¹

Given that *Le* was a 3-2 split decision, it is difficult to draw substantial precedential principles from it. It certainly demonstrates a higher emphasis on racial analysis in cases of arbitrary detention of racialized minorities than was present in *Grant*. However, the fact that a case involves a racialized minority will not be dispositive. Even though there was no finding of racial profiling in *Le*, current trends of racial profiling by police certainly influenced the majority that the police were acting in bad faith given the context. This case is an authority that the social context of racialized individuals is relevant in determining psychological detention, but that additional evidence of bad faith police action is required to exclude evidence on that basis. *Grant* can easily be distinguished from *Le* on the basis that *Le* involved police trespassing into a private yard where individuals appeared to be doing nothing wrong, while *Grant* involve an individual in a public area who was interpreted as nervous and suspicious by police.

¹⁰ *Ibid* at para 148.

¹¹ *Ibid* at para 169.