Bonds: Gendered and Racialized Violence, Strip Searches, Sexual Assault and Abuse of Prosecutorial Power

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> While, at times, the police may have to resort to force in order to complete an arrest . . . the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences."[1]

Introduction

In the early morning hours (5:38 a.m.) of September 6, 2008, Stacy Bonds, a twenty-seven-year-old make-up artist, experienced the depths of depravity at the hands of five officers with the Ottawa Police Service.[2] It started when two male officers (one who was White, the other Hispanic) decided to question her on Rideau Street in Ottawa. One of the officers testified that he saw her with a beer bottle and speaking to the occupants of a van. The officers saw her drink from the bottle and then throw it into a garbage bin. When they stopped her, she wanted to know if they had thought she was "soliciting the occupants of the van."[3] After running her name and date of birth on the police computer, they told her she could go. As she walked away, she wanted more information about why she had been stopped. She turned around and again asked the officers why they had questioned her. They told her again to go home. When Bonds insisted on an answer, one of the officers arrested her for public intoxication. He testified that he could smell alcohol on her breath and she appeared to stagger when she had earlier walked away.

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[1]*R. v. Nasogaluak* (2010), 251 C.C.C. (3d) 293, 72 C.R. (6th) 1 (S.C.C.) at para. 32.

[2]There were four male police officers and a female Special Constable involved in Bonds' treatment while in custody at the police station. The only evidence led at trial came from three of the police officers involved in the arrest and subsequent searches of Bonds. Additional facts used to fill out the narrative have come from speaking with defence counsel or have been reported in the Ottawa Citizen.

[3]See Chris Cobb, "Bonds officers' testimony revealed" Ottawa Citizen (12 December 2010) [hereinafter *Bonds officers' testimony revealed*]. The Ottawa Citizen obtained the transcript of the case and this story summarizes and directly quotes from the officers' testimony.

The trial judge correctly concluded that this arrest which started the entire sequence of events was unlawful. The law in Ontario is clear that an arrest under sub-section 31(5) of the *Liquor Licence Act*[4] can only be made where it is necessary to protect the safety of any person.[5]Not only was there no such evidence, but the trial judge was not even satisfied that she was, in fact, intoxicated. After her street arrest and pat-down search,[6] Bonds was taken into custody, where she was forced to endure hours of gratuitous violence and humiliation, much of which was caught on videotape.[7] The trial judge concluded that her detention and search constituted violations of sections 8 and 9 of the *Canadian Charter of Rights and Freedoms*.

The videotape showed that when Bonds was brought into the booking room, shortly after 6:00 a.m., there was "no hint of violence and no hint of being aggressive."[8] Before she was searched, she was placed in a holding cell where she "was not aggressive and not belligerent [and] seemingly compliant."[9] Bonds was then brought to a search table. She was forced up against a counter and then twice violently kneed in the back of her body and her hair pulled back by a

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[4]R.S.O. 1990, c. L. 19.

[5]As Justice Swinton held in *Wilson v. Ontario Provincial Police*, 2008 CarswellOnt 5963 (S.C.J.) at para. 22:

> . . . in order to arrest for public intoxication, a police officer must have reasonable grounds to believe that an individual is intoxicated in a public place, and arrest is necessary for the protection of some person. A police officer can also arrest if he or she finds a person apparently in contravention of the *LLA*, and the person refuses to provide his name and address.

See also, *Radovici v. Toronto Police Services Board*, 2007 CarswellOnt 4317 (S.C.J.); and *R. v. Decoteau*, 2009 CarswellAlta 1982 (Alta. Prov. Ct.) at paras. 23–32.

[6]According to the trial judge, a female officer was summoned to the scene and searched Bonds. He observed that "there [was] nothing untoward or of a violent nature reported. She [was] clearly cooperating." *R. v. Bonds*, reported *ante* p. 119, at para. 10.

[7]The Ottawa Citizen obtained from court a copy of the videotape and has posted it on its website. See http://www.ottawacitizen.com/Exclusive+Citizen+obtains+video+Stacy+Bonds+jailhouse+abuse/3883952/story.html (date accessed: 3 December 2010). However, those portions where Bonds is naked have been removed as a result of a publication ban. Defence counsel confirmed that at all times that Bonds was searched, she was flanked by at least two male officers.

[8]*Bonds*, *supra* at para. 11.

[9]*Ibid.* at paras. 13-14.

female Special Constable.[10] A hand was then shoved down her pants.[11] It was at this point that, according to one of the officers, Bonds kicked the Special Constable, who moved away and appeared to be in some pain.[12]

Bonds was then forcibly taken to the ground, where she was held down by three officers, including the two who had arrested her on the street.[13] One of the officers used a riot shield to hold down her legs even though she was "not resisting with hands flailing or feet flailing."[14] A male officer took a pair of scissors and cut her shirt and bra.[15] What happened next is described as follows:

> Her bare back visible, Bonds is eventually lifted by the four male officers, her arm across her chest holding what remained of her tattered clothing in an attempt to prevent herself from being completely exposed.

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[10]Special Constables are civilian members of the Ottawa Police Service who are sworn in as peace officers and who are involved with court security, temporary detention and transportation. See "Special Constables," online: Ottawa Police Service, http://www.ottawapolice.ca/en/ServingOttawa/SectionsAndUnits/Constables/index.aspx (date accessed: 13 December 2010). At trial, defence counsel relied on an earlier case involving physical abuse by the same female officer who physically assaulted Bonds. In that case, the officer had kicked a helpless Aboriginal man as he lay on the floor of his cell. The man was charged with assault police. At his trial, the trial judge was so "profoundly disturbed" that she shouted out "Jesus" while watching it. See Andrew Seymour and Claire Brownell, "Ottawa officer who struck Bonds in separate case of prisoner abuse" *Ottawa Citizen* (26 November 2010).

[11]In his reasons, the trial judge does not identify who put their hand down Bonds' pants. It would appear that it was the female Special Constable. In the summary of the evidence set out in the Ottawa Citizen, the officer is reported to have testified that "Bonds became difficult when she attempted to search under her pants and underwear." See *Bonds officers' testimony revealed*, *supra*.

[12]The trial judge asked the officer whether "the kicking of Ms. Bonds in her sock feet was the cause of your injury or was the kneeing the cause of the injury." The Special Constable replied, "I didn't feel any pain, that I can recall, after delivering the strike." See *Bonds officers' testimony revealed*, *supra*.

[13]This fact was confirmed by defence counsel. It is also clear from the videos that the two officers who brought her to the cells were involved in her search.

[14]*Bonds*, *supra* at para. 19.

[15]According to the Special Constable, "the bra is a big area for edged weapons." See *Bonds officers' testimony revealed*, *supra*. The officer who cut Bonds' clothing also had a serious history of police brutality. Less than a week before the Bonds incident, the officer went into a cell to check on a female detainee. He kicked her while she was kneeling on the floor, causing her to hit the stainless steel toilet. He kicked her a second time. He then stood on the bed with his taser pointed at her while a female officer came in and strip-searched her. When the detainee reacted to this abuse by grabbing the officer's leg, he repeatedly tasered her. The officer was found guilty under the *Police Services Act*. He

> Another camera angle, which is covered by the publication ban, shows Bonds being led down a hallway to a holding cell with nothing but her arm and the small piece of fabric covering her chest. The side of her breast is briefly exposed at one point.
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> . . . the female officer, can be seen tearing away what's left of Bonds' shirt and bra before putting her in a cell with the help of the male officers.[16]

Bonds was left half-naked in her cell for over three hours. At some point during her ordeal, she soiled her pants. Bonds was eventually released from the police station shortly after 1:00 p.m. that same day but not before being charged with assault police.[17] She had to wait over two years to get justice.

Not surprisingly, the trial judge was shocked by what he saw, declaring it an "indignity to a human being." He stayed the prosecution, concluding that he did not want to be part of what he characterized as a "travesty."[18] In this comment, I

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received a three-month demotion. See Gary Dimmock, "Officer's unlawful actions revealed in detail" *Ottawa Citizen* (24 November 2010).

[16]See Andrew Seymour, "Citizen obtains video of Stacy Bonds" *Ottawa Citizen* (26 November 2010).

[17]See Gary Dimmock, "Lawyer 'overcome by sadness' watching strip-search victim" *Ottawa Citizen* (5 December 2010).

[18]*Bonds*, *supra* at para. 27. The trial judge appears to have stayed the proceedings under section 24(1) in light of the seriousness and pattern of *Charter* violations. He could also have stayed the proceedings under the common law/section 7 abuse of process doctrine. His comments reveal that he was satisfied that the arrest, strip search and prosecution were an abuse of process. With respect to remedying the abuse of prosecution, he could have relied on that part of *Canada (Minister of Citizenship & Immigration) v. Tobiass* (1997), 118 C.C.C. (3d) 443, 10 C.R. (5th) 163 (S.C.C.) at para. 96 where the Court observed that:

> [I]f a past abuse were serious enough, then public confidence in the administration of justice could be so undermined that the mere act of carrying forward in the light of it would constitute a new and ongoing abuse sufficient to warrant a stay of proceedings. However, only an exceedingly serious abuse could ever bring such continuing disrepute upon the administration of justice.

He could have also relied on *R. v. Tran* (2010), 257 C.C.C. (3d) 18, 76 C.R. (6th) 307 (Ont. C.A.) as authority for staying the charge because of police brutality and prosecutorial acquiescence in that brutality. *Tran* highlights a number of other cases where stays were entered to address the police brutality in the case. See para. 90. See also, Tim Quigley, "Stays of Proceedings due to Police Misconduct" reported *ante* at p. 124. What distinguishes *Tran* from *Bonds* is that in *Bonds*, the police abuse of process continued to exist at trial since the charge itself arose in response to the police abuse. In other words, both the trial fairness and residual categories were triggered by the abuse in this case.

want to explore (i) the elements of gendered and racialized stereotyping and violence in the case; (ii) the degree of departure from *R. v. Golden*,[19] the leading Supreme Court authority on strip searches; (iii) whether what occurred was a sexual assault; and (iv) the issue of accountability and the Crown's office. What permeates all of these issues is the relevance of gender and race to the analysis.

Gendered and Racialized Violence

Stacy Bonds has said little publicly about her ordeal. When asked about whether what happened to her was as a result of her being a Black woman, she indicated that she "didn't want to think" that there was a link and posited that it had more to do with questioning authority. She reiterated that she hoped that "it's not a racial thing."[20] The relevant question, however, remains whether gendered and racialized stereotypes and violence made her more vulnerable to the kind of degrading conduct she experienced than had she been White or male.[21]

Was she initially stopped, for example, as the result of her being profiled as a sex trade worker given the time of night, location and the fact that she is Black and was seen speaking to the occupants of a van?[22] Why was she arrested for

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[19][2001] 3 S.C.R. 679, 47 C.R. (5th) 1 (S.C.C.) [hereinafter *Golden*]. I was counsel for Ian Golden in the Supreme Court of Canada.

[20]See Gary Dimmock, "I hope and pray it's not a racial thing" *Ottawa Citizen* (28 November 2010). Bonds' defence lawyer has publicly stated that he did not think that racial profiling was involved. See Kelly Patterson, "Police set to start racial-profiling forum" *Ottawa Citizen* (18 November 2010). The concern about the failure of defence lawyers to identify the relevance of race in criminal cases has been discussed elsewhere. See, in particular, David M. Tanovich, "The *Charter* of Whiteness: Twenty-Five Years of Maintaining Racial Injustice in the Canadian Criminal Justice System" (2008), 40 *Supreme Court Law Review* 655; and David M. Tanovich, "The Further Erasure of Race in Charter Cases" (2006), 38 *Criminal Reports* (6th) 84.

[21]For an excellent discussion of police violence against racialized women, see Andrea J. Ritchie, "Law Enforcement Violence Against Women of Color" in Incite! Women of Color Against Violence, *Color of Violence: The INCITE! Anthology* (Cambridge, Mass.: South End Press, 2006) at 138 [hereinafter *Violence against Women of Color*]. In the Canadian context, see Ray Kuszelewski and Dianne L. Martin, "The Perils of Poverty: Prostitutes' Rights, Police Misconduct, and Poverty Law" (1997), 35 *Osgoode Hall L.J.* 835.

[22]It is interesting, as noted earlier, that she thought that the officers suspected her of soliciting. In *Paying the Price: The Human Cost of Racial Profiling* (Ontario Human Rights Commission, 2003, at page 45), the Ontario Human Rights Commission observed that "racialized women reported incidents where they were assumed to be prostitutes because they were in a car with a White man who was assumed to be a customer. . ." See also the discussion of this aspect of profiling in *Violence Against Women of Color*, *supra*

public intoxication only after she repeatedly asserted her right to know why the officers had earlier stopped and questioned her? Why was she so physically violated by multiple officers in custody? It is not as though there was any real concern about her being violent, armed or a danger to the officers or to other prisoners. As noted earlier, before she was physically searched, she was not in any way aggressive or violent. She was compliant. Moreover, the officers who initially arrested her for public intoxication were present during the custodial search and would have made the other officers aware that she was arrested for the most minor of provincial offences. One would have expected one of the other officers to question why Bonds had been arrested in the first place given the narrow right of the police to arrest intoxicated individuals. And so, given what the officers knew at that time, including the fact that she did not have a criminal record, their conduct had to be grounded in something else.[23]

Her encounter with the police, particularly with the officers on Rideau Street, is reminiscent of *Abbott v. Toronto Police Services Board*.[24] In *Abbott*, an adjudicator with the Ontario Human Rights Tribunal concluded that race and gender

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at 144–148. Shortly after the *Bonds* case became public, it was reported that a group of sex trade workers in Ottawa have asked the Ontario Human Rights Commission to hold an inquiry into systemic abuse by the police of sex trade workers. In a report prepared by POWER (Prostitutes of Ottawa-Gatineau Work, Educate and Resist), incidents of physical and sexual assault, harassment and strip searches, including in public places, were documented. See Don Butler, "Abuse standard treatment: sex workers" *Ottawa Citizen* (1 December 2010).

[23]Indeed, the trial judge was satisfied that there was no law enforcement justification for the officers' conduct. See *Bonds*, *supra* at paras. 21, 25-26.

[24]2009 HRTO 1909 (Ont. H.R.T.) [hereinafter *Abbott*]. Abbott was a Black newspaper delivery person whose erratic driving caught the attention of a police officer who was aware that she was delivering papers. The officer got out of his car and indicated that he wanted to speak to Abbott. Abbott started to call her husband, as she was concerned that she might be the victim of an assault by someone impersonating a police officer. The officer repeatedly asked her for her driver's licence and insurance. She advised the officer that she would not speak to him until she had a witness on the phone. At some point after this, the officer attempted to arrest her and a struggle commenced as he tried to handcuff her. According to the officer, they fell to the ground as they lost their balance. Abbott maintained that the officer had thrown her to the ground. There was no dispute that while on the ground, the officer pinned Abbott in order to handcuff her and that he grabbed the belt at the rear of her pants in order to get her back on her feet. The officer then charged Abbott with seven offences under the *Highway Traffic Act*. She was acquitted on six of those charges. There was no evidence before the Tribunal concerning the seventh charge of not wearing her seatbelt.

played a role in turning an encounter between a police officer and a Black woman violent and out of control:

> The question for me is whether the applicant's race and/or gender played a role in [the officer's] failure to take steps to try to de-escalate the situation . . . There is no doubt that the exercise of power is inherent in the interaction between a police officer and any member of the public, given the powers that are granted to a police office by statute. But this imbalance of power can be inappropriately exacerbated when it is layered on top of a racial and gender power dynamic. . . .
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> . . . Most often racial discrimination emanates from unconscious attitudes and belief systems. In a historical context, some of these attitudes and belief systems include that Black persons (and other groups) are expected to "know their place" and that any Black person who talks back or refuses to comply is to be regarded as "uppity" and needs to be dealt with harshly. . . .
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> . . . I find that [the officer's] actions in this regard are consistent with a manifestation of racism whereby a White person in a position of authority has an expectation of docility and compliance from a racialized person, and imposes harsh consequences if that docility and compliance is not provided.[25]

Gendered and racialized violence also provide the only reasonable explanation for why the conduct of the police in this case departed so substantially from the minimum standards for a reasonably conducted strip search. This departure permitted the officers to use the strip search as a sexual weapon and a form of punishment to further her humiliation and degradation.

Reasonably Conducted Strip Searches

In *Golden*, the Supreme Court recognized that strip searches "represent a significant invasion of privacy and are often a humiliating, degrading and traumatic experience for individuals subject to them."[26] The Court also recognized that given the disproportionate vulnerability of African Canadians and Aboriginals to strip searches, it was necessary to "develop an appropriate framework governing

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[25]*Ibid.* at paras. 42, 45, 46. For other examples of extreme police violence in response to a racialized or Aboriginal individual who asserted their rights or resisted, see *R. v. Homer*, 2009 CarswellOnt 7197 (C.J.); and *R. v. Munson* (2003), 172 C.C.C. (3d) 515 (Sask. C.A.). In *Munson* (2003), 172 C.C.C. (3d) 515 (Sask. C.A.), two police officers drove Darryl Night to the outskirts of Saskatoon in temperatures that hovered between -22 and -25 C. Night was not dressed with warm clothing. This phenomenon is known out west as the "Starlight Tours." See David M. Tanovich, *The Colour of Justice: Policing Race in Canada* (Toronto: Irwin Law, 2006) at 41–43.

[26]*Supra* at para. 83. See also the discussion at para. 89.

strip searches in order to prevent unnecessary and unjustified strip searches before they occur."[27] The Court rejected a warrant requirement in place of strict minimum standards for a reasonably conducted strip search.

The violent strip search of Bonds by five officers, four of whom were male, reveals that *Golden* remains largely ignored in day-to-day policing. Indeed, the high number of reported cases over the last two years (i.e. 2009-2010) where a strip search was found to be improper also speaks to the institutional failure to comply with *Golden*.[28] In four of the cases, a stay of proceedings was imposed.[29] It is, therefore, important to examine some of the minimum standards espoused by *Golden* as they relate to the conduct of the officers in this case. Each of those standards was violated.

Routine custodial strip searches are prohibited

Routine strip searches, even when the suspect is in temporary custody, are unreasonable under section 8 of the *Charter*.[30] Indeed, for strip searches that occur in circumstances where an intoxicated person is held overnight, the Supreme Court held:

> It may be useful to distinguish between strip searches immediately incidental to arrest, and searches related to safety issues in a custodial setting. We acknowledge the reality that where individuals are going to be entering the prison population; there is a greater need to ensure that they are not concealing weapons or illegal drugs on their persons prior to their entry into the prison environment. However, this is not the situation in the present case. 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 or routine strip searches of individuals

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[27]*Ibid.* at para. 83.

[28]See, for example, *R. v. Muthuthamby*, reported *ante* p. 64 [hereinafter *Muthuthamby* (sentence reduction); *Ward v. Vancouver (City)* (2010), 76 C.R. (6th) 207 (S.C.C.) (*Charter* damages); *R. v. Smith*, 2010 CarswellOnt 2346 (C.J.) (stay imposed); *R. v. Hoang*, 2010 CarswellBC 466 (Prov. Ct.) (evidence excluded); *R. v. Oyama*, 2010 CarswellBC 255 (Prov. Ct.) (no remedy because of absent of causal connection); *R. v. Crawford*, 2009 CarswellOnt 4333 (S.C.J.) (evidence excluded); *R. v. Chowdhury*, 2009 CarswellOnt 3351 (C.J.) (stay imposed); *R. v. S.(L.L.)*, 2009 CarswellAlta 650 (C.A.) (stay imposed on assault police charge); and *R. v. Mesh* (April 16, 2009), Rutherford J., [2009] O.J. No. 6194 (Ont. C.J.) [hereinafter *Mesh*] (stay imposed).

[29]A stay of proceedings was also imposed in the unreported decision of *R. v. Gaeshingtsong* (23 June 2009), Paris J.

[30]*Golden*, *supra* at paras. 90, 95.

> who are detained briefly by police, such as intoxicated individuals held overnight in police cells . . .[31]

Courts and even official policy require a case-by-case reasonable grounds assessment. For example, the strip-search policy of the Toronto Police Service states:

> 9. When in charge of a unit where persons are detained shall ensure that:
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> - The decision to search a person has been evaluated based on the risk factors . . . and
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> - where reasonable grounds to conduct a Level 3 search exist, ensure a Level 3 search is conducted
>
> - where reasonable grounds do not exist, ensure a Level 2 search is conducted.
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> When assessing the level of search, the OIC/police officer shall on a *case-by-case* basis (emphasis in original), evaluate the circumstances relevant to the individual to be searched and determine the appropriate level of search required to address any risk factors, keeping in mind that the safety of officers, the individual and to others is paramount. The OIC is responsible for ensuring that the level of search appropriately addresses the risk factors associated to the current arrest including those related to the person, and logistical issues such as the type of transportation and contact with others that this individual is expected to encounter.

The identified risk factors include:

> a. The details of the current arrest
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> b. The history of the person
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> c. Any items already located on the person during a Level 1 or 2 search
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> d. The demeanour or mental state of the individual
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> e. The risks to the individual, the police or others, associated with not performing a Level 3 search
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> f. The potential that the person will come into contact with other detainees, creating an opportunity for the person to hand off contraband, weapons, etc. . . . to another prisoner.[32]

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[31] *Ibid.* at para. 96. See also, *R. v. Samuels*, 2008 CarswellOnt 1111 (C.J.); and *Mesh*.

[32] As reproduced in *Muthuthamby*, *supra*, at paras. 13-14.

There must be evidence of necessity

There must be reasonable and probable grounds to believe that a strip search is necessary even when the suspect is taken into custody.[33] In *Bonds*, there were no such grounds. Indeed, there were no grounds for her initial arrest. The police only arrested her when she questioned their authority. This supports the view that her strip search was conducted to further intimidate her and/or punish her for questioning their authority and then defending herself against their unlawful search and physical assault at the search table.

Opposite-sex strip searches are unreasonable absent exigent circumstances

In order for a strip search to be reasonably conducted, the search should be conducted by officers of the same gender.[34] It is rare to find a reported case where this standard has not been respected.[35] In *Bonds*, this minimum standard was grossly violated by the presence and participation of four male officers.

Humiliating and abusive strip searches are prohibited

In *Golden*, Justices Iacobucci and Arbour held that "[a] strip search will always be unreasonable if it is carried out abusively or for the purpose of humiliating or punishing the arrestee."[36] As noted above, it is difficult to conclude that Bonds was not being punished given the absence of necessity, the extreme use of violence, the presence of four male officers and her post-strip search detention where she was left half-naked for over three hours. Indeed, the trial judge concluded that the only reasonable explanation for leaving Bonds in her cell half-naked was "vengeance and malice."

Strip searches should receive prior authorization from a senior officer and should be recorded

Although a warrant is not required, there should be, absent exigent circumstances, authorization from a senior officer.[37] In addition, a proper record should

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[33]*Golden*, *supra* at para. 98.

[34]*Ibid.* at para. 101.

[35]One such case is *R. v. G. (P.F.)*, 2005 CarswellBC 1204 (Prov. Ct.), where a male officer strip-searched a young female Aboriginal detainee.

[36]*Golden*, *supra* at para. 95.

[37]*Ibid.* at para. 101.

be kept of the reasons for and manner of the strip search.[38] Apparently, many police services, including Ottawa, are not keeping these records.[39]

A right of resistance

It would seem that in *Bonds*, the police felt that they could escalate the level of force used because she resisted when they tried to unlawfully search her, including sticking a hand down her pants. In *Golden*, Justices Iacobucci and Arbour, for the majority, recognized the right of individuals to resist unlawful police conduct:

> We particularly disagree with the suggestion that an arrested person's non-cooperation and resistance necessarily entitles police to engage in behaviour that disregards or compromises his or her physical and psychological integrity and safety. If the general approach articulated in this case is not followed, such that the search is unreasonable, there is no requirement that anyone cooperate with the violation of his or her *Charter* rights.[40]

Strip Searches and Sexual Assault

In *Golden*, the Supreme Court recognized that many, including women and minorities, experience strip searches as sexual assaults. The majority held:

> Some commentators have gone as far as to describe strip searches as "visual rape" (P.R. Shuldiner, "Visual Rape: A Look at the Dubious Legality of Strip Searches" (1979), 13 *J. Marshall L. Rev.* 273). Women and minorities in particular may have a real fear of strip searches and may experience such a search as equivalent to a sexual assault . . . The psychological effects of strip searches may also be particularly traumatic for individuals who have previously been subject to abuse (*Commission of Inquiry into Certain Events at the Prison for Women in Kingston, The Prison for Women in Kingston* (1996), at pp. 86–89) . . .[41]

To date, there is little precedent on when a strip search will amount to a sexual assault.[42] Clearly, if the person's private areas are touched for a sexual purpose,

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[38]*Ibid.*

[39]With respect to the Ottawa Police Service, see Andrew Duffy, "Troubles mount for police; White calls conduct shocking" *Ottawa Citizen* (27 November 2010).

[40]*Golden*, *supra* at para. 116.

[41]*Ibid.* at para. 90.

[42]One such case is *R. v. Shallow* (July 21, 2009), File No. M221/08 (Ont. S.C.J.) [hereinafter *Shallow*] where an African Canadian Crown Attorney attempted to have the officers who strip-searched him charged with sexual assault. The application to review the JP's

a sexual assault will have occurred.[43] But what about where the conduct consists only of a *visual inspection* and there is no evidence of sexual gratification? In *R. v. Chase*,[44] the Supreme Court held that the essence of a sexual assault is conduct that violates the sexual integrity or dignity of the complainant.[45] Justice McIntyre, for the Court, held that:

> . . . that the test for the recognition of sexual assault does not depend solely on contact with specific areas of the human anatomy. I am also of the view that sexual assault need not involve an attack by a member of one sex upon a member of the other; it could be perpetrated upon one of the same sex. . . .
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> The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one . . . The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant.
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> The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.[46]

In *Chase*, the Court discussed with apparent approval the decision in *R. v. Taylor*,[47] where the Alberta Court of Appeal set aside an acquittal for sexual assault in a case involving discipline. In *Taylor*, the accused handcuffed a teenage girl, in his care, to an overhead metal support and made her stand naked for periods of ten to fifteen minutes. On one occasion, he spanked her buttocks with a wooden paddle. Similarly, in *R. v. V. (K.B.)*,[48] the Supreme Court upheld a conviction for sexual assault where a father grabbed his son's genital area to discipline him for doing the same thing to others. The majority of the Court of Appeal, whose opinion was affirmed by the Supreme Court, held that "the appellant's misguided and primitive disciplinary exercise was an aggressive act

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refusal to issue an information charging sexual assault was dismissed. *Shallow* is discussed *infra*.

[43]See *R. v. Greenhalgh*, 2010 CarswellBC 3072 (S.C.).

[44][1987] 2 S.C.R. 293, 59 C.R. (3d) 193 (S.C.C.) [hereinafter *Chase*].

[45]*Ibid.* at page 302. See also, *R. v. Lutoslawski*, 2010 SCC 49 (S.C.C.).

[46]*Chase*, *supra* at pages 301-302.

[47](1985), 44 C.R. (3d) 263 (Alta. C.A.) [hereinafter *Taylor*].

[48][1993] 2 S.C.R. 857, 22 C.R. (4th) 86 (S.C.C.) [hereinafter *V. (K.B.)*].

of domination which violated the sexual integrity of his son and constituted an assault which can properly be viewed as a sexual assault."[49] Of particular significance is Justice Osbourne's observation that:

> What elevates an assault to a sexual assault will depend on the circumstances of each case. A sexual assault does not require sexuality and, indeed, may not even involve sexuality. It is an act of power, aggression and control.[50]

In *Shallow*, the one case to address the issue of strip searches and sexual assault, the complainant, like Bonds, was initially arrested for public intoxication and then cause disturbance and assault resist arrest. Following his arrest, Shallow, a Black Crown Attorney, was strip-searched at the station by three officers.[51] Justice Nordheimer, in his review of the refusal of the Justice of the Peace to issue a sexual assault private complaint against the officers, held that the manner in which the strip search was conducted did not permit a finding of sexual assault, particularly since there was no evidence of an assault. Even assuming the existence of an assault, he concluded that while the strip search violated Shallow's sexual integrity, the assault was not committed in circumstances of a sexual nature:

> . . . there was no direct touching of the applicant's body by either of the police officers. The strip search took place in a private room within a police station. While the applicant was ordered to manipulate various parts of his body, there is no suggestion that either the commands, or any gestures that may have accompanied them, had any sexual context to them. Lastly, there is nothing on the evidence that would suggest that the intent of either of the officers in conducting the strip search was for their own sexual gratification.[52]

The problem with Justice Nordheimer's reasoning is that it appears to focus on "sexual nature" as "sexuality", something that *V. (K.B.)* does not require. In his analysis, he only refers to the absence of touching, sexualized jokes or comments and the absence of evidence of sexual gratification. What should have been addressed was whether there was evidence of "power, aggression and control" such that one could infer that the purpose of the strip search was to degrade and humiliate Shallow because he was Black, had previously prosecuted police, and had questioned the authority of the officers to arrest, detain and search

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[49](1992), 13 C.R. (4th) 87 (Ont. C.A.) at 91.

[50]*Ibid.* at 91.

[51]The charges against Shallow were withdrawn by the Crown. See Betsy Powell and Peter Small, "Crown accuses police of racism" *Toronto Star* (10 January 2010) [hereinafter *Crown alleges police of racism*].

[52]*Shallow*, *supra* at para. 26.

him.[53] The subjective view of Shallow that he had been sexually assaulted should also have been considered.

Taking into account the "violation of sexual integrity" part of the test from *Chase*, and the "power, control and aggression" part of the test from *V. (K.B.)*, we can identify a number of relevant factors in assessing when, in the absence of evidence of sexual gratification, a strip search involving a *visual inspection* of a person's private areas should be deemed to be a sexual assault. These factors include:

> (i) whether there was lawful authority for the strip search;
>
> (ii) whether physical force was used to restrain the individual which, in the absence of lawful authority, would amount to an assault;
>
> (iii) what parts of the body were touched, for example, during other searches (e.g. frisk or pat-down);
>
> (iv) the degree of departure from the *Golden* minimum standards;
>
> (v) whether the search occurred in a public area, including an area in a police station or cells where other police officers or detainees could see what was going on;
>
> (vi) the presence and number of opposite-sex police officers;
>
> (vii) the level of force used to remove the clothing, including whether force was used to remove the complainant's underwear or bra;
>
> (viii) whether any dangerous objects were used during the strip search;
>
> (ix) the racial or Aboriginal background of the complainant and officers and the degree to which gendered and racialized stereotyping and violence can be inferred from the conduct of the officers;
>
> (x) whether the purpose of the strip search and its aftermath (e.g. how the complainant was treated post-strip search) was to humiliate, demean or degrade the complainant; and
>
> (xi) evidence from the complainant that the assault was experienced as a sexual assault.

In *Bonds*, all of these features were present. The strip search was unlawful. She was physically assaulted before, during and after it. It was conducted in the presence and participation of a number of male officers, three of whom were White.

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[53]In his human rights complaint, Shallow wrote that "[t]he unspoken message to me was: lawyer, Crown, or whatever, you're still just a black guy so know your place, boy"; and "[t]here is no doubt in my mind that it was done to slap this young black man 'back into his place'." See *Crown alleges police of racism*, *supra*.

A hand was stuck down her pants by one of the officers at the search table. A dangerous object was used by a male officer to forcibly cut Bonds' bra while she was being assaulted by other officers who were pinning her to the ground. The officers remained present while the female officer forcibly removed Bonds' bra and inspected her torso and breasts. Bonds was left half-naked for over three hours in her cell. Finally, she revealed publicly that she felt "mentally and verbally raped" by the officers.[54] All of these facts support a conclusion that the officers used the sexual nature of strip searches to humiliate and degrade Bonds, thus violating her sexual integrity. Indeed, the trial judge agreed that the only motive that made sense, as it related to leaving her in the cell, was one of "vengeance and malice."

Abuse of Prosecutorial Power

As noted earlier, Bonds had to wait over two years for her charge to be resolved. During this time, the Ottawa Crown Attorney's office was aware of the videotape and the conduct of the officers, including some of the similar fact evidence of prior police brutality. The decision to prosecute was made and reviewed by a case management team and by a number of senior Crowns in the Ottawa office.[55] The failure to denounce the police conduct and stay the proceedings prior to trial raises serious concerns about whether there was an abuse of prosecutorial power. It is hard to imagine that any reasonable Crown would conclude that there was a reasonable prospect of conviction or that prosecution was in the public interest given Bonds' initial unlawful arrest, her legal right to resist and defend herself from the police violence, the flagrant violations of *Golden*, the putative sexual assault, the deliberate attempt to humiliate her by leaving her in her cell half-naked with soiled pants for over three hours and the similar fact evidence of abuse by two of the officers involved.

Indeed, one is hard pressed to find a reasonable Canadian who is not shocked by the extreme conduct of the officers in a case involving the most minor of provincial offences and one for which the police had no legal right to arrest her, even assuming she was intoxicated. The Ottawa Chief of Police and trial judge have characterized the officers' conduct as "shocking" and an "indignity to a human being" and a "travesty." The conduct of the officers is the subject of an SIU criminal investigation for sexual assault. Criminal charges may be laid. So, how is it that in light of all of these circumstances and viewpoints, only the officers

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[54]Gary Dimmock, "Officers actions revealed in detail" *Ottawa Citizen* (24 November 2010).

[55]Andrew Seymour, "Attorney not at fault in Bonds case: Crown — Decision to prosecute made before case assigned: top lawyer" *Ottawa Citizen* (2 December 2010).

involved and the Ottawa Crown's office thought that the public interest warranted a prosecution?

The absence of any reasonable answer to that question requires us to interrogate whether the Crown Attorney's office would have prosecuted Bonds if she were White or male? In light of what we know about systemic racism in the legal profession and criminal justice system and given that the complainant was White and in a position of power, one cannot discount this possibility. The case also raises the very real danger that in some jurisdictions, like Ottawa, Crown Attorneys have aligned themselves with the police so much so that they are no longer acting as ministers of justice.

In *R. v. Tran*,[56] the Ontario Court of Appeal identified a general concern about Crown alignment with the police. In *Tran*, the Court entered a stay of proceedings in a case involving conspiracy to commit robbery, in part, because of the conduct of the prosecutor. The accused was violently assaulted by officers when he turned himself in. Tran suffered a broken jaw and permanent injury. The officers then attempted to cover up the incident, including by destroying evidence, lying to fellow officers and committing perjury. During the trial, the Crown invited the officers to remain in court to assist and sit with the Crown. Even after the trial judge prohibited the officer from sitting with the Crown, the Crown invited him to continue to be involved with the Crown witnesses. The Court of Appeal issued a stern reprimand, observing that the Crown's conduct reflected an "indifference to, if not approbation of, the police abuse and attempted cover-up" and that the "Crown's conduct was evocative of an alignment with the police, notwithstanding the abuse."[57] The Court also observed that:

> Conduct suggesting that the Crown was condoning egregious police misconduct in violation of its duty of even-handedness would . . . cause a reasonable person informed of the circumstances to question whether Tran could receive a fair trial.[58]

The Court of Appeal stayed the proceedings given the "horrendous police misconduct that breached Tran's sections 7 and 12 *Charter* rights, jeopardized the perception of trial fairness and brought the integrity of law enforcement into disrepute."[59] Unlike in *Bonds*, the charge facing *Tran* involved very serious con-

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[56](2010), 257 C.C.C. (3d) 18, 76 C.R. (6th) 307 (Ont. C.A.) [hereinafter *Tran*].

[57]*Ibid.* at paras. 96–99.

[58]*Ibid.* at para. 99.

[59]*Ibid.* at para. 104.

duct that took place well before the abuse.[60] In *Bonds*, the charge arose as a consequence of the unlawful police conduct.

Bonds thus raises the very real possibility that the prosecution was continued in *the interests of the police rather than the public*. It would appear that the real intent was to secure a favourable result either to shield the officers from subsequent criminal and civil liability or to ensure that the officers could continue, with the blessing of the Crown and maybe the trial judge, to engage in similar conduct in the future.[61] This raises the question of whether disciplinary action should be taken for all of the Crowns involved in the decision to proceed. According to media reports, the Attorney General conducted a quick review of the case and concluded that there was a reasonable prospect of conviction.[62] It would, therefore, appear that no internal discipline will ensue.

While the Attorney General of each province has a responsibility to ensure ethical conduct through its rules and ultimately discipline, the provincial Law Societies are also responsible for regulating the conduct of all lawyers, including government lawyers. In 2002, the Supreme Court of Canada in *Krieger v. Law Society (Alberta)*[63] clarified when a Law Society can discipline a prosecutor. It drew the line at professional conduct, leaving questions of prosecutorial discretion to the jurisdiction of the Attorney General. However, the Court was clear that even on decisions that normally fall under the umbrella of discretion (e.g. whether to charge or stay proceedings), a Law Society has jurisdiction to discipline where those decisions are made in bad faith or for an improper purpose.[64]

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[60]The charge arose out of a series of violent home invasions. Child abuse, attempt to cut off a finger, and sexual assault occurred during the invasions.

[61]If this is the case, it would satisfy the malice requirement for the tort of malicious prosecution. The test for malicious prosecution is a high one. It will only be satisfied where the prosecution was fuelled "by an improper purpose or motive, a motive that involves an abuse or perversion of the system of justice for ends that it was not designed to serve." See *Nelles v. Ontario*, [1989] 2 S.C.R. 170, 71 C.R. (3d) 358 (S.C.C.) at 199. Moreover, as the Supreme Court held in *Kvello v. Miazga*, *(*sub nom. *Miazga v. Kvello Estate)* [2009] 3 S.C.R. 339 (S.C.C.) at para. 7, "it is only when a prosecutor *steps out of his or her role* as a "minister of justice" that immunity is no longer justified."

[62]See Randall Denley, "In this system, it seems everyone's blind to injustice" *Ottawa Citizen* (28 November 2010).

[63][2002] 3 S.C.R. 372, 4 C.R. (6th) 255 (S.C.C.).

[64]*Ibid.* at paras. 51-52. As Justices Iacobucci and Major held:

> Review by the Law Society for bad faith or improper purpose by a prosecutor does not constitute a review of the exercise of prosecutorial discretion *per se*, since an official action which is undertaken in bad faith or for improper motives is not within the scope of the powers of the Attorney General. . . . We agree with the observation of MacKenzie J. that "conduct amounting to

There are a number of advantages to having a Law Society, as opposed to the Attorney General, conduct a review of the conduct of a Crown Attorney. There may be professional standards used by the Attorney General that are, in fact, lower than those required by a Law Society. For example, the Law Society of Upper Canada may take a different view of the Bonds prosecution. They may conclude after a full investigation that there is a systemic problem of Crown "alignment" with the police and that the failure to terminate the Bonds prosecution was motivated by this "alignment" or for other improper purposes such as a desire to protect the police officers from possible civil or criminal liability or even discrimination. It is unlikely that an internal evaluation would make such findings. Finally, the public has a right to know whether and how Crown prosecutors are disciplined. This public process would likely only occur through Law Society discipline. If nothing else, thinking about the role of the Law Society in this context will ensure that there is a healthy debate over these issues and it might lead the Ministry of the Attorney General to take steps to ensure a more transparent and accountable process.

Conclusion

The issue of gendered violence against racialized or Aboriginal women by police and state officials is an under-studied and litigated area in Canada. As has been observed in the American experience:

> . . . the few incidents of police violence against women of color which have commanded national attention continue to be viewed as isolated, anomalous deviations from the police brutality "norm." Perhaps the overwhelming silences are yet another manifestation of the ongoing sublimation of women of color's experiences to those of men in struggles for racial justice. Perhaps police violence against women of color is experienced as merely one strand in a seamless web of daily gendered/racialized assaults by both state and private actors, unworthy of the focused attention commanded by police brutality against men of color perceived as a "direct" form of state violence.[65]

And even when lawyers have attempted to raise the issue, there have been attempts to silence them. Rocky Jones and Anne Derrick were successfully sued at

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> bad faith or dishonesty is beyond the pale of prosecutorial discretion" (para. 55). . . . A finding that the Law Society does not have the jurisdiction to review or sanction conduct which arises out of the exercise of prosecutorial discretion would mean that prosecutors who act in bad faith or dishonestly could not be disciplined for such conduct. A prosecutor who laid charges as a result of bribery or racism or revenge could be discharged from his or her office but, in spite of such malfeasance, would be immune to review of that conduct by the Law Society.

[65]See *Violence against Women of Color*, *supra* at 141.

trial for defamation by a police officer. The jury awarded the officer $240,000. The trial judge ordered Jones and Derrick to pay $75,000 in legal costs. The officer had strip-searched three young Black girls in an inner-city high school. The search took place in a room with a window in the door. The offence being investigated was theft of ten dollars. Jones and Derrick suggested in their complaints to the Chief of Police and in a press conference that race and class likely played a causal role in the decision to strip-search the girls. The verdicts were set aside on appeal but only by a narrow 2-1 margin.[66] The majority recognized that lawyers have a duty to speak out against injustice and were protected by qualified privilege, a recognized defence to defamation.[67]

Perhaps one of the legacies of *Bonds* will be a greater recognition and understanding of gendered and racialized violence in policing and attempts by academics and lawyers to develop legal strategies to address the problem.

[66]See *Campbell v. Jones* (2002), 220 D.L.R. (4th) 201 (N.S. C.A.).

[67]Interestingly, there was no discussion of why the statements were defamatory or why truth did not afford the lawyers a defence.