

# No Warrant Necessary? Penile Swabs in Sexual Assault Cases

*R v Saeed* applies the existing police 'search incident to arrest' powers to a new form of search: a penile swab. The case is a good example of how the courts assess the constitutionality of police searches when heightened privacy interests are at stake.

## Facts

Ali Hassan Saeed was arrested for sexual assault after he was accused of forcing intercourse on a young woman at a house party. Upon his arrest, and without a search warrant, the police sought to examine his penis for the DNA of the complainant to use as evidence of the intercourse. This consisted of running a cotton swab along the length of the outside of his penis. The police left Mr. Saeed restrained for a period so that he could not wash himself while they interviewed witnesses. They then allowed Mr. Saeed to conduct the swab himself, under supervision.[\[1\]](#)

## Relevant Law

Police searched Mr. Saeed using their 'search incident to arrest' legal power, which allows police to conduct searches without warrants directly after making an arrest. Police may use this power when they have lawfully arrested a suspect, when the search is truly 'incidental' or related to the crime for which the accused was arrested, and when the search is conducted reasonably.[\[2\]](#)

All police searches, with or without a warrant, must conform to section 8 of the *Canadian Charter of Rights and Freedoms*,[\[3\]](#) which protects against unreasonable search and seizure. Police searches must be authorized by law, that law must be reasonable, and the search must be reasonably conducted.[\[4\]](#)

## Issues

The issue in this case was whether the penile swab violated Mr. Saeed's constitutional right to be secure from unreasonable search and seizure. If the 'search incident to arrest' power of the police did not allow this type of search, or if this type of search was an unreasonable exercise of that power, or the way this particular search was carried out was unreasonable, then the Court could refuse to admit the DNA evidence.

## Decision and Section 8 Charter Analysis

The majority of the Court held that the 'search incident to arrest' power authorized this type of search, that it was a reasonable exercise of the power, and that this specific search was conducted reasonably.

*Authorized by Law*

Firstly, the Court concluded that the police had the authority under the 'search incident to arrest' power to conduct penile swabs as a search without having to obtain a warrant. This was because DNA evidence could be destroyed if the police did not act quickly, and so the search was 'incidental' to the arrest.<sup>[5]</sup> The search was also conducted in a manner that was minimally invasive to Mr. Saeed, took little time, and was reasonably conducted.<sup>[6]</sup>

### *The Law Authorizing the Search is Reasonable*

The court then considered whether conducting penile swabs using 'search incident to arrest' breached section 8 of the *Charter*. It acknowledged that people have a heightened expectation of privacy when it comes to their own bodily information,<sup>[7]</sup> which must influence a decision on the reasonableness of a 'search incident to arrest' legal power.

In a previous case, *R v Stillman*, the Supreme Court had held that the 'search incident to arrest' power authorizing police to seize bodily samples of an accused, such as hair or dental impressions, was unreasonable, and that police would need a warrant for that form of search.<sup>[8]</sup>

In Mr. Saeed's case however the officers were not seizing the accused's bodily information.<sup>[9]</sup> Rather, they were searching for the *complainant's* bodily information, in the form of traces of the complainant's DNA on Mr. Saeed's penis. Thus the Court concluded that a person who is arrested has no heightened expectation of privacy when the police search for the DNA of another person on his body and therefore that this type of search was a reasonable exercise of the 'search incident to arrest' legal power.

### *The Search was Conducted Reasonably*

The court went on to outline a list of factors to guide police in conducting penile swabs, to ensure that they will do so in a reasonable way that complies with the *Charter*. For example, police should administer the swab in private at a police station, they should allow the accused the opportunity to carry it out himself, and the accused should remain as clothed as possible.<sup>[10]</sup> The court also found that the police had conducted a reasonable search of Mr. Saeed in the present case, as they had acted within these guidelines.

## **Dissenting Opinions**

Two of the Supreme Court Justices disagreed with the Court's decision that the search in this case was lawful. Justice Abella would have held that the search was an unjustifiable and unreasonable intrusion on Mr. Saeed's bodily integrity and privacy, and would therefore have excluded the DNA evidence from consideration by the Court.<sup>[11]</sup> She considered this search to be analogous to the collection of bodily samples in the *Stillman* case and reasoned that "a genital swab does not just require the individual to expose his or her genitals to state scrutiny, it asks that individual to violate his own bodily integrity by collecting potentially self-incriminatory evidence from that most private of areas." From her perspective, the impact on Mr. Saeed's privacy interests was "as profound as one could imagine."<sup>[12]</sup>

Justice Karakatsis agreed with Justice Abella generally. However, unlike Justice Abella,

she would still have admitted the DNA evidence. Section 24(2) of the *Charter* allows evidence obtained in violation of *Charter* rights to be excluded from a trial when its “admission...would bring the administration of justice into disrepute.”<sup>[13]</sup> Since the police did not yet know whether penile swabs were constitutional and had performed the search in good faith, and since the evidence was essential to the prosecution’s case, Justice Karakatsanis felt that admitting the evidence would not harm the reputation of the justice system.

## **Conclusion**

Section 8 of the *Charter* serves as a protection against unreasonable police searches. As scientific capacity increases and new forms of searches appear, the courts must determine whether these searches are reasonable, or whether they are an unacceptable breach of an accused’s privacy. As the search in this case was for DNA evidence of the complainant, not the accused, the Court held that the penile swab was a reasonable form of search. This case therefore will not condone a swab-search for an accused’s own DNA. Furthermore, this case may not apply to female genital swabs, as those might be considered more invasive.

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<sup>[1]</sup> *R v Saeed*, 2016 SCC 24 paras 8-29 .

<sup>[2]</sup> *Ibid* at 37.

<sup>[3]</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 .

<sup>[4]</sup> *Saeed*, *supra* note 1 at 36.

<sup>[5]</sup> *Saeed*, *supra* note 1 at 50.

<sup>[6]</sup> *Ibid* at 49.

<sup>[7]</sup> *Saeed*, *supra* note 1 at 38.

<sup>[8]</sup> *R v Stillman*, [1997] 1 SCR 607 paras 42-46.

<sup>[9]</sup> *Saeed*, *supra* note 1 at 45.

<sup>[10]</sup> *Ibid* at 78.

<sup>[11]</sup> *Ibid* at 94.

<sup>[12]</sup> *Ibid* at 152.

<sup>[13]</sup> *Charter*, *supra* note 3, s24(2).