

CANADA / JUDGMENT

R. v. Basran

2022 BCSC 1010

COURT

Supreme Court of British Columbia

DECIDED

15 June 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 1010 R. v. Basran

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Basran,

2022 BCSC 1010

Date: 20220615

Docket: X083239

Registry: New Westminster

Regina

v.

Jasman Singh Basran

Restriction on publication: A publication ban has been imposed under s. 486.5 of the Criminal Code restricting publication, broadcasting or transmission in any way information that could identify the witness referred to as A.B. This publication ban applies indefinitely unless otherwise ordered.

Before: The Honourable Madam Justice Devlin

Reasons for Judgment - Application to Exclude Evidence Pursuant to s. 24(2) of the Charter

Counsel for Crown:

R. Khangura

S. Wan

Counsel for the Accused Basran:

A.J. Robinson

Place and Dates of Hearing:

New Westminster, B.C.

May 30, 31, 2022

Place and Date of Ruling given to Parties with Reasons to Follow:

New Westminster, B.C.

June 10, 2022

Place and Date of Judgment:

New Westminster, B.C.

June 15, 2022

Introduction

- [1] The accused, Jasman Singh Basran, is charged on Indictment 83239-1 with accessory after the fact to murder between November 11 and 12, 2019, contrary to s. 240 of the Criminal Code, R.S.C., 1985, c. C-46 [Code]. The co-accused, Mr. Hayer, Mr. Hothi, and Mr. Bottomley, are charged with the first-degree murder of Andrew Baldwin on or about November 11, 2019 in Surrey, B.C.
- [2] In an earlier application, Mr. Basran challenged the facial validity and manner of execution of a search warrant with respect to a search for "electronic notes" on his phone. The search located two newspaper articles in PDF format related to the murder of Mr. Baldwin. In a ruling indexed as R. v. Basran, 2022 BCSC 337, I found there were insufficient grounds articulated in the ITO to authorize a search of the "electronic notes" folder. I also found that the manner of execution of the warrant as it pertained to electronic notes was in breach of Mr. Basran's rights pursuant to s. 8 of the Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11 [Charter]. On this application, Mr. Basran has applied under s. 24(2) of the Charter to exclude the two newspaper articles located in the documents folder of the Cellebrite extraction report of his cellphone data.
- [3] Mr. Basran takes the position that the police showed a pattern of indifference to his right to privacy, that they negligently and flagrantly breached his reasonable expectation of privacy, and that their actions demonstrated a clear disregard for his privacy rights. Further, he says these breaches - both individually and cumulatively - are serious, and to admit this evidence would bring the administration of justice into disrepute.
- [4] The Crown opposes Mr. Basran's application to exclude the evidence.

- [5] On June 10, 2022, I advised counsel of my decision with reasons to follow. These are those reasons.

Evidence on the Voir Dire

- [6] In response to Mr. Basran's application to exclude evidence, the Crown called the affiant, Cpl. Hong, and a civilian Criminal Intelligence Analyst, Ms. Sutherland.
- [7] Cpl. Hong has been a member of the RCMP since April 2014. In October 2018, he joined the RCMP Integrated Homicide Investigative Team ("IHIT"). He became involved in the Baldwin murder investigation on November 12, 2019. Cpl. Hong described the investigation as fast-paced and dynamic, with information coming in on an ongoing basis. As the designated affiant, it was necessary for him to be aware of all developments in the investigation to ensure any Information to Obtain ("ITO") sworn by him was updated and accurate. Cpl. Hong was the affiant of a 76-page ITO sworn on November 23, 2019 in support of an application for various judicial authorizations including a search warrant for Mr. Basran's iPhone.
- [8] Cpl. Hong acknowledged that he failed to include a justification within the ITO for the electronic notes. He explained that he considered electronic notes and calendar entries contain similar types of information and therefore he listed them together at para. 15(a)(iv) of the ITO as "[a]ll electronic notes and calendar entries". He explained that he believed electronic notes would contain information about the device user's activities, such as meetings, life events, appointments, etc. While he viewed electronic notes as different from calendar entries, he believed the justification for seeking these items was the same. Although at para. 100(i) of the ITO, Cpl. Hong provided a justification for seeking calendar entries, he neglected to include a similar justification for electronic notes. Cpl. Hong acknowledged that this was an oversight and that he should have written a justification for electronic notes. Cpl. Hong explained that he did not specify documents in the justification section, however, he believed para. 100(m), which referenced "any data that can be used to identify the owner of the device ", would extend to documents or PDFs.
- [9] As set out in my earlier ruling at para. 14, Ms. Sutherland described how she reviewed the contents of the Cellebrite extraction report for Mr. Basran's iPhone. She was not engaged in setting the parameters of things to be searched from the Cellebrite extraction report. When Ms. Sutherland opened the documents folder, she located 63 files. She filtered the documents by date to search for those relevant to the murder. As a result, she found two documents dated November 12, 2019, which she knew to be one day after the murder. These two documents were news articles about the Baldwin murder. Ms. Sutherland did not know where the documents had been located on the iPhone before they were extracted.
- [10] Ms. Sutherland testified that she received a disc that contained the Cellebrite extraction report as well as another folder containing various documents, including a report from the Digital Mobile Field Technician ("DMFT") prepared by Cpl. Ryder and a 3-page Exhibits

Results report which included Cpl. Ryder's examination notes. While she did not recall specifically reviewing these documents, she would normally consult the documents if there was something unfamiliar in the type of Cellebrite report she received. Ms. Sutherland explained that she understood the DMFT would produce the Cellebrite extraction report in accordance with the parameters of the search warrant. As an analyst, her role is to analyze the data provided to her by the investigators.

- [11] Ms. Sutherland explained that she located 63 file icons within the documents folder on the Cellebrite extraction report, four of which were empty. Most files were in PDF format. As she testified earlier in these proceedings, using an Excel spreadsheet format, she began a search for what she perceived to be relevant documents within the Cellebrite report. She selected the documents tab, which produced a list of 63 files. She began a search for relevant documents, filtering by date. She noticed two documents dated November 12, 2019 (the day after the murder), which she thought would be of interest to the investigators. The file names did not indicate the files' contents, so she had to open them to determine their contents. While she could not recall, she agreed it was possible that she looked at all the documents within the documents tab. Ms. Sutherland was not provided any instructions as to how to conduct her analysis. If she had been instructed to look for electronic notes, she would have advised the investigators that without opening each document, she could not determine whether the items in the document folder were electronic notes.

The Legal Principles - Section 24(2) Analysis

- [12] Section 24(2) of the Charter provides:

Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

- [13] Both Crown and defence counsel agree on the general legal principles governing the exclusion of evidence. There are two stages in an analysis under s. 24(2): First, there is a threshold analysis, wherein the court must determine whether there is a nexus between the breach of the Charter right and the evidence obtained through the breach that is sought to be excluded. Second, an inquiry proceeds pursuant to the three-prong framework established in *R. v. Grant*, 2009 SCC 32 [Grant]. I can easily dispose of the threshold analysis: It is clear that the impugned evidence was obtained in connection to the Charter violations.
- [14] Therefore, the focus of my analysis will be on the application of the Grant framework to determine whether evidence obtained in breach of the Charter must be excluded under s. 24(2). Although I have reviewed and considered the many authorities referred to by counsel, I include below only the cases that were key to my analysis.

The Grant Analysis

- [15] In *Grant*, the Supreme Court of Canada articulated three lines of inquiry for determining whether evidence obtained in a Charter-infringing manner should be excluded under s. 24(2) of the Charter. The factors to consider and weigh are (at para. 71):
- (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct);
 - (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little); and
 - (3) society's interest in the adjudication of the case on its merits.
- [16] These factors do not operate as a disjunctive three-part test. There are no particular findings under the three lines of inquiry that mandate particular results, and it "is not simply a question of whether the majority of the relevant factors favour exclusion in a particular case": *R. v. Harrison*, 2009 SCC 34 [Harrison] at para. 36. The balancing mandated by s. 24(2) is "qualitative in nature and therefore not capable of mathematical precision": *Grant* at para. 140. Rather, courts must assess and balance considerations under all three factors to determine whether, on balance and having regard to all the circumstances, admitting the impugned evidence would bring the administration of justice into disrepute in the long-term, as assessed from the objective perspective of a reasonable person, informed of all the circumstances and the values underlying the Charter: *Grant* at paras. 68, 85-86; see also *R. v. Reilly*, 2020 BCCA 369 at para. 149 (aff'd: 2021 SCC 38) [Reilly (SCC)].
- [17] The *Grant* factors look to the public's overall, long-term faith in the justice system: *Grant* at para. 68; *Harrison* at para. 36. The focus of s. 24(2) is also prospective - it starts from the proposition that damage has already been done to the public's confidence in the administration of justice by the Charter violation or violations that gave rise to the s. 24(2) analysis: *Grant*, para. 69. The *Grant* analysis concerns itself with whether admitting the impugned evidence will do further damage to the reputation of the justice system: *Grant* at para. 69. Finally, s. 24(2) has a societal focus, and is aimed not at punishing the police or compensating the accused, but rather at systemic concerns, focusing on the broad impact of the admission of the evidence on the long-term reputation of the justice system: *Grant* at para. 70.
- [18] Having set out the analytical framework established in *Grant*, I turn to an application of the three avenues of inquiry that it set out.
- (i) Seriousness of Charter-infringing state conduct
- [19] This first factor requires the court to consider the gravity of the state's offending conduct and whether the court should dissociate itself from that conduct by excluding the evidence: *Grant* at paras. 72-73.

- [20] In considering this, the court must examine both the qualitative seriousness of the state conduct as well as the level of knowledge on the part of the offending state actors. At one end of the spectrum are those breaches that are "inadvertent or minor" and at the other end of the spectrum are those that involve wilful or reckless disregard of Charter rights and that can be characterized as "abusive", "deliberate", or "egregious": Grant at paras. 74, 133. However, the outcomes under this leg of the analysis are not binary: As noted in *R. v. Le*, 2019 SCC 34 at para. 147, an absence of bad faith on the part of the police does not equate with good faith. Neither is the inverse true.
- [21] Although wilful or flagrant violations are undoubtedly more serious than unintentional ones, the public's confidence in the rule of law may also be undermined by negligent, wilfully blind, or careless violations that demonstrate insufficient regard for Charter rights: Grant at paras. 74-75. The more severe or deliberate the state misconduct, the greater the need for the court to dissociate itself from that conduct: Grant at para. 72. As noted in *Reilly* (SCC), the court must consider all Charter-infringing conduct at this stage.
- [22] Mr. Basran submits the state infringing conduct was serious because (a) the search was conducted in the absence of reasonable and probable grounds, (b) the manner of the search exceeded the scope authorized by the warrant, and (c) the state infringed his s. 8 Charter rights in more than one way.
- [23] The defence cites the case of *R. v. Greffe*, [1990] 1 S.C.R. 755, 1990 CanLII 143 (SCC) [Greffe] for the proposition that "a lack of reasonable and probable grounds is an indicator of a serious Charter infringement". They argue the fact that the ITO did not support an inference of reasonable and probable grounds to search for electronic notes or documents, or to search the document folder, is a serious breach. They submit this failure demonstrates an absence of good faith. I do not agree. Unlike Greffe, this was not a case where there was no evidence that the police had turned their mind to the issue of reasonable and probable grounds. In addition, since Grant, evidence from both unlawful warrantless searches and searches that breached s. 8 for the absence of reasonable grounds have still been admitted under s. 24(2) (see e.g., *R. v. Jones*, 2011 ONCA 632). Cpl. Hong testified that his failure to set out the grounds to support his request to search for electronic notes was an oversight. I accept his evidence. In my view, this is supported by the fact that para. 15 of the ITO includes a reference to electronic notes together with calendar entries, and this is included on the warrant itself. While the choice of terminology was less than precise, Cpl. Hong's poor drafting was not intended to mislead. In my view, Cpl. Hong's failure to include specific grounds to support a search for electronic notes was inadvertent.
- [24] The defence also relies on *R. v. Shevaley*, 2021 BCSC 295 [Shevaley] to support his position. I find the facts before me are easily distinguishable from those in Shevaley. In Shevaley, the court concluded that a breach was of at least moderate seriousness even though the police had acted pursuant to a facially valid warrant. The ITO in Shevaley sought, among other things, to search the internet web browser history and search history on the applicant's phone. The applicant challenged the facial validity of the warrant as it related to the internet

data searches, but he did not challenge the rest of the warrant or the other information retrieved. The court concluded that the grounds in the ITO were insufficient to support the searches conducted in relation to the internet data. In particular, the warrant was unacceptably unlimited in scope and the grounds were speculative, effectively authorizing a fishing expedition. Although the applicant in that case did not seek this outcome, the court noted in passing that there was arguably a basis to find the entire warrant invalid.

- [25] The applicant in Shevaley was successful in excluding the internet data search results pursuant to s. 24(2) of the Charter. With respect to the seriousness of the Charter-infringing conduct, the court noted "it is relevant that the police conducted their search under the authority of a facially valid warrant", which attenuated the seriousness of the breach (para. 83). However, it was also relevant that "the ITO did not provide grounds to justify the issuance of the warrant, a warrant that permitted a 'fishing expedition' into the applicant's internet data history" (para. 83). Although there was no bad faith on the part of the police, the state conduct was "fairly characterized as of at least moderate seriousness" (para. 84).
- [26] Here, I find as a fact that Cpl. Hong's failure to articulate the grounds to search for electronic notes was inadvertent and of minimal seriousness. As Rosenberg J.A. emphasized in *R. v. Rocha*, 2012 ONCA 707 at para. 28, "[a]pplying for and obtaining a search warrant from an independent judicial officer is the antithesis of wilful disregard of Charter rights". It is clear that the police were trying to respect Mr. Basran's rights and to not exceed the scope of the warrant, although their efforts failed: see e.g., *R. v. Mootoo*, 2022 ONSC 367 [Mootoo] at para. 111.
- [27] Mr. Basran also argues that the failure of the police to ensure the execution of the search warrant fell within the scope of the warrant constituted a serious breach of his s. 8 Charter rights. He submits the fact that Ms. Sutherland was not provided with any instructions regarding how to conduct her analysis demonstrates there is a serious flaw in the process; therefore, he says, the state conduct was serious.
- [28] It is important to consider the factors that led to Ms. Sutherland's examination of the document folder on the Cellebrite extraction report. As set out in my earlier ruling at para. 51, I found as follows:

In the case before me, the warrant authorized the police to search Mr. Basran's Phone for, among other things, electronic notes. It did not restrict where on the Phone the police were permitted to look for these things. The evidence of Cpl. Jones and Cpl. Ryder establish that notes are a subcategory of documents; therefore, I find it was reasonable for Cpl. Ryder to select the documents folder to determine if it contained electronic notes. In doing so, I find that Cpl. Ryder was mindful of the scope of the warrant and tailored his selection of files to adhere to this scope. Indeed, I find he took reasonable steps to ensure that he did not go beyond the permissible scope of the warrant when selecting data from the Cellebrite extraction report.

- [29] Ms. Sutherland conducted her analysis based on the assumption that the Cellebrite extraction report was created in accordance with the provisions of the warrant. In my view, it was reasonable for Ms. Sutherland to rely on the investigators to comply with the terms of the warrant. Although Cpl. Ryder believed that electronic notes were a category of documents, he never communicated that fact to the investigative team. As a result, Ms. Sutherland was unaware that the scope of the warrant only permitted her to review electronic notes. However, Ms. Sutherland explained that even if appropriate guidance had been provided to her regarding the scope, she would not have been able to determine the contents of the document in question without viewing it.
- [30] When I consider all of these circumstances, I find that this breach was the result of an oversight, rather than deliberate disregard of the accused's Charter rights: Ms. Sutherland did not set out to breach the accused's Charter rights, nor was she wilfully blind, reckless, or even negligent as to his rights. Rather, she reasonably - but erroneously - relied on her colleague's professional judgment, but Cpl. Ryder had failed to advise her to curtail the scope of her search. The result was in the nature of a technical breach, as even if she had been provided with proper guidance, she would have reviewed the document in any event.
- [31] Contrary to the accused's submissions, I find there was no pattern of disregard for Charter rights in this case, nor any bad faith on the part of the police or Ms. Sutherland. Rather, the police were under the impression (albeit falsely) that they were acting in accordance with the law. They attempted to respect the accused's Charter rights by following the proper process; that they made inadvertent errors when executing this process does not transform the essential character of their conduct. Having considered all of the circumstances on this factor, I find it militates in favour of admitting the evidence.

(ii) Impact of the breach on Mr. Basran's Charter-protected interests

- [32] The second line of inquiry focuses on the seriousness of the state's Charter-infringing conduct from the accused's perspective. Under this analysis, the court must examine the interests engaged by the infringed right and the degree to which the Charter infringement impacts or intrudes upon those interests: Grant at para. 77. A search that intrudes on an area in which the individual reasonably enjoys a high expectation of privacy, or that demeans their dignity, is more serious than one that does not: Grant at para. 78. The more serious the impact on the accused's protected interests, the greater the risk that the admission of the evidence may signal to the public that Charter rights count for very little, bringing the administration of justice into disrepute: Grant at para. 76.
- [33] With respect to the impact of the breaches, Mr. Basran emphasizes the highly personal nature of the documents reviewed by Ms. Sutherland, which included financial and medical documents. Mr. Basran argues the impact of the state intrusion into his private documents on his phone is similar to the search of Mr. Shevaley's internet data history as they both involved an "untrammelled intrusion into a zone of personal privacy that is entitled to robust protection" (Shevaley, para. 85).

- [34] The Crown concedes that searches of cell phones are serious in terms of their privacy impacts, but they emphasize that the impact is attenuated in this case. In particular, unlike Shevaley, here there was a defined time-frame for the search (September 22 to November 22, 2019). This was not a situation like Shevaley where the police embarked on a fishing expedition resulting in a "untrammelled intrusion". Furthermore, the warrant in Shevaley had "no limits whatsoever" and permitted a search of "the entire contents of the applicant's cell phone without any restriction" (para. 44); while the warrant in this case had some isolated deficiencies, the circumstances are readily distinguishable from the limitless warrant and search in Shevaley.
- [35] While I agree that the seriousness of the impact on Mr. Basran's privacy interests is attenuated based on the more confined nature of the search, this factor remains moderately in favour of exclusion.
- (iii) Society's interest in an adjudication of the case on its merits
- [36] This factor requires the court to consider "whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion": Grant at para. 79. This involves assessing the reliability of the evidence and its importance to the Crown's case, as well as the seriousness of the offence charged: Grant at paras. 81-84. The exclusion of reliable and relevant evidence may render the trial unfair from the public's perspective, thus bringing the administration of justice into disrepute: Grant at para. 81. The analysis is prospective and must take into account the long-term effect of the ruling on the repute of the justice system: Grant at paras. 68, 84.
- [37] However, a court analyzing this factor must be careful not to allow the seriousness of the offence and the reliability of the evidence to overwhelm the s. 24(2) analysis, because doing so would result in lesser Charter protection to those charged with more serious crimes: Harrison at paras. 34, 40. While the public has a heightened interest in seeing a case adjudicated on its merits where the offence charged is serious, the public "also has a vital interest in having a justice system that is above reproach, particularly where the penal stakes for the accused are high": Grant at para. 84. Sometimes, the importance of maintaining Charter standards outweighs the "price paid by society for an acquittal": Harrison at para. 42. Society has an interest in ensuring state actors consistently respect Charter rights, regardless of the context.
- [38] Mr. Basran submits that the admission of the two newspaper articles obtained through a series of violations of his reasonable expectation of privacy would send a message that individual rights count for little (Grant, para. 71; R. v. Morelli, 2010 SCC 8 at paras. 98, 109-111). In addition, it would send a message to the police that they are entitled to conduct searches without adhering to judicially-imposed limitations. Further, it would encourage the police to continue to submit poorly drafted applications containing ambiguous terms and lack of grounds. He argues that due to the cumulative effect of the breaches, this Court should conclude that the police action merits exclusion of the evidence: see R. v. Lauriente,

2010 BCCA 72 at paras. 27-34. Mr. Basran says that the police conduct in this case amounted to a pattern of indifference to his right to privacy, and that the cumulative effect of the breaches weighs heavily in favour of exclusion.

- [39] While the police actions in this case did result in several breaches of the accused's Charter-protected right to privacy, there is nothing about the police conduct, viewed individually or cumulatively, that would support a finding that their actions constituted a wilful, flagrant, or reckless disregard for the Charter. The police made mistakes, but they were not indifferent as to the accused's rights. Indeed, as I have discussed, I found the s. 8 Charter infringements fall at the very low or moderate end of the spectrum when viewed individually and collectively.
- [40] As I have noted, two considerations under this branch of the Grant analysis are the reliability of the evidence and the importance of the evidence to the Crown's case: Grant at paras. 81, 83; Harrison at para. 33. The evidence is both highly reliable and important to the Crown's case: The Crown submits this evidence is some evidence that the accused had knowledge of the murder, and its exclusion would have a significant impact on the viability of the prosecution. The accused is charged with being an accessory to murder, which is objectively a serious offence. While the police actions in this case did impact the accused's constitutionally guaranteed privacy interests, I found the intrusion was at the low end.
- [41] I conclude that in this case, society's interest in the adjudication of the case on its merits weighs strongly in favour of admitting the impugned evidence. There is a significant societal interest in having a trial adjudicated on its merits, and I find that the truth-seeking function of the trial would be better served by the admission of the evidence than by its exclusion: see Grant at para. 79.

Overall Balancing

- [42] In assessing and balancing the three avenues of inquiry as required in Grant, and considering the nature of the impugned evidence, I have concluded that the overall reputé of the justice system, viewed in the long term, will not be adversely affected by the admission of the evidence; rather, to exclude the evidence would bring the administration of justice into disrepute.

Conclusion

- [43] Accordingly, the accused's application to exclude the evidence pursuant to s. 24(2) of the Charter is dismissed.

"Devlin J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/10/2022BCSC1010.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-basran-2022-bcsc-1010>

Prepared on 25 October 2026 · Esheria