

CANADA / JUDGMENT

R. v. Bhatti

2025 ONCA 697

COURT

Court of Appeal for Ontario

DECIDED

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R. v. Bhatti

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COA-24-CR-0474

Judges

Miller, Bradley; Wilson, Darla A.; Pomerance, Renee M.

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Bhatti, 2025 ONCA 697

DATE: 20251016

DOCKET: COA-24-CR-0474

Miller, Wilson and Pomerance JJ.A.

BETWEEN

His Majesty the King

Appellant

and

Ali Bhatti

Respondent

Owen Goddard, for the appellant

Jeffery Couse, for the respondent

Heard: April 25, 2025

On appeal from the acquittals entered on April 11, 2024 by Justice Spencer Nicholson of the Superior Court of Justice.

B.W. Miller J.A.:

- [1] The respondent's fiancée was shot and killed by masked assailants. As soon as she had pulled into the driveway of the home she shared with the respondent, the two men fired more than 20 rounds into the vehicle she was driving. It was a targeted killing, but the police suspected that the respondent – who they believed to be a high-level drug dealer – was the intended target.
- [2] A confidential informant told police that the respondent knew who was behind his fiancée's murder and was planning to take matters into his own hands. The police believed that the respondent would have relevant information on his cell phone. They obtained a general warrant to detain him to search for his phone. The warrant permitted police to seize and search one device: a phone associated with a specific phone number. The search for the phone authorized by the warrant was limited to the person of the respondent and his "immediate" and "surrounding" area. The warrant also authorized police to seize other devices, but "only to determine which device is associated to [the phone number]".
- [3] The respondent himself was, of course, a witness to the murder and not a subject of the criminal investigation. He was, however, known to the police, had outstanding drug trafficking charges, and had a criminal record for firearms offences (including a conviction for possession of a firearm in a motor vehicle) and drug trafficking. This context had some bearing on how the police proceeded.

The terms of the general warrant

- [4] The warrant provided that the police were authorized to "detain the person in possession of the cellular device associated to the phone number XXX-XXX-XXXX for the purpose of searching their person and immediate area for this cellular device." [1]
- [5] The warrant included several terms and conditions as to how it was to be conducted:

THIS WARRANT IS SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS to ensure that the activity authorized by this Warrant is reasonable in the circumstances:

- For the purpose of this warrant, "the device" is the one associated to the number XXX-XXX-XXXX;
- Peace Officers will detain Ali Bhatti and tell him that he is being detained under the authority of a General Warrant, pursuant to Section 487.01 of the Criminal Code;
- Peace Officers will use the minimal amount of force necessary to detain Ali Bhatti for the purpose of this warrant;
- The search and detention of Ali Bhatti will not interfere with his bodily integrity
- Peace Officers will advise Ali Bhatti of his rights to counsel and provide him with his caution;
- Peace officers will search Ali Bhatti and his surrounding area, for his cellular device (if Ali is in possession of multiple cellular devices, these will be seized only to determine which device is associated to the phone number XXX-XXX-XXXX any further analysis of any device, other than the one which is the target of this warrant, will not be analyzed further without separate judicial authorization);
- Once the cellular device has been seized, Ali Bhatti will be released from this detention, unless he is subject to arrest or further detention unrelated to this General Warrant;
- The warrant will only be executed once; and;
- The detention of the seized devices will be determined pursuant to Section 489 and 490 of the Criminal Code.

The execution of the warrant

- [6] The plan for the execution of the warrant was to stop the respondent, seize whatever phones were present, and then take them back to the police station where forensic analysis would determine which phone was associated with the phone number. That phone would then be searched for evidence.
- [7] The police set up surveillance on the respondent's house and decided, for safety reasons, to carry out the stop while the respondent was driving. Officers pulled him over in his rented Dodge Durango. The respondent complied when directed to step out of the car and told there was a warrant to search him and his vehicle. The respondent offered to go back into the car and retrieve the phone himself, which the police refused. When the respondent would not put his hands up to facilitate a pat down search for weapons, he was handcuffed.

- [8] Officer Weber opened the driver side door and saw three cell phones and a plastic shopping bag in the lower pocket of the door. He grabbed the cell phones and felt something hard in the plastic bag. He opened the bag and saw a magazine from a Glock 9mm handgun. He took the phones and magazine back to the cruiser to put the phones in airplane mode and remove the SIM cards. He testified that this was standard procedure to prevent the data on the phones being remotely wiped. Officer Pavoni returned to the vehicle to finish the search.
- [9] Officer Pavoni searched the area around the driver's seat, including the door and centre console. He noticed the locking mechanism on the inside door panel was loose and not sitting flush. The leather around it appeared worn, which suggested to him that the mechanism had been removed and replaced repeatedly. He knew from prior experience with this particular model of vehicle that the mechanism could be easily popped off, providing access to a large void where items could be stored. He had previously found firearms, drugs, and ammunition in the voids of similar vehicles. He also knew that in 2020, when the respondent had been arrested for drug trafficking, money had been found hidden in a void at the rear of the vehicle he was driving. Officer Pavoni testified that he popped off the cover as part of his search for phones. What he saw instead were two loaded Glock handguns.
- [10] Officer Pavoni placed Mr. Bhatti under arrest for firearm possession.

Police understanding about the scope of the warrant

- [11] Both Officer Weber and Officer Pavoni were cross-examined about what they understood to be the scope of the authorized search, and why they did not conduct the search differently.
- [12] Officer Pavoni testified that he understood the warrant authorized a search of the area "surrounding" Mr. Bhatti, and that as the door void on the driver's side was easily accessible to Mr. Bhatti while seated in the vehicle, it constituted part of the surrounding area. Officer Pavoni also testified that he understood other areas of the vehicle to be outside the scope of the warrant: for example, the passenger seat area and the rear of the vehicle.
- [13] As to why he didn't simply ask Mr. Bhatti to identify which of the three phones was the correct one, Officer Pavoni said he was not willing to take Mr. Bhatti's word for it.
- [14] Asked why the officers didn't simply phone the number of the target phone and wait for a response, Officer Weber stated that the fact that a phone rang did not mean it was "the main phone that's associated to that number". He understood he was required to seize any phone that might be associated with the target number and take it back to the station for forensic analysis. He did not believe he had the ability to make the required identification in the field:

My direction was to seize the cell phone associated with that device, if we could determine it at the time ... or any other cell phone that may have had that number at any point. I don't know which phone had that number, how many of them had the number, or if the phones that I had in my possession had that number at some point. So, I had to seize all of them.

[15] Officer Pavoni similarly testified that he believed that multiple phones could be associated with the same number, and only the Digital Forensic Unit had the capacity to determine which was the target phone. On his understanding, if a SIM card associated with the target phone number had been successively swapped into multiple phones, each of those phones would be a target. That is, the search was not for a single target phone, but for every phone that had ever held the SIM card associated with the target number. Although Officer Pavoni's understanding of the scope of the search authorized by the warrant was, as is discussed below, mistaken, this mistake is immaterial to the appeal.

The application judge's reasons

[16] The application judge found that the search inside the door of the vehicle exceeded the scope of the warrant and therefore violated s. 8 of the Canadian Charter of Rights and Freedoms. There were two interpretive difficulties with the warrant that the application judge resolved in favour of the respondent.

One device or several

[17] The application judge identified an apparent ambiguity in the warrant, in that it sometimes referred to the cellular device in the singular and sometimes in the plural. Were the police authorized to seize one phone or several? The application judge found that the warrant "makes it clear there is one target cellular device" and it provides that if Mr. Bhatti had multiple cellular devices "these were to be seized only to determine which device 'is associated to the phone number'" (emphasis in original). The application judge found it significant that the language of the warrant contemplated a seizure and search of a single device that was associated to the target phone number at the time of the seizure. The application judge also noted that the warrant stated the detention of "the seized devices" – in the plural – would be determined under s. 489 and s. 490 of the Criminal Code, R.S.C. 1985, c. C-46, the provisions which establish a judicially supervised procedure to be followed for the ultimate return of things seized. He reconciled the apparent ambiguity on the basis that "on the whole, I find that the general warrant contemplated the seizure of one cellular device with a particular phone number. Other phones could be seized for the limited purpose of determining which of the multiple phones was currently associated with that particular phone number."

"Immediate" or "surrounding" area

- [18] The warrant stated that it authorized the detention of Mr. Bhatti for the purpose of “searching their person and immediate area for this cellular device”. Elsewhere in the warrant it similarly referred to the “surrounding area”. The application judge recognized that this is vague language, which required the police officers who were executing the warrant to interpret the meaning of “immediate area” and “surrounding area” relative to the person of Mr. Bhatti.
- [19] The application judge accepted that the three cell phones that were located in the driver’s door pocket were within the immediate or surrounding area of Mr. Bhatti, as they were “readily accessible to Mr. Bhatti as he sat in the driver’s seat of his vehicle.”
- [20] The application judge found that the void in the interior of the door did not come within Mr. Bhatti’s “immediate” or “surrounding” area, as contemplated by the warrant. The application judge reasoned that immediacy is not simply a matter of physical proximity, but is to be understood contextually and, in this case, with respect to the function of a cell phone. For normal operation, the application judge reasoned, a cell phone would have to be within easy and immediate reach. An ordinary user of a cell phone would not put it where it could not be immediately accessed.
- [21] The application judge concluded that the search of the door void was not authorized by the warrant and was therefore a violation of the respondent’s right to be free of unreasonable search or seizure under s. 8 of the Charter.
- [22] The application judge excluded the firearms from admission into evidence under s. 24(2) of the Charter. Applying the framework for analysis set out in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, he found that the seriousness of the breach was “towards the more significant end of the spectrum.” He also found that the breach had a significant impact on the respondent’s Charter protected interest in privacy, particularly because the respondent was a victim and not a suspect in the homicide investigation.

Grounds of appeal

- [23] The Crown raised two issues on appeal:
1. The application judge erred in finding a breach of s. 8:
 - (a) The warrant permitted the seizure of multiple phones
 - (b) The void in the door was part of the “immediate” or “surrounding” area;
 2. The application judge erred in excluding the firearms under s. 24(2).

Analysis

- [24] As explained below, I agree that the application judge erred both in finding that the search was not authorized by the warrant, and that even if there had been a s. 8 violation, that the firearms ought to have been excluded under s. 24(2).

(1) Section 8 One phone or multiple phones

- [25] The police plan for executing the search warrant was to stop Mr. Bhatti in his vehicle and seize whatever phones were in his immediate area, put them in airplane mode and remove any SIM cards to keep their data from being wiped remotely, and take them to the forensic lab for analysis. That analysis would be twofold: (1) to determine which of the phones was associated with the target phone number; and once the target device(s) were identified, (2) to search the data on the phones.
- [26] There were, in effect, three searches contemplated by the warrant: (1) the search of the “immediate” or “surrounding” area to locate one or more phones; (2) a first-level search of the phone(s) limited to ascertaining which cell phone was associated with the target phone number; and (3) a second-level substantive search of the data of the one target device. It is not contested that the application judge rightly found that Officers Weber and Pavoni misunderstood the scope of the search in a key respect: the warrant did not authorize a second-level search of every cellular device that had ever been associated with the target phone number. It only authorized a substantive search of one device – the one device presently associated with the target phone number. This error had limited significance on the matters in issue before the application judge, as there was no s. 8 claim advanced with respect to a second-level search conducted on any device.
- [27] On appeal, the Crown contests a different finding by the application judge – that the warrant required that the first-level search made to determine which of the several phones was uniquely associated with the target number had to be done by the officers at roadside, and that the warrant did not authorize the officers to take custody of all of the phones they found in the immediate area and take them back to the lab for that analysis.
- [28] The application judge concluded that the officers could have easily determined which of the phones was the target by: (1) simply allowing the respondent to tell them, or (2) dialing the number and observing which of the phones responded. He concluded the warrant required that, having immediately located three phones in the open, they were to immediately ascertain whether any of those phones were the target device before they could search for additional phones: “the general warrant did [not] permit them to seize other cellphones until it could be ascertained whether they had located the correct cellphone.”
- [29] The application judge erred in a number of respects. First, the warrant did not require the police to proceed in the manner required by the application judge. It was largely silent as to these details of its execution. Nevertheless, there is a term of the warrant – noted but then set to one side by the application judge – that contradicts the application judge’s interpretation: the warrant contemplated the seizure of multiple devices that would be later returned to the respondent, as per the requirement to follow the procedure for the return of evidence set out in s. 489 and s. 490 of the Criminal Code.

- [30] Second, the application judge misapprehended the nature of the interaction between the police officers and the respondent. The application judge was correct to note that the respondent was not a subject of the homicide investigation, but was rather a witness and a victim of his fiancée's murder. But the application judge unreasonably narrowed his focus to the fact that the respondent was a victim of the crime under investigation, to exclude the many other facts that the police had to consider when assessing the situation. The application judge was simply wrong to conclude "there is no suggestion that concerns typically present during an arrest, such as safety or the destruction of evidence, existed." There were abundant concerns about both safety and destruction of evidence.
- [31] The police had safety concerns from the outset, demonstrated by the unusual step of asking the respondent to submit to a pat down for weapons, which the respondent refused. The respondent was believed to be a high-level drug dealer, a fact believed to be related to his fiancée's murder. The respondent had outstanding charges for drug trafficking. The respondent had convictions for firearms offences. The police had information that the respondent was planning retaliation for the murder. The police had observed Mr. Bhatti, wearing what they believed to be body armour, on a rooftop talking to an individual. Significantly, and never mentioned once by the application judge in either the s. 8 or s. 24(2) analysis, the police found an ammunition magazine for a Glock handgun in a plastic bag next to the three cell phones. This was not a situation remotely comparable to an ordinary interaction with a witness.
- [32] With respect to destruction of evidence, the police testified that they followed standard procedure in putting the phones into airplane mode and removing the SIM cards present in each device as soon as they took possession of them. This was done to prevent the phones from being wiped remotely by a third party. The officers testified that they did not believe they could identify the target phone in the field. They were not prepared to accept the respondent's word for which phone was the target phone. Nor were they required to. Regardless of how cooperative the respondent had been with the investigation, he was known by the police to live substantially outside the norms that bind most other citizens. Furthermore, the police were not required to simply phone the target number. They would not know if the phone with the target number had been forwarded to another device. The warrant allowed for the police to proceed in the manner they did to prevent the potential for the destruction of evidence.
- [33] While police must comply with the terms of a warrant, courts should also avoid interpreting warrants in a manner that "place[s] police in a straitjacket", *R. v. Lucas*, 2014 ONCA 561, 121 O.R. (3d) 303, at para. 197, and must not "lightly interfere" with operational decisions made by police in the execution of a warrant to ensure their own safety and preserve evidence: *R. v. Cornell*, 2010 SCC 31, [2010] 2 S.C.R. 142, at para. 48, per Fish J. (dissenting, but not on this point); see also: *R. v. Campbell*, 2024 SCC 42, 498 D.L.R. (4th) 195, at para. 115; *R. v. Hobeika*, 2020 ONCA 750, 153 O.R. (3d) 350, at para. 52, citing *Cornell*, at paras. 24 and 36.

The search of the void

- [34] Because a cellphone that had been placed in the void of the car door could not have been retrieved without some time and effort, and a cellphone in regular use presumably would not be stored in such an inconvenient manner, the application judge concluded that the void in the door was not part of the immediate or surrounding area of the respondent when he was driving the motor vehicle. The application judge appropriately drew on the analysis of the Supreme Court provided in *R. v. Stairs*, 2022 SCC 11, [2022] 1 S.C.R. 169, at paras. 60, 79 and 80 which addressed searches made incident to arrest. In that decision, the court emphasized the importance of the contextual nature of the inquiry: limiting the scope of the search by reference to the grounds for the arrest. The application judge adapted this requirement from the search incident to arrest context to the context before him, stressing, again, that the respondent was a victim of crime and not a suspect.
- [35] But, again, that the respondent is a victim of the crime under investigation does not exhaust the context. The police believed that the respondent was less than forthcoming about what he knew about the crime, and suspected he was planning to take matters into his own hands. They believed he had reason to keep the phone from them. That is why they obtained a warrant to seize the phone rather than simply asking him to hand it over voluntarily. It is why they were not willing to take him at his word when he offered to identify the phone after the traffic stop. Furthermore, they knew that the model of the vehicle he was driving was capable of storing contraband in the void of the door, and that this void could be easily accessed. They knew that the respondent had stored money in a similar void of the same model of vehicle in the past. They suspected, based on visual observation of the locking mechanism, that the void of this vehicle was similarly being used to hide things.
- [36] Based on all of the foregoing, it was not unreasonable to conclude that the respondent may have sought to hide the phone, or that it would be hidden in the void of the door. From the testimony of the officers, it would not have taken much time or effort to pop off the cover and throw the phone inside. It did not have to be a likely course of conduct or be consistent with the pattern of use by the ordinary cell phone user. The respondent was not an ordinary user in an ordinary situation.
- [37] Accordingly, in my view the application judge erred in finding the search for the phones was not authorized by the warrant. The warrant did not require the police to test each phone roadside to determine if it was the target phone before searching for more phones, and did not prevent them from searching the door void immediately next to where Mr. Bhatti was sitting. There was no s. 8 violation.
- (2) Section 24(2) [38] Having concluded that the application judge erred in finding that there was a violation of the respondent's rights under s. 8 of the Charter, it is not strictly necessary to consider the application judge's s. 24(2) analysis. But it is worthwhile to do so as aspects of the application judge's analysis are erroneous.

- [39] First, with respect to the assessment of the seriousness of what was characterized as Charter-infringing state conduct, I cannot agree with the application judge's conclusion that the conduct was serious. It is true that Officers Weber and Pavoni were both mistaken as to the scope of the third-level search. But that error was immaterial because the conduct complained of was restricted to the first-level search – the gathering of the phones – and declining to perform the second-level search themselves in the field. Although there was apparent ambiguity in the language of the warrant – and specifically whether it authorized first-level and second-level searches for one phone or several – the ambiguity was easily resolved by a reading of the warrant as a whole: the warrant authorized the seizure of multiple phones, a second-level search of the seized phones to find the one target, and a third-level search of the target phone. Whether the police misunderstood the scope of the third-level search is irrelevant to the appeal, and did not constitute a wilful disregard of Charter rights.
- [40] With respect to the impact of the breach on the respondent's interests, the application judge erred in principle in finding that the firearms would not have been found absent what was characterized as a warrantless search. There is no evidence in the record as to what the police would have done if they believed the warrant did not permit them to proceed to search inside the door void. They were not asked if they would have ended the detention and simply let the respondent drive off. Nowhere in his s. 24(2) analysis did the application judge advert to discovery of the Glock ammunition clip, whether the respondent – who had outstanding drug charges – had a licence authorizing possession or was under a weapons prohibition order, and whether the police would have arrested the respondent for breach and searched the vehicle incident to arrest, particularly since they were alert to the fact that the door void appeared to have been used to store something. Accordingly, I would have found that the impact was light: the police searched inside the door of a motor vehicle operating on a public road. There was nothing intimate or personally invasive about the search.
- [41] With respect to the final Grant factor – society's interest in adjudication on the merits – the application judge again emphasized the fact that the respondent was a victim of the crime under investigation. It was an error to do so. The police did not, as the application judge suggested, act as though Mr. Bhatti's criminal background made him "less worthy of Charter protection than any other victim in this context would be." What the police did was appropriately assess the risk to themselves and the potential for destruction of evidence in executing a search warrant. That assessment necessarily took into account the fact that the respondent was known to be a person who – to an unusual degree – placed himself outside the common law-abiding norms of society. Just how far outside was unknown to the officers, and for their own safety and in the discharge of their duties to the public, they were not required to assume the best of him. The fact that the respondent had suffered deeply from the crime under investigation was not determinative of how the police were entitled to proceed.

DISPOSITION

[42] I would allow the appeal and order a new trial.

“B.W. Miller J.A.”

“I agree. D.A. Wilson J.A.”

Pomerance J.A. (dissenting):

[43] I have read the reasons of my colleague, Miller J.A. With great respect, I take a different view of the Charter issues in this case. I agree with the application judge that, in executing the general warrant, the police exceeded the scope of the order and violated the respondent's rights under s. 8 of the Charter of Rights and Freedoms. I further agree that the firearms discovered in the hidden compartment should be excluded under s. 24(2) of the Charter.

[44] The application judge assessed the evidence before him. He made findings of fact and applied the correct legal principles. I see no error that would authorize this court's intervention.

[45] The warrant in this case authorized the police to detain the respondent and search his immediate surroundings for a cellular device associated with a particular phone number. The police exceeded the authority of the warrant in two ways. First, the warrant authorized seizure and forensic examination of one cellular device associated with a particular phone number. The executing officers seized three phones for forensic examination, positing that all three might, at some point in time, have been associated with the phone number.

[46] Second, the police searched a hidden compartment on the driver's side door of the respondent's rental vehicle, leading to the discovery of the firearms. This exceeded the spatial parameters of the warrant. The warrant authorized a search of the respondent's immediate surroundings for a cellular device that he regularly used. It was not reasonable for police to believe that such a device would be in a hidden compartment, particularly after they had found three phones in the vehicle.

INVESTIGATION OF ONE CRIME; PROSECUTION OF ANOTHER

[47] This case presents an unusual factual matrix: the offence for which the warrant was issued was not the offence for which the respondent was tried.

[48] In most cases, there is a straight line between the investigation, alleged Charter breach, and prosecution. The police discover evidence of a crime. The accused is charged with that crime. The Crown seeks to tender the evidence to prove that crime. The accused challenges admissibility on Charter grounds.

- [49] In this case, the investigation concerned one crime, and the prosecution another. We do not know what, if anything, police found on the respondent's cell phones. That is because the evidence seized in relation to the murder investigation – the data on the respondent's cell phones – was not relevant to the respondent's prosecution for firearms offences. Because the cell phone evidence was not tendered at the firearms trial, the respondent could not seek to exclude it from those proceedings.
- [50] Yet, the cell phones searches were central to the respondent's Charter application. The intention to search all three phones posed a serious risk of a significant privacy invasion. That risk bore directly on the admissibility of the firearms, as it arose during the execution of the same warrant during a single investigative transaction.
- [51] I will elaborate on these conclusions in the reasons that follow.

WARRANTED SEARCH: GENERAL PRINCIPLES

- [52] It is trite to observe that police are bound to follow strictly the terms of a search warrant during its execution. The model of prior judicial authorization posits that a neutral and independent arbiter stand between the state and the individual. That arbiter is to assess whether the societal interests in law enforcement outweigh individual interests in privacy, applying a standard of credibly based probability: *Hunter v. Southam*, [1984] 2 S.C.R. 145, at pp. 161-62. The balancing of state and individual interests may require that certain limiting terms and conditions be placed on the warrant's execution: where terms and conditions are imposed, they are not suggestions or recommendations. They are directives. Police are not entitled to pick and choose which of them they will respect, and which of them they will ignore: *R. v. Lucas*, 2014 ONCA 561, 121 O.R. (3d) 303, at para. 197.
- [53] Failure to honour the terms of a warrant may result in the entire search being invalidated: *R. v. Church of Scientology of Toronto* (1991), 9 C.R.R. (2d) 196 (Ont. Gen. Div.), at p. 212; *R. v. Tyler Perkins*, 2013 ONSC 1807, 279 C.R.R. (2d) 224, at para. 91, or it may result in a finding that certain seizures were warrantless. Where police are unaware of a limitation in the warrant, or choose to ignore it, this will usually generate a violation of s. 8 of the Charter: *Church of Scientology*, at p. 212. This can happen when police seize tangible items, such as documents, that are not described in the warrant. It can also occur when police exceed the bounds of a warrant authorizing the search of a computer or other digital device.
- [54] Limiting terms and conditions are particularly important when it comes to digital data. As was famously noted by Fish J. in *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 2: "it is difficult to imagine a search more intrusive, extensive, or invasive of one's privacy than the search and seizure of a personal computer". Since then, jurisprudence on digital searches has consistently highlighted the "unique and heightened privacy interests in personal computer data", including data found on cell phones: *R. v. McGregor*, 2023 SCC 4, 478 D.L.R. (4th) 193, at para. 27; *R. v. Reeves*, 2018 SCC 56, [2018] 3 S.C.R. 531, at para. 35; see also *R. v. Fearon*, 2014 SCC 77, [2014] 3 S.C.R. 621, at paras. 132, 197; *R. v. Spencer*, 2014 SCC 43, [2014]

2 S.C.R. 212, at para. 50; *R. v. Vu*, 2013 SCC 60, [2013] 3 S.C.R. 657, at paras. 40-41, 47; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 47; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 105-6; with respect to cell phones, see *R. v. Campbell*, 2024 SCC 42, 498 D.L.R. (4th) 195, at para. 58; see also *R. v. Marakah*, 2017 SCC 59, [2017] 2 S.C.R. 608, at paras. 35-36.

[55] In *Vu*, Cromwell J. stressed the need for specific prior authorization for searches of digital devices at para. 3:

In practical terms, the requirement of specific, prior authorization means that if police intend to search computers found within a place with respect to which they seek a warrant, they must satisfy the authorizing justice that they have reasonable grounds to believe that any computers they discover will contain the things they are looking for. If, in the course of a warranted search, police come across a computer that may contain material for which they are authorized to search but the warrant does not give them specific, prior authorization to search computers, they may seize the device but must obtain further authorization before it is searched.

[56] Finally, as in all search contexts, police are bound to respect the principle of minimization while executing search warrants: *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193, at paras. 14, 19. This is a principle of general application, though it tends to figure more prominently when the search implicates specialized privacy interests, or where the target of the search is not the alleged perpetrator of the criminality: *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860, at p. 889; *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1991] 3 S.C.R. 459, at p. 474; and *Lavallee, Rackel & Heintz v. Canada (Attorney General)*; *White, Ottenheimer & Baker v. Canada (Attorney General)*; *R. v. Fink*, 2002 SCC 61, [2002] 3 S.C.R. 209, at para. 37.

APPLICATION TO THIS CASE

(1) CONTEXT [57] The respondent was known to police as someone involved in criminal activity. He was believed to be a drug trafficker. This contributed to the view that he was the true target of his fiancée's murder. However, the warrant was not issued to investigate the respondent's criminal activities. It was issued to investigate the murder, in respect of which he was a putative victim. The police believed that his cellular device would contain, among other things, a fulsome account of his contacts. It might reveal that the motive for the murder had something to do with the respondent's trafficking activities.

[58] The information to obtain the search warrant ("ITO") asserted that the respondent might be planning a retaliation for the murder, but that is a red herring. It was not a named offence nor the basis for issuing the warrant. The information about possible retaliation came from a single confidential informant and was therefore of unknown reliability. In short, while the warrant adverted to the respondent's criminal activity, it was designed to solve a crime committed by others.

[59] It is against that backdrop that the terms and conditions of the warrant must be understood.

(2) THE GENERAL WARRANT [60] The preamble to the warrant stated:

THIS IS THEREFORE to authorize that Peace Officers may detain the person in possession of the cellular device associated to the phone number *-*-**** for the purpose of searching their person and immediate area for this cellular device. The above mentioned mobile device will be turned over to the Digital Forensic Unit to be analyzed to locate evidence on the mobile device. Examination of the mobile device shall be limited to seeking data relevant to the offence of Murder, contrary to section 235(1) of the Criminal Code.

[61] The warrant imposed the following terms and conditions:

THIS WARRANT IS SUBJECT TO THE FOLLOWING TERMS AND CONDITIONS to ensure that the activity authorized by this Warrant is reasonable in the circumstances:

- For the purpose of this warrant, “the device” is the one associated to the number *-*-****;
- Peace Officers will detain Ali Bhatti and tell him that he is being detained under the authority of a General Warrant, pursuant to Section 487.01 of the Criminal Code;
- Peace Officers will use the minimal amount of force necessary to detain Ali Bhatti for the purpose of this warrant;
- The search and detention of Ali Bhatti will not interfere with his bodily integrity;
- Peace Officers will advise Ali Bhatti of his rights to counsel and provide him with his caution;
- Peace Officers will search Ali Bhatti and his surrounding area, for his cellular device (if Ali is in possession of multiple cellular devices, these will be seized only to determine which device is associated to the phone number *-*-**** – any further analysis of any device, other than the one which is the target of this warrant, will not be analyzed further without separate judicial authorization);
- Once the cellular device has been seized, Ali Bhatti will be released from this detention, unless he is subject to arrest or further detention unrelated to this General Warrant;
- The warrant will only be executed once; and
- The detention of the seized devices will be determined pursuant to Section 489 and 490 of the Criminal Code. [emphasis added.]

[62] As found by the application judge, police resorted to s. 487.01 of the Criminal Code, R.S.C. 1985, c. C-46 – the general warrant provision – rather than s. 487, because they wished to have authority to search the respondent’s person for his cellular device. A s. 487 warrant can only authorize search of a building receptacle or place and cannot authorize search of a person. Therefore, the police properly utilized s. 487.01 to authorize detention of the respondent and search of his person, and surrounding area, for his cellular device. It was obviously contemplated that the device might be carried on his person, as is typical with

cellular devices.

- (3) MULTIPLE PHONES [63] The language of the warrant authorized seizure and examination of a single cellular device. The language is unambiguous. It described “the device”; the “one associated to the number...”. The warrant referred to detention of “the seized devices” pursuant to ss. 489 and 490 of the Criminal Code. However, the warrant clearly stipulated that, if more than one phone was seized, it was only for the purpose of determining which phone corresponded to the phone number in question.
- [64] The executing officers found a bag containing three cell phones. They testified that they seized all three for analysis on the basis that more than one phone might, in the past, have been associated with the phone number. From a technological standpoint, that might be correct. Had this information been placed before the issuing justice, he might have authorized the forensic examination of multiple phones. The problem is that this was not referenced in the ITO, and it was not the basis on which the warrant issued.
- [65] Courts must be careful not to interfere with operational plans formulated by police in executing a warrant. However, that proposition is subject to limitations. An operational plan must itself be reasonable having regard to the nature of the search; it must respect the express limits on the face of the warrant; and it must reflect the principle of minimization that governs any state conduct amounting to a search or seizure. None of those requirements were met in this case. The police were not merely executing an operational plan. They were executing a different warrant than the one issued.
- [66] The most obvious way to determine which phone corresponded to the identified phone number was to dial the number. The executing officers claimed that they could not do this. This was based, in part, on their insistence that the number might, in the past, have been associated with more than one phone. It was also because the police immediately removed the SIM cards, rendering the phones inoperative. This was done purportedly to prevent someone from remotely wiping the data.
- [67] That explanation rings hollow. First, the possibility of remote wiping was never mentioned in the ITO. It would have been a simple matter for the officer who swore the ITO to disclose to the justice the need to remove the SIM cards immediately. Had that been communicated, the terms of the warrant might have been different.
- [68] Second, the officers did not testify how it is that the phone might have been wiped remotely, or by whom. The officers executing the warrant had the element of surprise on their side. There is no evidence on the record that the respondent had advance warning that his phone would be seized, or that he would be stopped by police on the day in question. He was detained during the search, handcuffed behind his vehicle, and could not himself destroy evidence. There was no evidence to indicate that there were witnesses to the vehicle stop, or to explain how a criminal confederate would know of the pending seizure of the cellphone. Moreover, it would have taken but a moment to dial the number, a step that could logically have preceded removal of the SIM cards.

- [69] The application judge was unimpressed with the executing officers' explanation, and I share his view, which is entitled to deference.
- [70] Even accepting the officers' testimony that other phones might, at some point in the past, have been associated with the phone number, the warrant authorized seizure of one device, that being the one that was, at the time of the seizure, associated with the phone number. As noted by the application judge, the warrant speaks of the phone associated with the number "in the present tense", which is "inconsistent with the officers' view that they could seize any cellular device that had ever been associated with that number" (emphasis in original). By seizing all three phones for examination, the officers clearly exceeded the bounds of the authorizing warrant.
- [71] My colleague agrees that the police misunderstood this aspect of the warrant. He finds, however, that this error had limited significance, as "there was no s. 8 claim advanced with respect to a second-level search conducted on any device". Upon careful reflection, I take a different view.
- [72] The s. 8 claim necessarily encompassed the forensic examination of all three phones. The police were not interested in the respondent's phone as an item of stand-alone property; the police were interested in the respondent's phone as a receptacle of data. It was the item to be seized; but it was also a place to be searched. It was the proposed examination of all three phones that represented the Charter violation, one that directly implicated the biographical core protected by s. 8 of the Charter: Campbell, at para. 50. As noted earlier, courts have routinely recognized the heightened privacy interests attaching digital devices, given the vast tracts of personal information that they contain.
- [73] Various cases have dealt with the problem of digital overseizure. Usually, the complaint is that the police have exceeded the limits of what they were authorized to examine on a given device: R. v. Jones, 2011 ONCA 632, 107 O.R. (3d) 241, at paras. 2-5; R. c. Boudreau-Fontaine, 2010 QCCA 1108, at paras. 47-54; Perkins, at paras. 4-8, 104-107; and R. v. Beitel, 2011 ONSC 5394, 243 C.R.R. (2d) 296, at paras. 25-26. Here, the overseizure stands on a more obvious footing. The issue was not about the scope of access on a particular device; it was, rather, which devices were to be examined in the first place.
- [74] Unlike my colleague, I attach no significance to the fact that the warrant speaks of devices in the plural, in connection with ss. 489 and 490 of the Criminal Code. Those provisions apply whenever a police officer seizes something under warrant, or otherwise in the execution of duties, whether or not there is a specific term in the warrant, and whether or not there is property to be returned. They do not speak to, or justify, the overseizure in this case.

- [75] The warrant contemplated that more than one phone might be seized, but did not contemplate that more than one phone would be forensically examined. Pursuant to s.490 of the Code, the police could restore the respondent's property interests by returning the phones that did not correspond to the designated phone number. However, once they viewed the data on a device, that invasion of privacy could not be undone.
- [76] For the above reasons, I agree with the application judge that the police exceeded the terms of the warrant by seizing three phones intended for forensic examination.
- (4) SPATIAL PARAMETERS [77] The second concern in this case relates to the search of the hidden compartment in the driver's side door of the respondent's rental vehicle. This is, of course, where the police found the firearms that are the subject of the charges.
- [78] The search of the hidden compartment is troubling for two reasons. First it is not clear that it qualifies as the respondent's "surrounding area".
- [79] As was articulated by the Supreme Court of Canada in *R. v. Stairs*, 2022 SCC 11, [2022] 1 S.C.R. 169, the spatial parameters of a search incident to arrest, and the determination of whether a location is part of a "surrounding area" is a "contextual and case-specific inquiry": at para. 60. It depends on the location to be searched, and the offence for which the person was arrested. So too must a "surrounding area" clause in a warrant depend on the particulars of the search context.
- [80] The application judge accurately described the prevailing context in para. 104:
- I note that had the object specified in the warrant to be seized not been a cellphone, but some other object, the conclusion may have been different. Furthermore, my conclusion may have been different if Mr. Bhatti was the target of the murder investigation, as opposed to a victim of the crime. I also take into consideration that the police had already found three cellphones and could have at least tried to perform a simple test to ascertain whether any of them was the phone sought. Thus, as instructed by *Stairs*, I have considered the specific context of this particular search.
- [81] Against the backdrop of these contextual features, it was not reasonable for police to believe that the phone to be seized – one that was in regular use by the respondent – would be found in a hidden compartment. The warrant authorized police to search the respondent's person and his surrounding area, precisely because that is where people tend to keep their cell phones. Phones in regular use are likely to be kept, if not on the person, within easy reach.
- [82] The application judge found that items in the hidden compartment were not readily accessible. Some manipulation was required to access this area. This finding was, on the evidence, open to the application judge and discloses no palpable and overriding error.
- [83] One of the executing officers testified that he knew the respondent to have, in the past, concealed items in this type of hidden compartment. However, the officer acknowledged that he had never found cell phones hidden in this fashion. In cross-examination, the officer

conceded that a cell phone would be difficult to answer from a void, and that people generally want to answer both personal and “drug phones” quickly. Moreover, there was arguably no reason for the respondent to hide his cell phone. It is not illegal to possess a cellular device. It is not contraband. On the evidence, he had no advance warning that he was going to be detained by the police or that his phone would be seized.

- [84] Second, at the time they accessed the hidden compartment, police had already found three phones within reach of the respondent. As a general proposition, when police find the item that they are authorized to seize, the search is over. Again, it would have been a simple matter for police to dial the phone number and determine whether one of the three phones corresponded to the description in the warrant. It was the executing officers’ decision to foreclose that possibility by immediately removing the SIM cards. Police cannot create an impediment to a search, only to then rely on that impediment to justify their behaviour: *Campbell*, at para. 125; *R. v. Silveira*, [1995] 2 S.C.R. 297, at para. 53, per La Forest J. (dissenting).
- [85] The application judge concluded that: “there is no suggestion that concerns typically present during an arrest, such as safety or the destruction of evidence, existed”. That, too, is a finding entitled to deference.
- [86] It is true, as my colleague notes, that this was not an ordinary encounter with a victim or witness. The respondent was believed to be a high level drug dealer; he had outstanding charges for drug trafficking; he had refused to submit to a pat down; and police had found an ammunition magazine for a Glock handgun in a plastic bag next to the three cell phones. Yet, these factors do not realistically bear on what the police did in this case. I say that because the police never testified that they were looking for evidence of firearms or were motivated by other safety concerns. Even after discovering the ammunition magazine in the vehicle, they insisted that they were still only looking for cellular devices.
- [87] The validity of a search depends on the actual, subjective intentions of the police at the relevant time: “they must not only objectively search within the permissible scope ... they must turn their mind to this scope before searching”: *R. v. Caslake*, [1998] 1 S.C.R. 51, at para. 27. In *Caslake*, the Supreme Court of Canada held that, while an officer, as a matter of law, could have searched the accused’s car incident to arrest, the officer claimed to be conducting an inventory search to protect the accused’s possessions: at paras. 3, 26. Because an inventory search was not authorized by law, the court found a s. 8 violation even though it would have been objectively open to a different officer to search the car incident to arrest: *Caslake*, at paras. 29-30. In this case, it might well be that, upon finding the clip, a different officer would have believed he had grounds to search the car for a gun. That officer’s belief may or may not have reached the threshold of reasonable grounds and may or may not have justified a search of the hidden compartment. We do not get to the objective inquiry in this case, because the executing officers insisted that they were searching for cell phones.

- [88] Given the testimony of the executing officers as to what they were searching for and why, any safety issues here were beside the point.
- [89] My colleague points to the absence of evidence on what the police would have done had they believed the warrant did not permit them to search inside the door void. That is so, but in my view, the gap in the evidence cuts against the Crown. Warrantless searches are *prima facie* unreasonable, and the Crown bears the burden of proving otherwise: *Caslake*, at para. 11, citing *Hunter*, and *R. v. Collins*, [1987] 1 S.C.R. 265; *Campbell*, at para. 81. If the warrant did not justify searching the compartment, the officers must have subjectively relied upon on some other lawful authority for the search. They did not identify any such authority. They maintained that they were looking for the cell phone(s) described in the warrant. For reasons already given, the search could not be reasonably supported on that basis.
- [90] One of the executing officers knew the respondent to have concealed items in the hidden compartment of the vehicle in the past, a matter not shared with the issuing justice. That did not justify a search of the hidden area either. The officer was not entitled to supplement the ITO with his own subjective knowledge. Moreover, on the officer's own testimony, he had never before found a phone hidden in this fashion.
- [91] Therefore, the seizure of the firearms was, for purposes of s. 8 of the Charter, a warrantless seizure that infringed the respondent's rights. I will now turn to s. 24(2) of the Charter.

SECTION 24(2) OF THE CHARTER

- [92] The application judge excluded the evidence of the firearms found in the hidden compartment within the door frame of the respondent's rented vehicle. He applied the well-known test set out by the Supreme Court of Canada in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, and concluded, on balance, that admitting the evidence would bring the administration of justice into disrepute.
- [93] Trial decisions applying s. 24(2) of the Charter are entitled to considerable deference. Appellate intervention should be limited to those cases in which the analysis discloses an error in principle. I agree with the application judge and find that the evidence was properly excluded.
- [94] The elements of the *Grant* test are well known. The first inquiry is into the seriousness of the Charter infringing conduct. It is here that concepts such as good and bad faith are considered, with the court determining where to situate the state conduct on the spectrum of fault.
- [95] In this case, the application judge acknowledged that the evidence did not permit him to conclude that the investigative technique was used as a pretext "for the police to search the vehicle of a person that they reasonably believed was involved in the drug subculture." He noted that "defence counsel did not cross-examine the officers sufficiently" for him to draw that conclusion. Nonetheless, while declining to make a finding of bad faith, the application

judge found that the police could not lay claim to good faith, given the overly broad search and the failure to honour the limiting conditions contained in the warrant. As he put it:

[The officers'] interpretation of the general warrant was unnecessarily, and unfairly, broad. They failed to consider any other avenue that would lead to them obtaining what they were authorized to obtain. In my view, the police actions here fall closer to reckless disregard of Charter rights, [than to] inadvertent, technical or minor breaches, or even negligence.

- [96] My colleague finds that the Charter infringing conduct was not serious. As he explains: “Whether the police misunderstood the scope of the third-level search is irrelevant to the appeal, and did not constitute a wilful disregard of Charter rights.” That marks a point of departure between us. I see the examination of the phones as being directly relevant to the gravity of the Charter infringing conduct. The seizure of three phones for analysis, and the search of the hidden compartment, occurred during execution of a single warrant. If nothing else, the violation respecting the cell phones was temporally, tactically, and contextually linked to the discovery of the firearms and, for that reason, relevant to the s.24(2) analysis: *R. v. Singh*, 2024 ONCA 66, 432 C.C.C. (3d) 527, at para. 107, citing *R. v. Mack*, 2014 SCC 58, [2014] 3 S.C.R. 3, at para. 38; *R. v. Davis*, 2023 ONCA 227, 166 O.R. (3d) 401, at para. 28, citing *R. v. Strachan*, [1988] 2 S.C.R. 980, 46 C.C.C. (3d) 479, at para. 46, and *R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235, at para. 21; and *R. v. Pino*, 2016 ONCA 389, 130 O.R. (3d) 561, at paras. 50-56.
- [97] I agree with the application judge that this was serious Charter infringing conduct. The police failed to abide by the clear and express terms of the warrant. In their testimony, they tried to justify their conduct by relying on facts and theories not placed before the issuing justice. The application judge was in the best position to assess the validity of the officers’ after the fact explanation. He was skeptical of their motives, though he stopped short of finding bad faith. I see no reason to disturb those findings.
- [98] The search of the hidden compartment reflects a further disregard of the limiting terms in the warrant. As found by the application judge, the “police made no effort to ascertain whether any of the three cellphones that were in plain sight were associated with the phone number.” They believed that they could keep searching and seize a dozen phones to determine which ones had that number at some point.
- [99] I do not view the terms of this warrant as ambiguous. If there was ambiguity, it could not be resolved in the manner asserted by police. The warrant referred to examination of one phone, not three. It referred to the respondent’s surrounding area as understood in relation to the item to seize – a cell phone in regular use.

[100] In any event, when faced with ambiguity, police are expected to proceed with caution, rather than forging ahead in violation of constitutional rights: *R. v. McColman*, 2023 SCC 8, 423 C.C.C. (3d) 423, at para. 63. In *McColman* the police were confronted with conflicting case law on the scope of their lawful authority. Under the first limb of the *Grant* analysis, the court observed at para. 60:

Although there was relevant case law to support the police officers' sobriety stop, given the legal uncertainty that existed at the time, the police officers should have acted with more prudence. When faced with legal uncertainty, "the police would do well to err on the side of caution".
[Citation omitted.]

[101] Admittedly, this case is not concerned with conflicting guidance in the case law. Nonetheless, the cautionary principle should apply in any context in which the authority for investigative conduct – case law, a statute, or a warrant – is unclear. Section 8 demands that police steer the course that offers more, rather than less, protection to constitutional interests.

[102] Arguably, this principle applies with even greater force in the search warrant context. Statutory provisions and case law set general rules that govern investigative conduct. When police are investigating a fresh set of facts, they are called upon to apply general rules and principles to the situation before them. That situation may or may not resemble the facts of prior cases. By contrast, in the case of warrants, police have supplied the presenting facts to a judicial officer and have obtained a fact-specific order authorizing fact-specific activity. Execution is not about extrapolating general rules to specific facts; it is about observing limitations that have already been tailored to the facts of the case.

[103] In short, ambiguity in a warrant does not license investigative excess; it commands investigative restraint. That restraint was notably absent in this case.

[104] I therefore agree with the application judge that the first limb of the test pulls toward exclusion.

[105] As it relates to the second limb of inquiry, the impact on the Charter protected interests of the accused, the application judge properly found that motorists generally have reduced expectations of privacy in vehicles. That interest was further attenuated in this case given that the respondent was driving a rental vehicle. Despite this, the application judge found that the overall impact on the respondent was significant, given his status as a victim and his treatment during the search.

[106] I would offer a few additional comments about the second limb of the *Grant* test. The police chose to execute the warrant while the respondent was in his vehicle. It is true that motorists enjoy a reduced expectation of privacy in their vehicles. Driving is a privilege, not a right, and drivers' conduct is subject to licensing, regulation, and enforcement requirements. However, this was not a case in which the vehicle stop concerned traffic safety. Nor did the warrant specify a vehicle stop. It authorized a detention of the

respondent. While it was open to the police to execute the warrant while the respondent was in his vehicle, that choice did not strip the respondent of the privacy he otherwise enjoyed in his cellular devices.

- [107] The intention to forensically examine all three phones presented a serious risk of a significant privacy invasion. The impact of these searches on the respondent's constitutionally protected interests was considerable. The respondent could apply under s. 490 of the Criminal Code to have his phones returned but could not restore his privacy once the content of the phones was examined.
- [108] Accordingly, I agree with the application judge that, despite the reduced expectation of privacy in motor vehicles, the second limb of the test pulls toward exclusion.
- [109] On the third limb of the test, the application judge found that the firearms located in the door frame were reliable evidence, critical to the case for the prosecution. The application judge considered the seriousness of the offences, given the prevalence of gun violence, and concluded that the third limb of the test favoured admission of the evidence. I also agree with this analysis.
- [110] In balancing the various considerations, the application judge adverted to the "evils associated with firearms and communities' legitimate desire to combat those evils" but noted that "there is no firearms exception under s. 24(2)". Ultimately, the application judge was moved by the fact that the respondent was, for purposes of the search, a victim of a violent crime (the fiancée of a murder victim) rather than a suspected perpetrator. The fact that he was himself involved in the criminal drug subculture did not justify his treatment during the execution of the warrant, or the excessive breadth of the searches.
- [111] The scourge of gun violence is well known. The offences in issue are serious. However, it will be rare for the third limb of the test to singlehandedly support the case for admission: *R. v. Beaver*, 2022 SCC 54, 420 C.C.C. (3d) 421, at para. 134, citing *R. v. Lafrance*, 2022 SCC 32, [2022] 2 S.C.R. 393, at para. 90. Here, the first two branches favour exclusion, the first more strongly than the second. But it is the cumulative weight of the first two lines of inquiry, not their average, that must be balanced against the third: *Lafrance*, at para. 90. And "when the two first lines, taken together, make a strong case for exclusion", the third "will seldom tip the scale in favour of admissibility": *Lafrance*, at para. 90; *Beaver*, at para. 134.
- [112] The application judge carefully weighed the relevant factors and concluded that the scales tipped toward exclusion. Having found no error in principle, I would defer to his analysis on both ss. 8 and 24(2) of the Charter. On that basis, I would dismiss the Crown's appeal.

"R. Pomerance J.A."

Released: October 16, 2025 "B.W.M."

- [1] The phone number of the device subject to the warrant has been anonymized.

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