

CANADA / JUDGMENT

R. v. Biring

2022 BCSC 536

COURT

Supreme Court of British Columbia

DECIDED

4 April 2022

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

2022 BCSC 536 R. v. Biring

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Biring,

2022 BCSC 536

Date: 20220404

Docket: X083412

Registry: New Westminster

Regina

v.

Gurmail Singh Biring and

Daljeet Biring

Corrected Judgment: The text of the judgment was corrected at paragraphs 8, 9, 10, 15, 18, 19, 21, 27, 29 and 40 on June 9, 2022

Before: The Honourable Justice Schultes

Ruling re: Ruling on Voir Dire #3 - Seizure of Toyota Corolla

Counsel for the Crown:

C.A. McPherson, Q.C.

C.J. Banta

Counsel for the Accused, Gurmail Singh Biring:

T.C. Paisana

G. Arnet-Zargarian

Counsel for the Accused, Daljeet Biring:

R. Mansouri-Dara

C.L. Leggett

Place and Dates of Hearing:

New Westminster, B.C.

March 14-15 and 17-18, 2022

Place and Date of Judgment:

New Westminster, B.C.

April 4, 2022

Introduction

- [1] The accused are charged with manslaughter. They are alleged to have jointly participated in a fatal assault on Lakhwinder Bal in an alley in Surrey on the evening of August 19, 2018.
- [2] This application deals with the validity of the seizure of a vehicle connected to the accused from the Pacific Highway Border Crossing by a member of the Integrated Homicide Investigation Team ("IHIT") on October 16, 2018. The officer involved, Det. Rivard, purported to rely on her authority under s 489 (2) of the Criminal Code to carry it out. The parts of that sub-section that potentially apply in this case are:

489(2) Seizure without warrant

- (2) Every peace officer who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without a warrant, seize any thing that the officer believes on reasonable grounds
 - (b) has been used in the commission of an offence against this or any other Act of Parliament; or
 - (c) will afford evidence in respect of an offence against this or any other Act of Parliament.

[Emphasis added]

- [3] The seizure formed part of the grounds to obtain a search warrant for the vehicle, which in turn yielded evidence that the Crown wish to rely on at trial.
- [4] The Crown agree that they bear the onus of justifying this warrantless seizure as a reasonable one. They also concede that the accused have a reasonable expectation of privacy in the vehicle (albeit a very minimal one in their submission), so as to give the accused standing to contest this application.

Background

- [5] The assault on Mr. Bal involved the use of a golf club. The head and shaft of the club were found in the area of the attack.
- [6] Mr. Bal made it out of the alley before collapsing on a nearby sidewalk. There was a significant amount of blood at the location of the attack and at the place where he collapsed, with a trail of blood running from the former to the latter.
- [7] Security video from an adjacent business showed the two attackers arriving and departing in a vehicle that was subsequently identified, by circulating stills from the video in a bulletin within the law enforcement community, as a grey or silver Toyota Corolla, with a model year between 2003-2010. The quality of the video was not sufficient to allow the attackers to be identified.
- [8] Daljeet Biring came to the attention of the investigators as a person who had had a previous conflict with Mr. Bal. When investigators went to his home - a ground-level rental suite in a house located a two-to-three-minute drive from the scene of the attack - they discovered that the landlords had a security video system that showed the perimeter of the house, as well as the driveway. They downloaded footage from the system and it showed Daljeet and his father Gurmail Biring leaving their suite a few minutes before the attack in a Toyota Corolla that resembled the one from the attack scene. Gurmail, who had not previously been a suspect, was seen on the video carrying what appeared to be a golf club (both that club and the one from the scene were irons, but could not be matched more closely than that) when he was leaving the suite in the direction of the driveway, and then appearing to place it in the vehicle. Daljeet was seen wearing gloves and carrying an object that resembled a crowbar when walking towards the driveway, but then appeared to return the object to the area of the suite before they left.
- [9] The vehicle, which was registered in the name of Bhagwant Biring (Gurmail's spouse and Daljeet's mother) was not seen parked at their home again after it left that evening.
- [10] Through surveillance, the investigators were able to follow Gurmail, who was driving a different family vehicle, to a storage yard in Surrey where he rented space for his transport truck. Security video downloaded from the system maintained by the storage yard showed that the Corolla was kept there from at least August 27 (there was no video available from before that date) to September 1. Daljeet and Gurmail were seen on that video moving items back and forth between the other family vehicle and the Corolla, including floor mats. On September 1, Gurmail and Bhagwant were seen leaving the storage yard in the Corolla and it was not located again until it was seized at the border on October 16.

- [11] The investigators made extensive efforts to find the Corolla, including posting a request to other police agencies be on the lookout for it, and to ICBC to notify them if it was transferred. They made a similar request to the Canadian Border Services Agency, but it was pointed out to them that this would only result in them being alerted if it returned to Canada from the United States. To cover situations in which it was leaving Canada, they would have to make a request of the U.S. Department of Homeland Security.
- [12] As I will discuss, there is an issue in this case about the manner in which the investigators obtained the security video footage from around the Biring residence and the storage yard. In both cases they did so with the consent of the property owners, rather than by obtaining search warrants.
- [13] Sgt. Nichols, the primary investigator, explained that the video from the residence was seized with the consent of the landlords, but that she has since become aware of "upgrades" in the case law relating to privacy in common areas. She was not familiar with the legal term "third party consent". There was no practice direction at IHIT on this point, she explained. Instead, such situations be dealt with on a case by case basis, and if it was felt that there was an expectation of privacy, a search warrant would be sought.
- [14] She said that in this case they had consent, and felt that it would be sufficient, but she also stressed that the decision had been made by the officers who actually carried out the seizure, and that they would be in the best position to explain it. (She was not specifically questioned about the decision to proceed by consent in the case of the security video at the storage yard, but I infer that her evidence would have been the same).
- [15] Crucially, she agreed that the footage from the residence enabled the investigators to identify Gurmail and Bhagwant as suspects and to connect them to the Corolla (Daljeet had become a suspect as of August 22, when the investigators first went to his suite to try to interview him). That video footage also became the point of origin for an assembly of images from various security video systems in the area (including from a neighbour's residence) that showed a vehicle resembling the Corolla travelling to and from the scene of the attack.
- [16] In previous applications I ruled that the accused had a reasonable expectation of privacy in the video footage from the home and the storage yard, which gave the accused standing to challenge the seizures. Because the seizures were made without warrants, they are presumptively unreasonable, and subject to being excised from the grounds for the search warrants that were subsequently obtained. As I will discuss, in this case the defence argues that the information arising from the video footage must also be excised from Det. Rivard's grounds for the seizure.

Request to U.S. Authorities and Seizure of the Corolla

- [17] Det. Rivard, a member of the Abbotsford Police Department who was seconded to IHIT, was given the task of making the arrangements with Homeland Security to place a lookout on the Corolla. This was in her capacity as the officer responsible for managing exhibits in the investigation. She phoned the Homeland Security office on September 12 and was told to send the request in the form of an email, including certain required information. She sent the email later that afternoon.
- [18] For the purposes of this application, it is relevant that Det. Rivard wrote that she was "requesting" the lookouts, and that "Homeland Security assist IHIT by flagging" Daljeet and Gurmail. If they were "intercepted IHIT respectfully ask[ed]" that the lead investigators (Cpl. (now Sgt.) Nichols, or Cst. (now Cpl.) Polspoel) be contacted. If the Corolla were to be intercepted, she requested it "be seized immediately and members will attend to take custody of the vehicle". She explained in the email that the Daljeet and Gurmail had "a history of crossing into the United States for work (truck driver) and pleasure". The Corolla was described as the vehicle that they were "believed to have used in the incident".
- [19] The offence under investigation at that time was murder. After indicating that the Daljeet and Gurmail were aware that they were under investigation, Det. Rivard wrote that "[t]o date we do not have sufficient grounds to arrest them for the incident". Brief summaries of the criminal histories of each suspect were also provided.
- [20] She testified that in her view the U.S. authorities "could have said no [that is, to IHIT's request] - any of these agencies can say no."
- [21] After sending the email Det. Rivard received a phone call from an officer at Homeland Security, who advised her that a lookout had been placed on Daljeet and Gurmail and the vehicle for three months.
- [22] Cpl. Polspoel, one of the officers named in the request, received a phone call from a Homeland Security officer on the morning of October 16. He informed her that the Corolla had been trying to enter the U.S. at the Pacific Highway crossing. It was being driven by a man named "Rick", who turned out to be Gurmail and Bhagwant's son-in-law. Cpl. Polspoel confirmed that this was the vehicle they were interested in and told the officer they would have their crime scene person come and seize it. When the officer asked her asked if they wanted to know anything about the driver, she responded that they just needed his contact information, in case he had left by the time they came to seize the vehicle.
- [23] She then contacted Det. Rivard and asked her to seize the vehicle and have it towed to a secure facility, where it could be examined.
- [24] Det. Rivard arranged for a tow truck driver to meet her near the border. Cpl. Polspoel had told her the Homeland Security officer she would be dealing with, as well as the CBSA officer she should contact when she was returning through the Canadian side.

- [25] When she spoke to the Homeland Security officer, he told her that she and the tow truck driver should use the Nexus lane to go to the border crossing, and that Homeland Security would "keep the car there".
- [26] She followed his instructions and once she and the tow truck went through the gate she saw that the Corolla was parked a short distance past it, in an angled parking space. She met with the Homeland Security officer with whom she had previously spoken, although there were several other officers present. She confirmed that the Corolla was the one IHIT was looking for by means of its licence plate and the Vehicle Identification Number that is visible through its front window, then directed the tow truck driver to hook it up. Other than looking at the VIN in the window she did not otherwise examine the vehicle.
- [27] Det. Rivard testified that her authority to seize the Corolla was pursuant to s.489 of the Code - "seize without a warrant" as she described it. She believed that the vehicle had been involved in Mr. Bal's murder, and would afford evidence with respect to it. In addition to describing the accumulated investigational knowledge that I have previously summarized, she referred to some additional information, including that:
- The investigators understood that Daljeet had actually been in conflict with Mr. Bal earlier on the same day of the fatal attack, and that his father had picked him up afterwards, making it likely that he had spoken to his father about the conflict;
 - In addition to the tips from other law-enforcement officials about the kind of vehicle that was shown in the attack scene video, she herself recognized the distinctive rear lights of that vehicle as belonging to a Corolla (of a certain vintage, I took it);
 - There was no apparent reason for the Birings to keep the Corolla at the storage yard, given the ample parking that was available in the driveway of their home, or for it to disappear completely from view from September 1 onwards;
 - Another golf club was seen "tucked in" on the driver's side of another Biring family vehicle when the investigators were executing a search warrant for Gurmail's truck at the storage yard; and
 - In a previous unrelated investigation from "several years before", Daljeet had been described standing over his wife, holding a golf club, while she was on the ground.
- [28] Less obviously related to seizing the vehicle, Det. Rivard also referred to the driver of the Corolla when it arrived at the border crossing not being its registered owner, and the fact that it could not simply be left in the secondary inspection area where she found it.
- [29] To address the defence argument about the grounds arising from the warrantless seizure of the security videos, Crown counsel also asked Det. Rivard to set out her grounds for this seizure without considering that video footage. She said that her grounds would have been very similar, and referred to:
- The video showing the Corolla at the scene of the attack;

- The tips from other law enforcement officials about its model and year range;
- Her own ability to identify it as a Corolla from the video, when comparing it to a generic photo of such a vehicle;
- The previous incidents of bad blood between Daljeet and Mr. Bal;
- The fact that the Corolla was registered to Bhagwant; and
- Its disappearance after September 1, which she did not think was "reasonable".

[30] She maintained that she "would not have done anything differently", and would still have seized the Corolla based on these more restricted grounds.

[31] She agreed with the suggestion in cross-examination that her belief that evidence would be found inside the Corolla depended on it having been at the scene of the attack, and further that if the evidence was insufficient to place the Birings at the scene then there was also insufficient evidence to say that it was this Corolla that had been involved. However, when she was describing her basis for believing that this Corolla was involved, she referred to information that did not originate from the security videos (its identification as that model and year range from the attack scene video, the previous history of conflict between Daljeet and Mr. Bal, its registration to Daljeet's mother and its mysterious disappearance) and emphasized that "we were just following the evidence we had".

[32] She explained that she obtained her grounds from a combination of her own actions and observations in the investigation, attending briefings with the rest of her team, and reviewing the minutes that were taken of meetings that she did not attend.

[33] Det. Rivard was cross-examined extensively on the absence from her notes of any reference to s. 489(2) or her grounds for proceeding under it. Her reliance on the section was not recorded until the will-say statement arising from her interview with Crown counsel the week before she testified. She maintained that she knew her powers, in particular the requirements of a seizure under that section, and rejected the suggestion that she had arrived at her grounds for the seizure after the fact, or that she had simply acted on the direction of other officers to make the seizure, without considering her own authority to do so.

[34] With respect to the suggestion that there was a contradiction between the presence of grounds to believe that the Corolla would afford evidence because the Birings committed the offence on one hand, and her assertion in the email that there were not sufficient grounds to arrest them, she explained that "you need a lot more evidence to arrest and charge". She agreed that the only additional evidence that arose after she sent the email to Homeland Security was that the investigators still could not find the Corolla.

[35] She testified that she did not think the vehicle was in the U.S. when she seized it. Her reasoning was that the car and driver had not been admitted to the U.S. and that they had to take the U-turn route that is provided for that purpose in order to return to Canada. She did

not know where exactly the vehicle was in relation to "the 49th parallel" - that is, the actual border line - or whether the Pacific Crossing facility is in relation to that line. In response to the suggestion in cross-examination that she had not turned her mind to the specific place she was in when she carried out the seizure, she said, "No I just went down to get the car." She later elaborated that she "did not for a moment" think she was in the U.S. and that she was aware that she had no lawful authority there. One of her bases for believing that she had not entered that country was that she was not required to show any documents before seizing the vehicle.

- [36] She also did not believe that she would have been able to just "drive in and seize the vehicle" without the approval of the U.S. officials.
- [37] After the Corolla was hooked up to the tow truck, they returned through the Canadian border crossing by using the U-turn route that I have previously mentioned. The driver was being held in the secondary screening area on the Canadian side. Det. Rivard's understanding was that he had been walked over there by Homeland Security officers. She was under instructions from Sgt. Nichols just to identify him and take his cellphone. She also seized his passport, which had originally been taken from him by the CBSA officers.
- [38] The Corolla was then towed to a secure bay at an RCMP facility in Surrey, with Det. Rivard following the tow truck in her vehicle to maintain continuity. She stayed with the Corolla until the search warrant was obtained for it.

Positions

- [39] Crown counsel makes the following essential points:

- The email from Det. Rivard to Homeland Security could never have been more than a request, given that the U.S. officers were not subject to Canadian laws and could not have been required to carry out the seizure. The analogy to individuals who act as agents of the police is inapt here, because these officers were not subject to direction;
- It is a fundamental principle that the Charter does not apply to the investigations of Canadian investigators in other jurisdictions unless the foreign state consents, which did not occur in this case: *R. v. Hape*, [2007] S.C.R. 292 at para. 69;
- More specifically, foreign authorities acting on information-gathering requests by Canadian authorities in their own states do not thereby infringe the Charter: *Schreiber v. Canada (A.G.)*, 1998 1 S.C.R. 841 at paras. 31-32;
- There were ample grounds to believe that the Corolla was involved in the offence and would afford evidence with respect to it, and Cpl. Rivard clearly took into account all of the relevant information that had been gathered in the investigation up to that point to form her grounds. It would be utterly artificial to require that she rewrite all of the investigative steps as of the point of the seizure in her notes in order to demonstrate her reliance on them. She was not shaken on her strong assertion that she knows her grounds for seizing exhibits and specifically relied on s.

489(2);

- With respect to the impact of the security video from the Biring residence on the storage yard on these grounds, considered authority in this province has rejected the application of the rule of automatic exclusions of evidence gained by Charter breaches that applies to reviews of the grounds for search warrants to grounds for arrest: *R. v. Flintroy*, 2019 BCSC at paras. 46-47. The same analysis should be applied to grounds for a seizure under s. 489(2), as it has been in Ontario: *R. v. Merritt*, 2019 ONSC 1508 at paras. 113 and 114;
- This is certainly not a situation in which the investigators made warrantless seizure of that video evidence knowing that it was unauthorized - the law relating the reasonable expectation of privacy in the areas viewed by the cameras was in a state of flux at the time, as was the distinction between seizures of physical objects that provide evidence in themselves and those that contain information within them, such as computers; and
- The situation facing the investigators here was a dynamic one. The Corolla was outside of Canada and they were relying on the good graces of Homeland Security to hold it. The option of leaving the vehicle there was untenable, so it is difficult to see what else they could have done but seize it and return it to Canada, where the legal concept of seizure under the Code would take effect[1]. Once Det. Rivard was in the secondary holding area on the Canadian side, all of the conditions for a lawful seizure under s. 489 were met.

[40] The essential defence points can be distilled as follows:

- The *Schreiber* decisions does not exempt Homeland Security's role as IHIT's agent from Charter scrutiny because the Crown has not proven that the seizure occurred outside of Canada - the Homeland Security officer who refused the Corolla's driver admission into the U.S. and directed him to their secondary area did not give that direction before the driver had actually left Canada;
- Agency in this context does not require a formal agreement. It is sufficient that the agent did something for law enforcement purposes that they would not otherwise have done: *R. v. M. (M.R.)*, [1998] 3 S.C.R. 393 at para. 29; *R. v. Buhay*, [2003] 1 S.C.R. 631 at para. 36. In this case there is no basis to believe that the Corolla would have been refused entry or otherwise detained without IHIT's request;
- Under this analysis, the Corolla was action seized as a result of Cpl. Polspoel's direction in her phone call with Homeland Security, without her being present at the place of seizure, as s. 489(2) requires, and based on grounds that are not in evidence on this application;
- To the extent that Det. Rivard's grounds enter into the analysis at all, her claim to have formed them in relation to this seizure must be fatally undermined by her failure to refer to them, or to proceeding under s. 489(2), in her notes. The duty of police officers to take sufficient notes is well-established, as are the negative inferences that can arise about their evidence when they fail to do so in relation to an important matter. The absence of any reference to these important matters in Det. Rivard's notes also contrasts sharply to her detailed notes of numerous other aspects of her investigation that day.

- What appears more likely, given her repeated references to not having been one of the decision-makers in the case, is that she was simply following instructions in carrying out the seizure, rather than considering her own authority to do so. A further indication of this is her failure to consider the specifics of her location and whether as a result she was "lawfully in a place" - in other words, in Canada - for the purposes of the section;
- Det. Rivard's claim to have had the necessary grounds to believe that the Corolla was involved in the offence or would afford evidence with respect to it, which she conceded was linked to her belief that Daljeet and Gurmail had been its occupants, also cannot co-exist with her indication in her email to Homeland Security that as of that date IHIT lacked the necessary grounds to arrest them. No meaningful additional evidence was acquired between the date of that email and the seizure;
- With respect to excision from Det. Rivard's grounds, the defence points out that Flintroy and the decisions that have followed it all dealt with grounds for arrest, not with search and seizure issues. The key distinguishing factors relied on in Flintroy - the volatile and rapidly changing circumstances of an arrest, and the separate provisions of the Code that deal with that power - are not engaged in circumstances like the present one. In cases of seizure, the governing B.C. authority is *R. v. Bartoli*, 2003 BCSC 1888 at para. 44, in which grounds to arrest an accused that had been obtained by a search that went beyond the officer safety component of an investigative detention could not be considered in order to justify the arrest.

Discussion

- [41] I have concluded that it is unnecessary to resolve the questions of whether Det. Rivard actually relied on s. 489(2) to carry out the seizure or, if she did, whether her grounds for doing so must have the video evidence from the Biring residence and the storage yard excised from them. This is because the application can be decided on a narrower basis.
- [42] As a preliminary issue, I have no difficulty drawing the inference that the Homeland Security officers who directed the Corolla and its driver to park in the location from which Det. Rivard later seized it gave their initial direction when both they and the Corolla were in the U.S. It is unfortunate that an admission of fact was not arrived at to establish the specific location of the international border for the purposes of this application, but purely as a matter of common sense I cannot conceive of how U.S. border officials could purport to exercise their authority over vehicles and their occupants who seek entry to the U.S. unless both the officials and the would-be entrants are situated within the territorial jurisdiction that gives the officials that authority.
- [43] This finding makes it unnecessary to consider whether the request emailed by Det. Rivard to Homeland Security put them in the role of IHIT's agents. In accordance with the principle explained in *Schreiber*, the assistance of officials in another country to gather evidence at the request of Canadian law enforcement does not engage the Charter.

- [44] Most importantly, there is no dispute that Det. Rivard was in the United States when she actually seized the vehicle, and that as a result s. 489(2) did not apply to authorize her actions. This lack of territorial jurisdiction is even more fundamental than the question of whether she was thereby "lawfully present in a place" as the sub-section requires. The Crown argues that the seizure "crystallized" when she returned to Canada in possession of the vehicle - in other words, that her powers under that subsection were invoked once they applied. The difficulty is that, assuming that she turned her mind to her authority under s. 498(2) and the grounds in support of her exercise of it, she did so only at the point of seizure, and did not purport to reconsider or reapply them when she and the Corolla had crossed back into Canada. Indeed, her evidence was that she did not consider herself to have been in the U.S. when she carried out the seizure.
- [45] On a purely conceptual level, I cannot see how a seizure that is carried out without its underlying territorial jurisdiction can crystallize into a valid one solely by the item in question then being returned to Canada, and the Crown has not referred to any decisions that would support such an approach. While it is true that the Charter did not apply to Det. Rivard's actions in the U.S., the point is that once she returned to Canada she was in possession of the Corolla without having seized it pursuant to any valid authority. It does not assist to say that she could have re-seized it in Canada. Because she never accurately put her mind to where she was when she initially seized it, she did not seek to exercise that authority on the Canadian side.
- [46] How serious a breach that was remains to be litigated, but for the purposes of this application, I am unable to find that the Corolla was seized pursuant to s. 489(2) of the Code, in the sense of Det. Rivard having applied that section to her actions, at a location in which she had the authority to do so. The warrantless seizure has therefore not been justified pursuant to any lawful authority.

"Schultes J."

- [1] The availability of measures under international legal assistance legislation was not canvassed.

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/22/05/2022BCSC0536cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-biring-2022-bcsc-536>

Prepared on 26 October 2026 · Esheria