

CANADA / JUDGMENT

R. v. Biring

2022 BCSC 925

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2022 BCSC 925 R. v. Biring

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Biring,

2022 BCSC 925

Date: 20220603

Docket: X083412

Registry: New Westminster

Regina

v.

Gurmail Singh Biring and

Daljeet Biring

Corrected Judgment: The text of the judgment was corrected at paragraph 3 on June 9, 2022

Before: The Honourable Justice Schultes

Ruling on Additional Excisions and Sufficiency - DNA Warrants

Counsel for the Crown:

C.A. McPherson, Q.C.

C.J. Banta

Counsel for the Accused, Gurmail Singh Biring:

G. Arnet-Zargarian

Counsel for the Accused, Daljeet Biring:

R. Mansouri-Dara

C.L. Leggett

Place and Dates of Hearing:

New Westminster, B.C.

May 16-18, 2022

Place and Date of Judgment:

New Westminster, B.C.

June 3, 2022

Introduction

- [1] Daljeet and Gurmail Biring are charged with manslaughter arising from their alleged joint participation in a fatal assault on Lakhwant Bal on August 19, 2018. Warrants for bodily substances for DNA analysis in relation to both of them were issued by a provincial court judge on May 28, 2020, and later executed.
- [2] In this application they are seeking the excision of what they argue are conclusory statements in the informations to obtain those DNA warrants (the "ITOs"), which were written by Cpl. Lavallee of the Integrated Homicide Investigation Team ("IHIT"). They contend that when those excisions are combined with the ones that the Crown has already agreed to make in light of previous rulings in this case, there is no longer a sufficient basis on which the warrants could have issued.

Summary of the ITOs

- [3] As I will discuss further, more information has been excised by consent from Gurmail's ITO than Daljeet's, because one of the previous rulings dealt only with Gurmail's privacy interests. Despite this, both ITOs have the same basic structure and essential remaining components. I will summarize what appear to be the most important of these components.
- [4] The fatal assault on Mr. Bal was carried out in an alley off of 96 Avenue in Surrey. The alley runs between several businesses and the parking lot of a McDonald's. There was a hedge along the edge of the McDonald's parking lot.
- [5] Mr. Bal was a person with substance use issues, who frequented the Berezan Liquor Store on 96 Avenue and lived in the hedge that I have described. One witness described him as being prone to engage in arguments and fights when he was intoxicated. The toxicology report from his autopsy showed a blood-alcohol level that would have led to severe intoxication on his part.

- [6] Witnesses saw the person who turned out to be Mr. Bal speaking on a cellphone in the McDonald's parking lot and then going behind the hedge into the alley.
- [7] Witnesses then heard male voices arguing in the alley, after which the shaft of a golf club came flying over the hedge and landed in the parking lot. Mr. Bal walked out of the alley and fell to the ground, bleeding profusely from a wound to his neck, which proved to be fatal shortly afterwards. A 911 call was placed at 8:55 p.m.
- [8] A blood trail led back into the alley from the place that Mr. Bal had collapsed, to an area where there were also blood spatter stains against the wall of a business. The head of a golf club was found in the alley.
- [9] The pathologist who performed the autopsy on Mr. Bal found that the cause of his death was a stab wound to the neck. The nearly circular nature of that wound, as well as of another of a non-fatal wound in the same area, led Cpl. Lavallee to express the belief that it was consistent with having been inflicted by the shaft of a golf club. The same was true of the shape of bruising to M. Bal's chest.
- [10] Forensic analysis was able to identify mixed DNA profiles of Mr. Bal and two other unknown individuals on the golf club's shaft and head, as well as a "single source, partial profile" from the "shaft/handle area" of the shaft.
- [11] Security video from a nearby business called No Frills showed a silver or grey four-door sedan travelling north in the alley at the relevant time. Its specific make and model could not be "confirmed" based on the video, and its licence plate number could not be seen. A person who is believed to be Mr. Bal walked into the alley, two "individuals" got out of the sedan, and the three of them then had some kind of interaction, which involved "lots of motions". Mr. Bal walked out of the alley and east on the sidewalk. The occupants of the sedan got back into it and it reversed south out of the alley - in the direction from which it had come. All of these observations were recorded between 8:52 and 8:55 p.m. on August 19. Cpl. Lavallee wrote that "I have viewed the video and I believe that this vehicle is the Toyota Corolla". As I will discuss, the Biring family had a vehicle of that make and model, and Cpl. Lavallee used the term "the" Toyota Corolla to refer to their vehicle in the ITOs.
- [12] The investigators submitted stills of the vehicle shown in this video to a police intelligence centre that disseminates such information to officers throughout the province. On August 23, two officers responded by identifying the vehicle as a Toyota Corolla.
- [13] Daljeet is Gurmail's son. At that time Bhagwant Biring, who is Daljeet's mother and Gurmail's wife, was the registered owner of a grey 2007 Corolla. Cpl. Lavallee asserted that, based on his "review of numerous images of vehicles on the internet", he believed that the suspect vehicle is a "silver or light coloured vehicle" that "matches" Ms. Biring's vehicle. Earlier in the ITO, during his summary of the video evidence from the alley, he had asserted his belief that the "four door sedan" that the two individuals were recorded getting into "was the 2007 Grey Toyota Corolla registered to Bhagwant "

- [14] At that time Daljeet, Gurmail and Bhagwant lived in a basement suite in the 12800 block of 96B Avenue.
- [15] Video footage from other sources captured what Cpl. Lavallee described as the "the suspect vehicle" around the time of the fatal incident with Mr. Bal.
- [16] The alley can be accessed from 128 Street. At 8:51 p.m. (before the incident) this vehicle was recorded by a camera at Sanjha Punjab Sweets entering the alley, after travelling "from the north" (that is, southbound) on 128 Street. The suspect vehicle was recorded leaving the alley to travel northbound on 128 Street again at 8:55 p.m., after the incident. Cpl. Lavallee added that he had viewed the video and believed "that this vehicle is the Toyota Corolla".
- [17] According to the report of Cst. Ip, the IHIT officer who reviewed the video evidence that was obtained in the investigation, the camera at the Berezan Liquor Store showed a Corolla "matching" the Birings' vehicle travelling west on 96 three times just before the incident - once at 8:43 and twice at 8:50. During the passes at 8:50 Mr. Bal could be seen on the video in the liquor store parking lot. Cpl. Lavallee expressed the belief that Daljeet and Gurmail were looking for Mr. Bal at that point.
- [18] Cameras maintained by the City of Surrey also showed movements by the suspect vehicle before and after the incident. Cpl. Lavallee wrote that Cst. Ip "used the video surveillance from McDonald's Restaurant and the Berezan Liquor store to assist identifying the Corolla." (There is no other reference to video from McDonald's in the ITOs) At 8:48 p.m. it drove west on 96 Ave and turned right onto Prince Charles Boulevard, then at 8:50 came back towards 96 on that street and turned to go west again on 96. At 8:51 it was seen proceeding west on 96 but then turning south on 128, which is in the direction of the entrance to the alley off of 128. After the incident, at 8:56 and 9:08, it was seen proceedings north on 128, "through" 96.
- [19] Potentially of the greatest importance, the security camera of a neighbour of the Birings on 96B Avenue recorded a Toyota Camry backing out of the Birings' driveway and parking on 96B Avenue. The driver then got into a Toyota Corolla in the driveway and it departed west on 96B, at 8:45 p.m. Cpl. Lavallee asserted that Cst. Ip "completed an analysis" of this video surveillance and indicated in his report that the "video time stamp is 15 minutes ahead of real time". The time of the Corolla's departure in relation to the incident with Mr. Bal that is relied on in the ITOs is based on the adjustment from the time stamp to the actual time.
- [20] Results of the investigators' analysis of cell phone records do not advance the grounds in any significant way. The records included a call from the phone associated to Daljeet to one associated to Gurmail at 5:17 p.m. on August 19, as well as six calls from Gurmail's phone to Daljeet's from 2:32 to 4:58 that afternoon. There were also calls exchanged between those phones on August 9, the day that Daljeet described having been assaulted by Mr. Bal. The only call among the accused and Bhagwant around the time of the incident was a call from Bhagwant's phone to the one associated to Gurmail, at 9:40 p.m.

- [21] The investigation revealed a history of conflict between Mr. Bal and Daljeet. On August 9 they had a confrontation during which Mr. Bal assaulted Daljeet with a piece of wood and robbed him of a small amount of money and his transit card. Daljeet described this incident in his first statement to the police.
- [22] There was evidence of a further confrontation between Mr. Bal and Daljeet in the afternoon of the day of the homicide. Daljeet described Mr. Bal holding up a piece of wood and threatening to "finish the job I started to beat you up and kill you". The catalyst for this, according to Daljeet, was his refusal to provide Mr. Bal with beer when Mr. Bal approached him at the liquor store. He then called his father Gurmail to pick him up.
- [23] A witness to this confrontation, Balbir Sahl, said that Daljeet threatened that he was going to make Mr. Bal "pay". Mr. Sahl told Daljeet that it was not worth the argument and they left the area. In his post-arrest police statement Daljeet said "I wanted to do him in, right?" in relation to Mr. Bal, but decided that it was not worth it. Video from the liquor store that was recorded at 3:52 p.m. on August 19 shows Mr. Bal outside of it, holding a black object and appearing to gesture towards Daljeet and another male to leave.
- [24] Mr. Sahl described Daljeet then being picked up by his father. Cpl. Lavallee expressed the belief that this "speaks to the motive" for Daljeet and Gurmail "to later return to the crime scene on August 19, 2018, and commit the [o]ffence."
- [25] With respect to alternative suspects, a witness to the August 9 confrontation, Rajinder Yadav, owned a light brown 2010 Corolla that was similar in appearance to the suspect vehicle. Another officer "determined" that it was not the suspect vehicle by comparing it to the still images from the No Frills video. In addition, Mr. Yadav's wife advised the investigators that she had driven their vehicle to work on August 19, and had not returned home until 9:05 p.m.
- [26] One witness heard Mr. Bal make comments while he was on his phone before the incident that could be interpreted as issuing or responding to an offer to engage in a fight. However, the records from his phone do not indicate any calls on it during the period corresponding to the arrival of his attackers. According to those records, his last call was at 8:40 p.m., to a number that may possible have been a dial-a-dope line. At 8:34 p.m. his phone called another number that investigators believed was "likely a drug dealer phone number".
- [27] Cpl. Lavallee referred to some evidence of what could potentially be characterized as post-offence conduct by the accused.
- [28] In Daljeet's first statement to the police he said he called Gurmail for a ride after this incident, and that after his father picked him up they arrived home between 5:00 and 6:00 p.m. He said that he did not leave his home again that evening.

- [29] In his post-arrest statement, he said that they arrived home between 4:00 and 5:00 p.m. and that he left the home again, after Gurmail had already left. He did not know where Gurmail had gone, but thought that he might have slept in his tractor trailer unit, which had a double bunk.
- [30] In that statement Daljeet initially said he was with a couple of friends who lived near the liquor store, and had returned home at 10:45 p.m. He later said that he walked along 128 street and was picked up by a friend who was driving by, who asked him if he wanted to go for beers. They arrived at the liquor store 102 Avenue and 128 Street at 10:45 p.m. and he returned home at 1:40-1:45 a.m. Cpl. Lavallee pointed out that there was no liquor store at that location.
- [31] Following her arrest in October, Bhagwant gave a warned statement in which she advised the investigators that neither Daljeet nor Gurmail came home on the night of the incident.
- [32] On September 3, both accused were captured on video buying items at a Canadian Tire store that included an upholstery cleaning product, which Cpl. Lavallee said he believed was used to clean Mr. Bal's blood from the Corolla.
- [33] Security video from Seaboard Storage, a "secured storage parking lot" for which Gurmail had an access fob showed the Corolla stored there from August 27 to September 1. On August 27 Gurmail attempted to start the Corolla. On August 30 he removed the floor mats from his Camry and placed them in the Corolla. On September 1 he jump-started the Corolla and he and Bhagwant left the yard in it. They returned later that day in a Suzuki 4x4 vehicle and left in the Camry. Cpl. Lavallee attached significance to the fact that Gurmail moved the Corolla out of the lot two days after the investigators executed a search warrant at the Birings' home. (These paragraphs were excised from the ITO relating to Gurmail and so are admissible only against Daljeet.)
- [34] A five iron golf club was later found in the Suzuki during a police search. In her statement to the police, Bhagwant said that Gurmail kept a golf club in his truck and in another vehicle for "safety".
- [35] On September 25, Gurmail and Bhagwant's son-in-law took the Corolla to a car detailing service in Surrey and had it cleaned. On October 16, he attempted to enter the United States in the Corolla, at the Pacific Border crossing. A search of his cell phone revealed text messages in October demonstrating his attempts to sell the Corolla.
- [36] By consent, sections of the ITOs describing evidence that was obtained from security video of the perimeter of the Birings' home and the seizure of the Corolla by investigators from the US border have already been excised. The Crown's consent to those excisions was based on my previous rulings that Daljeet and Gurmail had a reasonable expectation of privacy in the home security video, which was seized without a warrant, and that the Crown was unable to justify the warrantless seizure of the Corolla pursuant to s. 489(2) of the Criminal Code. The Crown also fairly agreed themselves that certain statements in the ITOs were conclusory.

Additional Excisions and Sufficiency

Defence

[37] In overview, the defence argues that the three main pillars giving rise to a credibility-based probability that information would be obtained by means of these warrants are that:

- 1) the suspect vehicle was a Corolla;
- 2) the Birings owned a Corolla that matches it; and
- 3) the Birings' Corolla left their residence at a time that was consistent with attendance at the location of the incident.

[38] Beyond that, there is the evidence of animus towards Mr. Bal, by Daljeet, the association between Daljeet and Gurmail and (admissible against Daljeet only) Gurmail carrying out actions in relation to the Corolla at the storage yard.

[39] The defence says that even as they presently stand the ITOs cannot support the issuance of the warrants. They do not place Gurmail at the scene or within the Corolla at all, and the only additional grounds in relation to Daljeet are a degree of animus on his part towards Mr. Bal and the activities relating to the Corolla at Seaboard Storage (which the ITO does not describe him participating in).

[40] In any event, the defence submits that when the further necessary excisions are carried out, as summarized below, it is clear that the pillars on which the ITOs rest are no longer present.

The identification through the police intelligence centre of the vehicle depicted in the video of the incident as a Toyota Corolla

[41] Cpl. Lavallee cited a report describing that two officers made this identification, but there was no indication of how those officers did so, or their training or experience in identifying vehicles.

The references to the suspect vehicle as "the" Toyota Corolla in the descriptions of the Sanjha Punjab Sweets, 96B Avenue neighbour and City of Surrey videos

[42] He offered no basis for his statement of belief in relation to No Frills or Sanjha Punjab Sweets videos that the vehicle depicted is "the" Corolla. The video from the 96B neighbour offers no basis for its description of the Corolla either. In his report on the City of Surrey videos, Cst. Ip said that he relied on the "assistance" of video from the McDonald's and the Berezan Liquor Store. However, there is no other reference in the ITOs to McDonald's having any relevant video available, and Cst. Ip's report on the Berezan Liquor Store video referred only to a Corolla "matching" the Biring's vehicle.

Cpl. Lavallee's assertions of belief that the Birings' vehicle is or matches the suspect vehicle, and his exclusion of an alternative suspect vehicle

- [43] His statement of belief that the "four door sedan" captured in the No Frills video "was the 2007 Grey Toyota Corolla registered to Bhagwant" is not supported with any subsequent sourcing. His statement, following his review of the No Frills video "that the suspect vehicle is a silver or light coloured Toyota Corolla that matches the Toyota Corolla" is not accompanied by any details of the "numerous" images of vehicles that he said he had searched on the internet in order to lead him to this belief, or a description of any training or experience he may have in making such identifications.
- [44] His other references of this kind were bereft of any descriptive details, either of the Birings' vehicle or the suspect one, that would explain the asserted match. A good example is the absence of any reference to the model year of the vehicle identified in the No Frills video, in comparison to the Birings' known 2007 model.
- [45] Similarly, Mr. Yadev's Corolla was eliminated from consideration based on the "determination" by another officer that it did not match the No Frills video (although in fairness there was also its differing colour and his wife's statement that she was using it for work).

The timing of the 96B neighbour's video

- [46] There is no basis for the assertion by Cst. Ip that it was "15 minutes ahead of real time", such as a description of the steps that he took to confirm its relationship to some independently accurate source.

The motive ascribed to Gurmail to return to the crime scene and commit the offence

- [47] Picking up Daljeet from the location of his confrontation with Mr. Bal on the afternoon of August 19 provides no basis, other than speculation, that Gurmail later wished to engage in an attack on Mr. Bal.

Cpl. Lavallee's statements of belief that Daljeet and Gurmail were in the Corolla at crucial points

- [48] In addition to his comments about the significance of the footage of the Corolla driving on 96 Avenue before the incident, he repeated that belief in his summary of his grounds at the end of the ITOs, and also expressed the belief that they drove to the crime scene to carry out the attack. Once again, there was no actual evidentiary basis present in the documents on which those assertions could be based.

Crown

- [49] In contrast, Crown counsel stresses the importance of considering the information disclosed in the ITOs as a whole, and not microscopically parsing out individual portions, which is the artificial approach being urged by the defence. What appears on a narrow examination to be conclusory may well end up, after the required broadly-based analysis, being supported by the totality of the evidence disclosed. The Crown submits that the real question is what reasonable inferences are available once the totality of the ITO's contents have been properly considered.
- [50] The defence position that more detail should have been included by Cpl. Lavallee also does not take into account that the processing of seeking a warrant is not a trial, and that including every possible detail would lead to a document of unworkable length. As it was helpfully expressed by Justice Romilly in *R. v. Adam*, 2006 BCSC 200:
- 29 If affiants were required to exhaustively set out the basis for every statement, including those relying on the work of other, sometimes anonymous fellow officers, the wiretap authorization process would be cumbersome indeed. It is certainly available to the issuing judge to challenge any statement and trace it back to first principles, but this right will not always be exercised.
- [51] For example, Cst. Ip's report on the 96B neighbour video is something that Cpl. Lavallee should have been able to cite and rely on without further elaboration. More importantly, Cst. Ip's relation of the time recorded in the video to the actual time of the events being recorded must be read in light of the introductory statement in that paragraph that he "completed an analysis" of the video surveillance from that location, which surely must support a reasonable inference that he took appropriate measures to verify the time it had recorded. This is also the analysis that should apply to the officers who responded to the circulation of the stills of the scene vehicle - Cpl. Lavallee should have been able to incorporate the results of the report describing that process, without having to minutely describe the specific responses that were provided.
- [52] Addressing Cpl. Lavallee's identification of the Corolla from the video footage at the scene of the incident on the basis of the entire ITOs, Crown counsel points out the significant overall body of evidence from which the authorizing judge could have drawn inferences, which "all goes into the hopper" when considering the extent to which Cpl. Lavallee's belief has been supported. This includes the identification of the suspect vehicle by the officers responding to the circulation of the stills as a Toyota Corolla, the 96B neighbour footage of the Corolla leaving the Biring residence, its presence in the area surrounding the incident, its physical features, Bhagwant's ownership of such a vehicle, and Daljeet's animus towards Mr. Bal.
- [53] The same analysis applies to Cpl. Lavallee's belief that "the suspect vehicle is a silver or light coloured Toyota Corolla that matches the Toyota Corolla". The entire body of evidence pointing to the involvement of the accused and their family vehicle was available to the authorizing judge to support an inference in keeping with that asserted belief.

- [54] Considering the totality of the evidence identifying the Corolla as the vehicle at the scene of the incident, the significance of the very recent conflict between Daljeet and Mr. Bal, and the weight that can be given to the post-offence conduct, such Daljeet's inconsistent explanations about his whereabouts after the incident and Bhagwant's statement that neither accused came home that night, Crown counsel submits that there is an ample basis on which both warrants could have issued.

Discussion

Applicable Principles

- [55] An authorizing judge (or justice, depending on the nature of the application) who is presented with an information to obtain a warrant must determine if the facts on which the affiant has based their belief are reasonable. If those facts are not disclosed in the information, then the judge cannot verify the reasonableness of the affiant's belief. The affiant's mere statement that the grounds exist is insufficient: *Restaurant Le Clémenceau Inc. v. Drouin*, [1987] 1 S.C.R. 706 at para. 7.
- [56] Accordingly, "mere opinion and conclusion and inference do not in and of themselves afford the basis for the issuance of investigative orders where such are entirely unsupported by reported facts together with their sources": *Criminal Code, Re*, [1997] O.J. No. 4393 (Ont. Div. Ct.) at para. 10.
- [57] The question of whether the grounds have been sufficiently disclosed, and whether a particular statement is conclusory, must be considered in the context of the entire body of material that was before the authorizing judge, including reasonable inferences that were available to the judge based on what was disclosed: *R. v. Grant*, (1999) 117 O.A.C. 345, leave to appeal refused [1999] S.C.C.A. No. 168.
- [58] The cases often speak of the "excision" of statements in an ITO that are not supported by facts, in a manner analogous to the required excision of evidence obtained by constitutional violations and false and misleading statements. Counsel have described this application in that manner, although they agree that it would be equally correct to say that such information should be disregarded in the review process.
- [59] I think it is most accurate to say that unsupported conclusory statements in an ITO are incapable of contributing to the grounds for the warrant's issuance, rather than that they must be formally excised like other kinds of improperly-generated content. That was the approach taken in the frequently-cited decisions of this Court of *R. v. Sunner*, 2017 BCSC 2445 and *R. v. Belanic*, 2019 BCSC 1411.

- [60] In this respect, the analysis of whether there are conclusory statements in an ITO is closely related to the consideration of the overall sufficiency of the grounds that it contains. On the ultimate question of whether there remains a reliable evidentiary basis on which the warrant could have issued (the classic reference being *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at para. 56), unsupported statements cannot contribute to that basis.
- [61] Finally, a distinction should be drawn between unsupported factual statements by the affiant, including statements of belief in certain facts, and the affiant's statements about the significance of the evidence that has been gathered, in relation to the theory of the investigation and the grounds for issuing the warrant. Statements relating to the theory of the investigation are provided intentionally, in order to assist the reviewing judge, and are self-evidently dependent for their value on the facts that have been provided to support them. When confined to that purpose, they are appropriate and necessary, as Criminal Code, Re: makes clear:

10 In some cases, notably cases with a relatively simple factual underpinning, the disclosure of learned facts with investigative sources will suffice to provide the judicial reader with a sense of the theory of the investigating authorities. It is in light of the theory that the court must consider whether issuance of the orders is justifiable and warranted. In a case of greater complexity, based upon an affidavit/information of some length and complexity, there exists a greater obligation on the draftsman to assist the reader in understanding how persons and places and the sub-transactions described relate to the authorities' investigative theory regarding criminal complicity and such other matters as may be relevant to the respective applications. In cases of greater complexity, the meaning of the factual assertions is assisted by a statement of the affiant as to his or her opinions and conclusions in the sense of investigative theory and inferences in order to serve as a guide to the reading of the application. Where the investigative conclusions or theory are clearly expressed or codified at the outset of the affidavit/information by way of overview, the reader has a useful index or guide in order to determine whether the remainder of the document contains investigative facts with related sources, of sufficient credibility and cogency, to support the investigative theory which is inextricably linked to the necessity for the orders sought

[Emphasis added]

Contentious Passages

- [62] At the outset I should note that the Crown is quite correct, as Grant explains, that the entire body of evidence in an ITO, including reasonable inferences that were available to the authorizing judge based on that evidence, must be considered on a review. Despite this, there is an important difference between finding support for an apparent conclusory statement in the overall material, which is quite proper, and seeking to rely on an accumulation of conclusory statements to advance the desired propositions, which is clearly not. Put another way, one unsourced factual statement cannot support another.

[63] Applying the principles that were summarized above, I have reached the following conclusions about the contentious passages:

The identification through the police intelligence centre of the vehicle depicted in the video of the incident as a Toyota Corolla

[64] Although its potential weight is certainly diminished by the absence of detail of what specifically the two police officers recognized about the suspect vehicle in the stills that were circulated, the fact that these two officers responded to the stills with their opinions about the make and model of the vehicle shown in them is still some evidence that they recognized it as having sufficiently similar characteristics to a known type of vehicle to lead them to express their opinions. It is also quite possible that they did not provide any further details in their responses to support the opinions that they had expressed.

[65] Unlike specialized kinds of expertise, which are meaningless without explanation, recognizing familiar objects such as types of vehicles is a commonplace activity. Like all lay opinion, it is merely a compendious way of describing the bundle of individual facts that go to make up the recognition. Unpacking those individual facts for an authorizing judge is certainly preferable, but the judge in this case was still left with some basis on which to assess the origins of this information, for what it was worth.

The references to the suspect vehicle as "the" Toyota Corolla in the descriptions of the Sanjha Punjab Sweets, 96B Avenue neighbour and City of Surrey videos

[66] Cpl. Lavallee's statement of belief that the vehicle depicted in the Sanjha Punjab Sweets video is the Corolla is really an opinion to that effect. As such, it is on the same footing as the responses by other officers to the circulation of the stills. It is deprived of weight because of the absence of accompanying detail, but is still of some supporting value, as a reflection of the commonplace process of recognizing a type of vehicle, which falls well within non-expert experience.

[67] The reference to the Toyota Corolla in the 96B neighbour video was not explicitly described as a statement of opinion by Cst. Ip, but I think such a belief can reasonably be inferred from the description that the officer "completed an analysis of the video surveillance" at that location. As a result, it is capable of supporting the officer's description of that type of vehicle, but its weight is similarly diminished by the lack of further details.

[68] In contrast, the City of Surrey videos purport to rely at least in part on video from McDonald's, which is not otherwise referred to in the ITOs, so there is no clear basis on which the authorizing judge could have been satisfied that Cst. Ip was engaging in the straightforward recognition of a vehicle with which he was familiar. I think this is true even though the officer also relied on his report analyzing the Berezan Liquor Store video, in which he had described the Corolla depicted as "matching" the Birings' vehicle, to assist him in his identification. The City of Surrey videos therefore cannot be relied on to support the grounds.

Cpl. Lavallee's assertions of belief that the Biring's vehicle is or matches the suspect vehicle, and his exclusion of an alternative suspect vehicle

- [69] Standing alone, the assertion of belief that the four door sedan captured on the No Frills video "was the 2007 Grey Toyota Corolla registered to Bhagwant" is of no value. The question is whether it acquires some supportive substance when viewed in the context of Cpl. Lavallee's subsequent statement of belief in relation to what is depicted, based on his review of "numerous images of vehicles on the internet", that it is a "silver or light coloured" Corolla that "matches the Corolla".
- [70] As in the case of the previous challenged passages, some description of the internet review process would have been desirable, but I think there was still a reasonable inference available to the reviewing judge that the images reviewed would have been of similar vehicles, or the process would have been pointless for him to engage in. Similarly, while defining it more precisely would ahead added a welcome degree of clarity, it is sufficiently clear, in the context of the entire document, that "the" Toyota Corolla means the Birings' vehicle.
- [71] The real problem with this passage is that, as worded, it is not clear what Cpl. Lavallee is actually asserting. Specifically, one is driven to question how a review of numerous images led to a conclusion about the type of vehicle that is shown in the No Frills video and that it matches the Birings's vehicle. If images had to be compared with the video just to determine what make and model it was, how could the video then be sufficient to "match" the Birings' Corolla? No authorizing judge could reasonably have drawn the requested inference from this incoherent and self-contradicting description, and so it cannot be accorded any weight. The previous bare assertion that the video shows the Birings' vehicle therefore finds no support in this passage and must also be disregarded.
- [72] Cpl. Lavallee's subsequent blunt assertion of belief that, based on his review of the No Frills video, the vehicle that reversed south in the alley was the Corolla, must also suffer the same fate. Unlike some of his other statements of belief, which can be treated as lay opinion evidence that the depicted vehicles and the Corolla are the same, this statement must contend with the other evidence that the video had to widely circulated to generate opinions from other officers about even its make and model, which the ITO says could not be determined from the video itself until the responses to the circulated stills were received. As I have described, it appears that Cpl. Lavallee resorted to images of other vehicles on the internet for the same purpose. The inferences to be drawn from the evidence in the ITO are of course for an authorizing judge to determine, but a judge could not have acted reasonably by preferring such an unqualified assertion in the face of other evidence that clearly showed the limitations of the No Frills video in the investigation. As a result, this passage cannot be relied on either.

[73] Finally under this heading, when viewed in the overall context of the differing colour of Mr. Yadev's Corolla from the suspect vehicle, and his wife's explanation for its whereabouts at the time of the attack, the investigators elimination of it from consideration as the suspect vehicle was amply supported.

The timing of the 96B neighbour video

[74] Unlike simply recognizing a vehicle with which one is familiar, establishing the relationship between the time recorded by a video system and the actual time at which the events depicted are portrayed is a technical process, one that does not fall within the realm of common sense and ordinary human experience. Cst. Ip's conduct of an "analysis" of the recordings cannot be inferred to have included such a process. The bald assertion about the time is therefore not something that the authorizing judge would have been able to assess and weigh, without a description of the actual steps involved. Consequently, it cannot be relied on.

The motive ascribed to Gurmail to return to the crime scene and commit the offence

[75] This is simply a description of an aspect of the investigative theory which, as I have previously described, is useful for an affiant to engage in. It is not an assertion of fact in itself, of the kind that needs to be disregarded. In fact, it is quite plausible on the available evidence to infer that after picking Daljeet up, Gurmail was informed of the threats that Daljeet had just received from Mr. Bal and, in light of the previous assault on Daljeet, decided to participate in retribution against Mr. Bal for his actions. It does not need to be disregarded.

Cpl. Lavallee's statements of belief that Daljeet and Gurmail were in the Corolla at crucial points

[76] Once again, these are also simply assertions of the investigative theory, plausible for Cpl. Lavallee to infer in light of the totality of the evidence in the ITOs. They also do not need to be disregarded.

Sufficiency

[77] After disregarding the conclusory statements that I have described above, the question is whether there remains an evidentiary basis in which the judge could have been satisfied that:

1. A designated offence for the purposes of the DNA provisions of the Code had been committed;
2. Bodily substances had been found on things associated with the commission of the offence;
3. The accused were parties to the commission of the offence; and

4. Forensic DNA analysis would provide evidence about whether the bodily substances found came from them.

[78] The only real matter in issue is the identification of the accused as parties to the offence.

[79] Distilled to its essence, the basis on which the authorizing judge could have found Daljeet to be a party was that:

- He had been assaulted by Mr. Bal ten days before the offence, and was threatened by him on the afternoon of it. A witness to the threat from Mr. Bal described Daljeet making a reciprocal threat.
 - His mother owned a 2007 light grey Toyota Corolla. He lived with his parents.
 - The assailants attended the scene of the incident in a vehicle that two police officers said they recognized in stills from a security video as a Toyota Corolla, with no model year provided.
 - The affiant asserted a belief, based on reviewing a video from a different location, that an image of a vehicle that was captured leaving another part of the alley after the incident is the (that is, the Birings') Corolla.
 - A vehicle "matching" the Birings' Corolla (which in context must connote a degree of certainty below the assertion of a belief that it was "the" vehicle) was recorded on video driving on 96 Avenue in the area of the attack, both before and after it.
 - A security video from the Birings' neighbour recorded a Corolla leaving the Birings' driveway and heading west on 96B Avenue, which could be in the direction of the incident. However, based on the time recorded in this video, which there is no remaining evidence to modify, this Corolla would have left the residence after the incident was over.
 - He gave two different versions of his whereabouts on the evening of the offence in his pre-arrest and post-arrest statements, although he was consistent that he was home at the time of the incident. His mother told the police that he and his father did not come home.
 - A golf club is a relatively distinctive weapon to use in an assault. His father carried a golf club for "security" in at least one other family vehicle.
 - He and his father purchased upholstery cleaner after the event.
 - As of eight days after the incident, the Corolla was kept at a storage lot to which his father had access. His father attended the lot and placed floor mats from another family vehicle in the Corolla. On September 1 he jump-started the Corolla and removed it from the lot. This was two days after the investigators had executed a search warrant at the Biring home.
 - His brother in law had the Corolla cleaned and in October tried to take it into the United States.
- [80] Viewed in its totality, I do not see how the authorizing judge, acting reasonably, could have found a credibly based probability that Daljeet was a party to the offence on this evidence. The only direct evidence of the Biring vehicle being connected with the incident is Cpl. Lavallee's purported identification of it leaving a different part of the alley in which it

occurred afterwards. As I have said, the weight that can be ascribed to that identification must be attenuated by the lack of supporting detail. Even when the motive, the quite distinctive weapon and the post-offence conduct by other family members (the latter of which is fairly equivocal) are added, I think the best that could have been said is that it was possible that Daljeet was a party, rather than probable.

- [81] The evidence is even less compelling against Gurmail. The storage lot evidence was excised against him by consent, and the strength of Daljeet's motive is diluted against him, even if some inference of family loyalty could be drawn. Daljeet's second statement has him leaving the home later on the evening of the incident, but it is silent about his whereabouts during the incident. His wife's statement that he did not return home that night does not acquire any weight in the absence of something reliable linking him to the assault itself. The possibility of his involvement as a party is therefore even more remote than for Daljeet.
- [82] Accordingly, I conclude that the ITOs are insufficient to provide the necessary grounds in relation to either accused.

"Schultes J."

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