

CANADA / JUDGMENT

R. v. Chan

2020 BCSC 207

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 207 R. v. Chan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Chan,

2020 BCSC 207

Date: 20200218

Docket: 27984

Registry: Vancouver

Regina

v.

Duke Yin Chan and Lawton Louis Ma

Before: The Honourable Mr. Justice A. Ross

Reasons for Judgment

(Voir Dire on Manner of Entry)

Counsel for the Crown:

D. Meneley

Counsel for the Accused Duke Chan:

S. Wright

Counsel for the Accused Lawton Ma:

J. Stowe

V. de Jong

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 3-7, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 18, 2020

- [1] Mr. Chan and Mr. Ma are charged with eight counts of possession of controlled substances for the purpose of trafficking contrary to s. 5 (2) of the Controlled Drugs and Substances Act, S.C. 1996, c.19. Those charges are set out in Indictment #27984-2.
- [2] Mr. Chan and Mr. Ma were arrested on the February 3, 2017. On that date, the Vancouver Police Department ("VPD") executed a search warrant on several locations. The searches of three apartments located in complexes at 3162 Riverwalk Avenue ("Riverwalk"), 3663 Crowley Drive ("Crowley"), and 4818 Eldorado Mews ("Eldorado") are the subject of this application.
- [3] The manner of entry used by the VPD was "breach and hold". That practice involves an announcement that the police are executing a search warrant followed shortly thereafter by the use of a battering ram to knock down the front door of the apartment.
- [4] Mr. Chan and Mr. Ma allege that this manner of entry constituted a breach of their rights to be secure against unreasonable search and seizure under s. 8 of the Charter. A voir dire was conducted regarding the manner of search.
- [5] Certain evidence was tendered pursuant to an agreed statement of facts.
- [6] Regarding the Riverwalk residence:
 - a) while VPD members had intermittently surveilled Riverwalk, no one, other than Mr. Chan and members of his family, were associated with Riverwalk;
 - b) at 10:34 a.m. on February 3, 2017, members of the VPD Emergency Response Team ("ERT") assisted with the execution of a search warrant at Riverwalk. The door was breached with a ram;
 - c) surveillance had shown that Mr. Chan, his wife, and their child had left Riverwalk earlier that morning and had not returned at the time the door was breached.
- [7] Regarding Eldorado:

- a) at approximately 8:00 a.m. on February 3, 2017, two detectives arrived at Eldorado to set up surveillance and monitor any activity. No relevant observations were made prior to the entry by VPD of Suite 520;
 - b) at 9:55 a.m. on February 3, 2017, members of the VPD ERT assisted with the execution of a search warrant for Eldorado. An officer breached the door with a ram while another officer gave loud verbal announcements of "Vancouver police. Search warrant". There was no one present inside the suite.
- [8] Regarding Crowley: At 9:55 a.m. on February 3, 2017, members of the VPD ERT assisted with the execution of a search warrant at Crowley. The door was breached with a ram. Mr. Ma was present in the suite.
- [9] The only witness at the voir dire was Sgt. Russell Brown of the VPD. He has been with the VPD for 17 years. In 2017 he was a lead member of the ERT.
- [10] Sgt. Brown testified that on February 3, 2017, the VPD was investigating a suspected drug operation. A total of six locations were searched pursuant to the search warrant.
- [11] Sgt. Brown testified about the factors considered by the ERT when planning for the execution of the warrant. As noted, there were six locations to be searched. Due to work force limitations, the ERT team divided into two squads. Each squad would search three properties.
- [12] He testified that there are four options when considering the execution of a search warrant:
- (1) Knock and announce: This is the lowest security method of executing a search warrant. It involves simply knocking at the door and announcing that the VPD is at the residence to execute a search warrant. The police then wait for an occupant to answer the door.
 - (2) Contain and call out: This method is used when there is no concern regarding the preservation of evidence. The VPD does not breach the front door.
 - (3) Breach and hold: This method is described above. It was used in this case.
 - (4) Dynamic: This method involves breaching the door with a battering ram and members of the ERT flooding into the residence and physically detaining any occupants.
- [13] Sgt. Brown testified that the primary concern with regard to all of the searches was the knowledge that Mr. Chan had a young child who resided at Riverwalk. A decision was taken that Mr. Chan's residence would not be breached or searched while the child was at home. All searches would be triggered by the departure of the child from the Riverwalk residence.
- [14] The ERT decided to utilize the "breach and hold" option in this case for several reasons:
- a) There was a concern over the ability of an occupant of any of the locations to destroy evidence in the form of drugs by flushing them or washing them down the sink. Further, "score sheets" could be destroyed, and phones and fobs could be thrown out of windows.

- b) Each team had three residences to search. Hence, at the time of the first search, there was a second and then third location to search. They were concerned that somebody in the suite, if given an opportunity, could text or contact somebody who could notify a person at the second or third residence who would then be prepared for the subsequent search.
 - c) The police could never guarantee whether there were, or were not, people in the suite. Their planning seeks to minimize risk, but always considers the worst-case scenario.
 - d) The primary consideration is always the safety of officers. The police were investigating a suspected high-level drug trafficking operation. The VPD had no specific information regarding weapons in the premises or any tendencies of the targets toward violence. However, as noted, they always prepare for the worst-case scenario to ensure the safety of officers, residents, and targets.
- [15] Under cross-examination, Sgt. Brown testified that the VPD's concern regarding a risk to a child in the residence is that the police do not know how a target will react when the search is executed. The target could attempt a countermeasure against the police. The police may then be required to respond with force. The police response could result in harm to a child. Police seek to reduce the chance of that occurrence.
- [16] Sgt. Brown conceded that the ERT was aware that Mr. Chan had left his residence with his wife and child. However, he noted that the police could never be 100% sure that there was not a person in any residence. The goal is to minimize risk.
- [17] Sgt. Brown also conceded that, with respect to the entry to Mr. Ma's residence on Crowley, the search warrant did not indicate that they were searching for any drugs at that location. All the items in that search related to either paper documents or electronic devices or cash. He noted that the search team was not particularly familiar with the source documents or the Information to Obtain used to obtain the search warrant. The ERT was simply responsible for announcing, entering, and securing the locations. Other members of the department undertook the search. Mr. Ma was present when the search was executed. According to the agreed statement of facts, Mr. Ma was arrested at 9:45 a.m. Mr. Chan was arrested at 11:08 a.m.
- [18] Although Sgt. Brown was involved in the search of Crowley and Riverwalk, he was not involved in the search of Eldorado and could not speak to it. However, he was able to testify about the decision-making process.
- [19] The Crown and the two accused agree on the guiding principles relating to the manner of search.
- [20] In *R. v. Cornell*, 2010 SCC 31, the Supreme Court of Canada ruled that, except in exigent circumstances, police officers must knock and announce their presence and purpose for attending prior to forcibly entering a dwelling house: para. 18.

- [21] In *Cornell*, the Court held that a dynamic entry by masked police officers was justified in the circumstances of that search because police officers were concerned with the destruction of evidence and the possibility of weapons, particularly firearms, being present at the search site. Even when the known residents of the dwelling were known not to be present inside, the Court still held that the use of a dynamic entry was justified.
- [22] Similarly, in *R. v. Flintroy*, 2019 BCSC 90, the use of dynamic entry was found to be justified. Justice Williams noted that where the police decide to depart from the "knock and announce" approach, there is an onus on the Crown to explain the reasons the police thought it necessary to do so (citing *Cornell* at para. 20). The police in *Flintroy* had turned their minds to various ways to enter and execute the search warrant and determined that a dynamic entry was the most appropriate to manage concerns of officer safety and destruction of evidence.
- [23] Justice Williams set out a list of the factors to consider in *Flintroy*:
- [17] The controlling authority with respect to this issue is *R. v. Cornell*, 2010 SCC 31 [*Cornell*]. There the court examined the issue in detail, including having reference to earlier relevant authorities, most particularly *Eccles v. Bourque*, [1975] 2 S.C.R. 739 [*Eccles*] and *R. v. Genest*, [1989] 1 S.C.R. 59 [*Genest*]. The main question is whether the police had reasonable grounds for concern to justify use of an unannounced forced entry: *Cornell* at para. 22.
- [18] The applicable principles are, to my understanding, the following:
1. To be reasonable under section 8 of the Charter, a search must be authorized by law, the authorizing law must itself be reasonable, and the search must be conducted in a reasonable manner: *R v. Collins*, [1987] 1 S.C.R. 265 at 278.
 2. The onus is on the party alleging a breach of his Charter rights to prove that the search contravened section 8 of the Charter: *Cornell* at para. 17.
 3. Except in exigent circumstances, police officers must make an announcement before forcing entry into a dwelling house. In the ordinary case, they should give: (i) notice of presence by knocking or ringing the door bell, (ii) notice of authority, by identifying themselves as law enforcement officers and (iii) notice of purpose, by stating a lawful reason for entry: *Cornell* at para. 18, citing *Eccles* at 747.
 4. Where the police depart from this approach, there is an onus on them to explain why they considered it necessary to do so. If challenged, the Crown must lay an evidentiary framework to support the conclusion that the police have reasonable grounds to be concerned about the possibility of harm to themselves or occupants, or about the destruction of evidence. The greater the departure from the principles of announced entry, the heavier the onus on the police to justify their approach: *Cornell* at para. 20.
 5. The evidence to justify such behaviour must be apparent in the record and available to the police at the time they acted. The Crown cannot rely on ex-post facto justifications.

6. As per Chief Justice Dixon in *Genest*, what must be present is evidence to support the conclusion that "there were grounds to be concerned about the possibility of violence".
 7. The decision by the police must be judged by what was or should reasonably have been known to them at the time, not in light of how things turned out to be: *Cornell* at para. 23.
 8. Section 8 of the Charter does not require the police to put their lives or safety on the line if there is even a low risk of weapons being present: *Cornell* at para. 20.
- [19] Overall, courts must permit police a certain degree of latitude in the manner in which they decide to enter premises. They cannot be expected to measure in advance with nuanced precision the amount of force the situation will require. In assessing the manner in which a search has been conducted, it is important for the court to appropriately balance the rights of suspects with the requirement of safe and effective law enforcement, and not to become a "Monday morning quarterback": *Cornell* at para. 24.
- [24] The question to be answered is "whether the search overall, in light of the facts reasonably known to the police, was reasonable": *Cornell* at para. 31.
- [25] In *R. v. Ruiz*, 2018 ONSC 5452, the court found a dynamic entry to be unreasonable in circumstances where the police had very little information about the situation they were entering into and where there was no evidence that the police had meaningfully considered the manner of search prior to executing the warrant.
- [26] I pause to note that the cases discussed above all concern the use of dynamic entry tactics by law enforcement officers. Sgt. Brown explained the various entry methods used in the execution of a search warrant to secure a structure for investigators. He noted that dynamic entry is the most forceful approach, and that he and his colleagues determined that it was not appropriate for the execution of this search warrant. As such, they used the "breach and hold" method.
- [27] Mr. Ma argues that there were no exigent circumstances at the time the police arrived at his door at Crowley. They were not searching for drugs at his residence. They were only searching for documents and electronically stored information. Mr. Ma had no history of violent crime. There was no specific evidence of any weapons associated with Mr. Ma.
- [28] In my view, the arguments regarding the Crowley search ignored the prospect that, upon the police announcing their presence, Mr. Ma would have taken the opportunity to contact others regarding the execution of the search. Mr. Ma argues that, at the time the search of Crowley was executed, Mr. Chan was under surveillance; however, the fact that he was under surveillance does not mean that he could not be contacted. The efficacy and safety of the subsequent searches depended upon the securing of the Crowley residence as quickly as possible.

- [29] Mr. Chan argues that there was no reason to use the "breach and hold" method on the Riverwalk residence because the police knew that Mr. Chan and his family were not in attendance. However, as noted by Sgt. Brown, the police can never have 100% certainty about any location they are searching.
- [30] With regard to the search of the alleged stash house at Eldorado, as noted, Sgt. Brown was not involved in that search. However, the same considerations that went into the other searches apply to Eldorado. The two accused argue that, with fob records, the police would have known whether there was anyone in attendance. Again, as noted by Sgt. Brown, the police never have 100% certainty regarding any location, and they prepare for the worst-case scenario in the pursuit of safety.
- [31] I find that the Crown has met the onus required to explain the reason behind the manner of searching the three residences. The reasons explained by Sgt. Brown are sufficient in the circumstances.
- [32] It is my view that the decision to use the "breach and hold" entry in the execution of the search warrant at the three locations listed above was not unreasonable.
- [33] The application is dismissed.

"A. Ross J."

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