

CANADA / JUDGMENT

R. v. Chan

2020 BCSC 189

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Supreme Court of British Columbia

DECIDED

18 February 2020

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2020 BCSC 189 R. v. Chan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Chan,

2020 BCSC 189

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 Full Answer and Defence)

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Place and Date of Hearing:

Vancouver, B.C.

February 3-7, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 18, 2020

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- [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] The two accused made a number of applications under the Canadian Charter of Rights and Freedoms before trial. These reasons relate to the application brought by both accused, asserting that their rights under s. 7 of the Charter were violated when the police failed to preserve and produce certain security camera video. The two accused argue that their rights to provide a full answer and defence to the charges against them have been infringed.
- [3] For the reasons set out below, I have found that the actions of the police did constitute a breach of the rights of Mr. Chan and Mr. Ma to make full answer and defence pursuant to s. 7 of the Charter.

Factual Background

- [4] The Vancouver Police Department (VPD) suspected that the two accused were involved in a drug trafficking operation. The police obtained a production order and placed trackers on two vehicles associated to Mr. Chan. They tracked those vehicles travelling to a condominium complex at 4818 Eldorado Mews, Vancouver (the "Eldorado") on multiple occasions. Through other means, the police knew that neither of the accused lived at the Eldorado. The police suspected that the two suspects were using a suite in the complex as a "stash house".

- [5] As part of the investigation, an officer attended at the Eldorado. He asked the building manager for key fob records. He linked the attendances of the tracked vehicles to the use of certain key fobs registered to a woman believed to be Mr. Chan's sister. He learned the suite number that the two men were accessing. He asked to view security camera video surveillance for the times when the fob and tracking records indicated that one or both of the accused had attended the suite.
- [6] Ultimately, the officer's observations of the security video were set out in an Information to Obtain ("ITO") affirmed by another officer. That ITO was used as the basis to obtain a search warrant. The search warrant authorized searches of the residences of the two accused as well as the suite at the Eldorado. The police arrested the two accused on the date of the searches. For chronological context, the police carried out the searches and arrests on February 3, 2017.
- [7] The officer testified at the voir dire that he made three trips to the Eldorado wherein he viewed security video clips.
- [8] His first visit to the Eldorado was on January 15, 2017. On that occasion, he learned that there were three fobs associated with the suspected stash house. He observed video from January 14, 2017, showing one of the accused, Mr. Chan, driving into the parking garage and using a fob to enter the elevator to access the fifth floor. Mr. Chan departed ten minutes later. The officer obtained that video footage. When it was requested, the Crown produced that clip to the defence.
- [9] The officer attended at the Eldorado again on January 18, 2017, and observed further security video. He seized a short video clip showing Mr. Chan and Mr. Ma accessing the elevator lobby of the parking lot together on January 5, 2017. In that clip, they did not access the suspected stash house. They exited the building at ground level. That clip was disclosed to the defence when requested.
- [10] There was another video clip viewed by the officer on January 18, 2017, but it was not preserved. That video showed another attendance by Mr. Ma on January 5, 2017. There is some question as to whether the officer actually seized that video evidence on January 18, 2017, and it was later lost, or it was never preserved in the first place. I find that it does not matter for the purpose of this application. Counsel for Mr. Ma conceded that his argument was the same whether the video was seized and lost, or simply not seized.
- [11] On February 1, 2017, the officer again attended and met with the manager at the Eldorado to review further security video. The officer observed security video of Mr. Chan and Mr. Ma attending the building together on January 27, 2017, accessing the fifth floor and returning to the parkade. This video was not preserved or seized.

- [12] Also, on February 1, 2017, the officer observed video footage of Mr. Chan accessing the fifth floor by fob on January 30, 2017. The ITO states that, on this occasion, Mr. Chan was holding a clear white bag filled with a white substance when he entered the suite. He exited the suite without the bag. This video clip was not preserved or seized.
- [13] This observation of Mr. Chan carrying white powder into the suite on January 30, 2017, was linked, in the ITO, to Mr. Chan purchasing a white powder called "Mannitol" from a pharmacy in the Kerrisdale neighborhood earlier in January 2017. The ITO states that Mannitol is an artificial sweetener that is often used as a cutting agent for heroin and cocaine. The ITO sets out the officer's belief that, on January 30, 2017, Mr. Chan attended the stash house "to drop off a bag of cutting agent for diluting concentrated amounts [sic] fentanyl, cocaine and heroin."
- [14] The officer also states that on February 1, 2017, he viewed a video clip from January 31, 2017, showing Mr. Ma attending at Eldorado by himself, accessing the fifth floor using a key fob and then exiting the suite. Mr. Ma's counsel says that this occasion was the only evidence in the ITO linking Mr. Ma to possession of the third fob to the Eldorado. This video clip was not preserved or seized.
- [15] Finally, the officer observed video of another target of the investigation driving into the parkade at the Eldorado on January 30, 2017. The officer conceded that he knew that that this clip of video was relevant because it tied this additional target to the building. By this point in the investigation, the additional target had conducted a drug transaction with an undercover officer. Hence, the police were aware that this additional target was at least suspected of dealing drugs. This video clip was not preserved or seized.
- [16] As noted, the officer provided his observations of the security video to another officer who was the affiant on the ITO. That ITO was affirmed on February 2, 2017. The search warrant was authorized later that day. The searches and arrest occurred on February 3. Hence, all of the viewed video depicted events that occurred within a month of the arrests.
- [17] Charges were laid against the two accused in May 2018. The accused ultimately requested production of the video evidence in January 2020. The Crown made enquiries of the police, and the two clips (from January 5 and 14) were produced.
- [18] The tracking device on the vehicles associated to Mr. Chan indicated that those vehicles attended at the Eldorado 17 times between January 20 and January 31, 2017. The officer's evidence and the ITO indicate that the officer viewed some, but not all, of the video relating to those visits.
- [19] When cross-examined by counsel for the accused, the officer conceded that he knew that video evidence could be very important in this type of investigation. He knew the evidence was relevant at the times that he viewed it. He was aware that such video would perish with the effluxion of time. The security system would ultimately record over it. He was not asked whether he knew the number of months before it would be deleted. He further agreed that

his descriptions of the video clips were not as accurate as watching the video itself. He described seizing and preserving the video as the "best practice".

- [20] The officer's notes were admitted in evidence. He had no notes nor any recollection of the seizure of the January 5 video. There is some confusion regarding the dates of other entries.
- [21] The officer conceded that he knew that video of the two men entering the Eldorado, either together or alone, was relevant to the issue of care and control of the alleged stash house. The officer conceded that the video showing Mr. Ma accessing the alleged stash house indicated that he had "sole access to the suite and had the ability to come and go without another person present".

Positions of the Parties

- [22] Mr. Chan and Mr. Ma argue that these facts constitute a "lost evidence" type of case. Put simply, they argue that the police were in control of relevant evidence, but did not preserve or seize that evidence. That evidence is now lost. The Crown had an obligation to produce all relevant evidence under the principles in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326. As a result of the lost evidence, the two accused do not have the ability to make a full answer and defence to the allegations against them. Hence, their s. 7 rights have been breached.
- [23] In response, the Crown describes these facts as involving evidence in the hands of a third party. The Crown argues that this is a circumstance governed by *R. v. O'Conner*, [1995] 4 S.C.R. 411. The evidence is, or was, in the possession of a third party and was available for the two accused to obtain or request through an application. The two accused made no such request until January 2020. The Crown argues that it does not have an obligation to produce documents that are not in the possession of the police. The principles arising from *Stinchcombe* apply to documents in the Crown's possession. The Crown says that police cannot be required to seize every piece of evidence that they view during an investigation.

Obligations of the Police and Crown to Preserve and Disclose Evidence

- [24] In this case, the security video evidence falls into three categories:
- a) clips that were seized and produced by the police;
 - b) clips that were viewed by the police, but not seized; and
 - c) clips that existed at the time of the investigation, but were never viewed or seized by police.
- [25] The first category is not at issue because those clips were produced. The third category was not argued before me. This application relates only to the second category, that is, clips that the police viewed, but did not seize. As noted above, the officer conceded that he was aware, at the time of viewing the clips, that the evidence of the two men attending at the Eldorado and accessing the suite was relevant to the investigation. His description of those clips is set out in the ITO.

- [26] It is evident, and I find, that the police took the steps of attending at the Eldorado and viewing the security video as part of their investigation into the alleged trafficking operation by the two accused. Hence, viewing the video was an investigative step, taken with the expectation that it would yield evidence that would support an ITO and eventually a conviction on the any charges that may result. That was the reason for the officer's attendance at the Eldorado. In other words, this was not evidence that the police came upon during an investigation, the significance of which was not clear at that moment. The officer knew the videos were relevant. There was no other reason for his attendance.
- [27] The video evidence viewed by the officer related to attendances at the building within a month of the date that the police executed the search warrant. This was not an investigation that dragged out over time, with an unclear end-date. Further, the targets and the alleged criminal activity were also clear.
- [28] In written submissions, the two accused relied upon the following cases:
- a) R. v. Carosella, [1997] 1 S.C.R. 80;
 - b) R. v. La, [1997] 2 S.C.R. 680;
 - c) R. v. Fitts, 2015 ONCJ 252;
 - d) R. v. Tremblay, 2013 ABQB 43;
 - e) R. v. Gilliland, 2016 BCPC 320;
 - f) R. v. Neidig, 2015 BCCA 489;
 - g) R. v. Bero (2000), 137 O.A.C. 336;
 - h) R. v. Fenton, 2011 BCPC 134.
- [29] The Crown, correctly in my opinion, notes that all of those cases involve situations where evidence was actually in the possession or control of the police but was lost, or situations where a third party destroyed the evidence.
- [30] The distinction between the obligations of the Crown in first party, versus third party, production cases was discussed in R. v. McNeil, 2009 SCC 3:
- [20] Implicit in the Crown's broad duty to disclose the contents of its file under Stinchcombe are not the absence of any residual expectation of privacy, but rather the following two assumptions. The first is that the material in possession of the prosecuting Crown is relevant to the accused's case. Otherwise, the Crown would not have obtained possession of it (O'Connor, at para. 12). The second assumption is that this material will likely comprise the case against the accused. As a result, the accused's interest in obtaining disclosure of all relevant material in the Crown's possession for the purpose of making full answer and defence will, as a general rule, outweigh any residual privacy interest held by third parties in the material. These two assumptions explain why the onus is on the Crown to justify the

non-disclosure of any material in its possession.

- [22] The Stinchcombe regime of disclosure extends only to material in the possession or control of the Crown. The law cannot impose an obligation on the Crown to material which it does not have or cannot obtain
- [26] In O'Connor, this Court was concerned with the manner in which the accused, who was charged with multiple sexual offences, could obtain production of the therapeutic records of the complainants from third party custodians. O'Connor has been overtaken by Parliaments subsequent enactment of the Mills regime contained in ss.278.1 to 278.91 of the Criminal Code for the disclosure of records containing personal information of complainants and witnesses in sexual assault proceedings. In respect of any other criminal proceeding, however, the O'Connor application provides the accused with a mechanism for accessing third party records that fall beyond the reach of the Stinchcombe first party disclosure regime.
- [31] The facts in the present case fall somewhere in the middle of those two regimes. On the facts of this case, the specific issue is: Does the viewing of the video evidence as part of an investigative step constitute "possession" of that evidence such that it creates a duty to preserve it and disclose it?
- [32] Counsel for the two accused submitted the following cases that I find of assistance in my analysis.
- [33] In R. v. Heddle, [2008] O.J. No. 2021(S.C.), police were called regarding an assault that occurred near a pizza outlet on Danforth St. in Toronto. Upon arriving at the scene, the police viewed security video of the incident. That video assisted them in identifying and arresting the suspect later that evening. The police did not return to preserve or seize the video in question.
- [34] The video in Heddle, at least in theory, showed the assault that was the basis for the arrest of the accused (although he was eventually charged with other offences). The judge noted that the video was highly relevant specifically because it showed the event that formed the basis for the arrest. Justice Harvison Young wrote:
- [17] I would also note that, in light of the fact that Mr. Heddle was initially arrested in relation to the Pizza Pizza assault, the video had obvious relevance at the time. There is no evidence of any steps whatsoever having been taken to preserve the video. I am unable to find that the Crown has satisfied the Court that the evidence was not lost or destroyed owing to unacceptable negligence. Accordingly, I find that the s. 7 rights of the accused were breached in the circumstances.

- [35] I note that the police viewed the video during the very opening stages of their investigation while interviewing witnesses. It was not viewed as a specific step in the investigation. They made no effort to preserve or seize the video, but they had viewed it. The judge found this to constitute "unacceptable negligence".
- [36] In *R. v. Kish*, 2011 ONSC 1243, the police investigated a stabbing on Queen Street West in Toronto. Police determined that an establishment near the incident had exterior video cameras. Police attended at the establishment and watched the video. They did not seize the video at that time. However, a member of the "technical unit" was later tasked to attend and secure the video footage. That member attended on the establishment five days after the altercation and transferred the recording of the altercation onto a "thumb drive". By that time, the victim of the stabbing had succumbed to his wounds, and the police were pursuing a murder investigation.
- [37] Some months later, when the information was disclosed to the accused, the police determined that the video was not, in fact, copied to the thumb drive. Justice I.V.B. Nordheimer wrote:
- [16] That said, the decision in *R. v. La* also recognizes that the investigation and disclosure processes in a criminal prosecution are human based and that, as a consequence, despite best efforts mistakes will occur. This reality is acknowledged in *R. v. La* at para. 20, where Sopinka J. said:
- Yet despite the best efforts of the Crown to preserve evidence, owing to the frailties of human nature, evidence will occasionally be lost. The principle in *Stinchcombe No. 2*, supra, recognizes this unfortunate fact.
- [24] Having said that, this surveillance video was clearly relevant evidence. The Crown concedes that it was. It might have provided some insight into the actual events of the early morning of August 9, 2007. Its potential value as evidence was not lost on the investigators who were anxious to secure it from the outset of the investigation. Every effort should have been made to preserve and protect it. However, very basic steps, principally the copying of the hard drive, were not taken. As a result, relevant evidence was lost. In my view, the police did not take the steps that ought to have been taken in respect of this evidence. The loss of the evidence was directly due to this failure. I have concluded, therefore, that the Crown has not met its onus to establish that the evidence was not lost through unacceptable negligence. It follows that the loss of this evidence amounts to a breach of the Crown's duty to disclose and thus constitutes a breach of Ms. Kish's s. 7 rights. The issue then is whether this breach justifies a stay of proceedings.
- [38] *Kish* involved evidence that was actually seized and in the possession of the police. However, through the negligence of the police, the evidence was lost. It is therefore a *Stinchcombe* case.

- [39] In *R. v. Nkemka*, 2013 ONSC 2091, a complainant reported a sexual assault had occurred in a taxi. The police knew that the taxi was equipped with a recording device. The video from that device would be deleted (recorded over) within two to four days. An officer was assigned to the case on the day of the alleged assault. That officer did not attend at the taxi company until 19 days later. By that time, the video had been deleted. Justice Spies wrote:
- [47] The next question is whether or not the video was lost due to unacceptable negligence on the part of the police. This is not a case where the explanation for not following up to obtain the video is inadvertence. D.C. Elzinga's evidence makes it clear that she made a deliberate decision not to follow up to obtain the video in the short time it was still available even though she had enough information from Detective Hosain, some of which was corroborated by Ms. C. on November 7th, to ask for the GPS search for the taxi to be done on November 8th or even on the 9th. The only explanation for her not doing so is that she felt she needed to do further investigation and obtain a formal statement from the complainant. When that did not provide corroborating information about the description of the taxi, she took days and weeks to follow up with other witnesses. She gave absolutely no reason for why she believed she "needed" to do this further investigation all the while knowing with certainty that as she took the time to do so, the video would be lost for good. In my view she provided absolutely no explanation for taking no steps to preserve the video. Her failure to follow up immediately with Mr. Hall amounted to unacceptable negligence. Since D.C. Elzinga was aware of the video, its relevance and the fact it would soon be lost, she should have made every effort to take immediate steps to locate the taxi and preserve the video. Her failure to take any steps whatsoever resulted in the loss of relevant evidence. I have, therefore, concluded that the Crown has not met its onus to establish that the evidence was not lost through unacceptable negligence. As such the loss of the video was a clear and serious breach of the Crown's obligation of disclosure in this case and constitutes a breach of s. 7 of Mr. Nkemka's Charter rights. [Emphasis added.]
- [40] Later in the decision, Spies J. stated at para. 48, "The police must take all reasonable steps to preserve this type of evidence so that it can be disclosed to the defendant and used at trial by the party whom it favours."
- [41] I note two things about the *Nkemka* decision. First, the video in question was, potentially, a video of the alleged offence. It was highly relevant and could have been exculpatory. Second, although they clearly intended to obtain it, at no time did the police ever view it. Hence, the video was never in the possession of the police. The judge in *Nkemka* specifically relied on the decisions in *Heddle* and *Kish* as cases "where the court has found that the failure by police to secure and preserve a surveillance video in the hands of a third party is a breach of s. 7 of the Charter" (at para. 46).
- [42] However, neither *Heddle* nor *Kish* involves a situation where the police had never viewed, or even confirmed the existence of, a video recording.

- [43] Finally, Mr. Ma relies on the decision of Justice Allan in *R. v. Hajee*, 1998 CarswellBC 995 (S.C.). In that case, two employees of a gas station were accused of stealing funds from night deposits. The employer dismissed the two employees in April 1995 after the deposits from several evenings were not credited to the employer's account. The two accused were arrested in July 1995, and charged in August 1996. In that case, the bank facility that dealt with the night deposits had video equipment recording the handling of the night deposit bags. However, that facility was unable to say whether the April 1995 videotapes were given to the RCMP or retained within the facility. By the time the tapes were requested by the two accused, the video no longer existed.
- [44] The Crown in *Hajee* framed the issue as the destruction of documents in the hands of a third party. Hence, the Crown argued, there was no duty to preserve or disclose the evidence. Justice Allan wrote at para. 26:

26 I do not agree with that analysis because it appears that the R.C.M.P. either obtained the documents in question, or at a minimum, they had the ability to do so. There is no suggestion that the Bank or the armoured car companies objected to production of any of the documents.

- [45] It is evident from the discussion in *Hajee* that the circumstances of the loss of the evidence were unclear. However, the RCMP had, at some point, sought to secure the video. I also note that the video in *Hajee* would have been of the same type as the video in the present case. The video may have shown that the deposits were made, or it may have shown that they were not. It was video of an element of the offence, but not the offence itself (as in *Hedde*, *Kish*, and *Nkemka*). Hence, Allan J.'s reasoning is more persuasive than the reasoning in the three Ontario cases.

Discussion

- [46] As noted, I find the analysis in the above quoted cases to be helpful, but I do not accept all of the reasoning. I do not accept the suggestion that security video evidence that was never in the possession or control of the police must be preserved and disclosed, or that the failure to do so constitutes a breach of the accused's rights to make full answer and defence. That is not what the parties argued here.
- [47] The facts in this case include the following:
- a) The police were investigating specific targets and attempting to determine whether those targets were involved in specific offences.
 - b) The police viewed video, on three occasions, as part of that ongoing investigation. They did so while taking investigative steps to obtain evidence in pursuit of a search warrant and ultimately a conviction.

- c) At the time the police viewed the video, they were aware that it contained evidence that was relevant to the investigation. Although it did not record an actual offence, the recordings were relevant in respect of elements of the offence.
- d) The police did request, and obtain, two clips of video. Hence, it is clear that the manager at the Eldorado was willing to produce the video without a warrant or other authorization.
- e) The officer's description of the activities recorded on the security video was referenced in the ITO.

[48] On those facts, I find that the police were "in possession" of the clips that they had viewed of the security video at the Eldorado. The "possession" was established by the police taking those investigative steps, viewing the evidence, knowing it to be relevant, and having the ability to seize the video simply by asking the manager. In those circumstances, the police had an obligation to preserve, and ultimately to disclose the evidence.

Severity of the Failure

- [49] The next question relates to the reason for the failure to preserve the evidence and severity of that failure. The onus is on the Crown to show that it was not lost due to unacceptable negligence.
- [50] Counsel for the two accused concede that the actions of the police in this case do not approach an abuse of process. They argue, however, that the police conduct constitutes "unacceptable negligence".
- [51] As noted, the officer testified that he knew the evidence was relevant and that seizing the video would constitute the "best practice". The Crown argues that not every instance of failing to undertake "best practices" constitutes "unacceptable negligence". I find that a failure to preserve and seize relevant evidence goes further than simply not following best practices. In my opinion, the video should have been seized.
- [52] On the issue of the severity of the failure by the police, I again note that the video did not show "the offence" but merely activity that could form elements of the offence. I further note that the importance of the video was not immediately relevant even to counsel for the two accused. They did not request the video until January 2020. Hence, it cannot be argued that the relevance was so obvious that they demanded it immediately upon their arrest or upon charges being laid.
- [53] I find that the failure to secure the video in these circumstances constituted "unacceptable negligence" and, therefore, constituted a breach of the accused's s. 7 rights.
- [54] The application of the two accused is allowed. The issue of remedy will be addressed at a later hearing.

"A. Ross J."

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Prepared on 26 October 2026 · Esheria