

CANADA / JUDGMENT

R. v. Chen

2022 BCCA 296

COURT

British Columbia Court of Appeal

DECIDED

30 August 2022

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2022 BCCA 296 R. v. Chen

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Chen,

2022 BCCA 296

Date: 20220830

Docket: CA47387

Between:

Regina

Respondent

And

Stephen Hai Chen

Appellant

Restriction on publication: A publication ban has been imposed under s. 486.5(2) of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify the undercover officer referred to in this judgment by the initial W. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Chief Justice Bauman

The Honourable Justice Dickson

The Honourable Mr. Justice Fitch

On appeal from: An order of the Supreme Court of British Columbia, dated July 16, 2019 (conviction) (R. v. Chen, 2019 BCSC 2292, Vancouver Docket 27277).

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(via videoconference):

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Place and Date of Hearing:

Vancouver, British Columbia

April 12, 2022

Place and Date of Judgment:

Vancouver, British Columbia

August 30, 2022

Written Reasons by:

The Honourable Mr. Justice Fitch

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Justice Dickson

Summary:

Appeal from conviction for trafficking in MDMA. Held: Appeal dismissed. In this circumstantial case, the appellant was found to have supplied MDMA to a dealer who, in turn, sold it to an undercover police officer. The evidence against the appellant was based on police surveillance and intercepted calls and text messages between the appellant and the dealer. No error was shown in the trial judge's determination that there was a basis upon which an order authorizing the interception of private communications could have been made. Investigative necessity was not a requirement because there were reasonable grounds to believe the offence was committed for the benefit of, at the direction of, or in association with a criminal organization. In any event,

the trial judge made no error in concluding that there was a basis upon which the authorizing judge could have been satisfied that the requirement of investigative necessity had been met. The verdict was not unreasonable. The judge's reasons were thorough and sufficient for appellate review.

Reasons for Judgment of the Honourable Mr. Justice Fitch:

I. Introduction

- [1] The appellant, Stephen Hai Chen ("Chen"), was convicted by a Supreme Court judge of trafficking in N-methyl-3,4-methylenedioxyamphetamine ("MDMA"). He appeals from his conviction on two grounds.
- [2] First, he argues that the trial judge erred in concluding that there was a basis upon which an order authorizing the interception of private communications pursuant to s. 186(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46 [Code], could have been made. This ground of appeal takes aim at the trial judge's conclusion that there was sufficient reliable evidence upon which the authorizing judge could have been satisfied the requirement of investigative necessity had been met.
- [3] It is common ground on appeal that the question before the judge was not whether he would have issued the warrant, but whether there was sufficient credible and reliable evidence to permit the issuing justice to authorize the warrant: *R. v. Morelli*, [2010] 1 S.C.R. 253, 2010 SCC 8 at para. 40; *R. v. Campbell*, [2011] 2 S.C.R. 549, 2011 SCC 32 at para. 14 [Campbell].
- [4] It is also not contentious that the standard of review on appeal is deferential, and that this Court should not interfere with the trial judge's decision absent an error of law, misapprehension of evidence, or a failure to consider relevant evidence: *R. v. Perkins*, 2021 BCCA 9 at para. 12. The appellant says the trial judge erred in principle in his assessment of the investigative necessity requirement.
- [5] For its part, the Crown argues that because the authorization was issued in relation to a designated organized crime offence, it was unnecessary to establish investigative necessity as a condition precedent to the granting of the authorization. Even if it was, the Crown submits the judge made no error in holding that there was a basis in the Information to Obtain ("ITO") upon which the authorizing judge could grant the order.
- [6] Second, the appellant argues that the trial judge erred in law in his treatment of what he describes as the "voice identification" evidence. Briefly, the evidence established that the appellant's co-accused, Tarsen Jawanda ("Jawanda"), supplied W, an undercover officer, with MDMA. The central issue at trial was whether the appellant was Jawanda's supplier.

- [7] Properly framed, the second issue is not, in my view, about the admission or use of voice identification evidence per se. Rather, it is about whether the verdict is unreasonable because the judge resolved the central issue against the appellant: (1) based on illogical or irrational reasoning (the alleged "Beaudry error"), or (2) in the face of a "gap" in the evidence that precluded a reasonable finding that the appellant was Jawanda's supplier (the alleged "Bergstrom error").
- [8] Finally, the appellant asserts that the trial judge erred by failing to provide sufficient reasons for the verdict (the alleged "Sheppard error").
- [9] As I am unable to give effect to any of these grounds of appeal, I would dismiss the appeal.

II. Background

1. Overview of the Investigation

- [10] I will set out only so much of the factual and procedural background as is necessary to address the grounds of appeal.
- [11] In 2014 and 2015, the police investigated alleged drug offences involving four principal known persons: Jawanda, Vincent Chavarie, Saroop Dasta and Gurchet Manhas.
- [12] The investigation concerned opium importation, cocaine importation from Washington State, and a plan to export MDMA from British Columbia to California and import cocaine from California.
- [13] The investigation involved the use of a police agent, Lawrence Trombley ("Trombley"), who died before the trial, and undercover officers, including W.
- [14] During the investigation, and while engaging with Trombley and W, Jawanda referred to unnamed associates, including "a kingpin", a "main guy", and his "guys over the border".
- [15] In attempting to engage W in the cross-border transportation of MDMA and cocaine, Jawanda said that he represented "some big players" and "a group" who moved very large quantities of drugs. He told W, "We have so much coke in L.A. It's just waiting there." He described himself as the "middle guy". He told W that "his associates" would allow the first load to contain 40-50 kilograms. He told W that the drop-off and pickup points in the United States would not be the same, as different people were involved. Jawanda said he had a connection with different "lines", and that "my guys" are working with "the bikers". He identified another Canadian-based associate who was "fully involved". He said they had 20 kilograms of MDMA ready to go to Seattle and 40-100 kilograms of cocaine sitting in L.A. He said his suppliers were getting "choked" because transportation arrangements were not moving quickly enough.

2. The Application to Intercept Private Communications

- [16] On February 13, 2015, an application was made pursuant to s. 186 of the Code to intercept the private communications of Jawanda and the three other known targets of the investigation.
- [17] At the time of the application, two one-party consent authorizations granted under s. 184.2 of the Code were in force--one involving W and other consenting officers, and the other involving Trombley. The ability of the police to achieve the objectives of the investigation through the existing one-party consent authorizations and other conventional investigative techniques was a central component of the appellant's argument before the trial judge on the question of investigative necessity.
- [18] The authorization was sought for the purpose of investigating various substantive drug-related offences, conspiracy, and committing an offence for the benefit of, at the direction of, or in association with a criminal organization contrary to s. 467.12 of the Code. The affiant swore that the principal known persons and their associates were operating as a criminal organization, and he set out the factual basis for his belief. One of the investigative goals was to identify the scope of the organization--its members, structure, and the specific role played by each participant.
- [19] The inclusion of this averment--that the principal known persons were operating as a criminal organization--in the affidavit is significant. Investigative necessity need not be shown where the judge is satisfied that the application for an authorization is in relation to an offence committed for the benefit of, at the direction of, or in association with, a criminal organization. For convenience, the relevant provisions of the Code are reproduced below:
- 186(1) An authorization under this section may be given if the judge to whom the application is made is satisfied
- (a) that it would be in the best interests of the administration of justice to do so; and
 - (b) that other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures.
- (1.1) Notwithstanding paragraph (1)(b), that paragraph does not apply where the judge is satisfied that the application for an authorization is in relation to
- (a) an offence under section 467.11, 467.111, 467.12 or 467.13;
 - (b) an offence committed for the benefit of, at the direction of or in association with a criminal organization; or
 - (c) a terrorism offence.

- [20] Another objective of the investigation was to "identify the suppliers and persons who have a controlling interest in MDMA in Canada and cocaine in the United States and to gather sufficient evidence to prosecute them". To that end, the affiant deposed that "[i]f the authorization sought herein pursuant to s. 186 of the Criminal Code is granted, investigators intend to intercept the communications that Jawanda and the other Principal Known Persons have with their supplier of cocaine and/or the intended recipient of the cocaine in Canada".
- [21] The notice of application referred to an authorization pursuant to s. 186 of the Code, but did not explicitly mention s. 186(1.1).
- [22] Nineteen pages of the affidavit were devoted to investigative necessity and the basis for the affiant's belief that the objectives of the investigation were unlikely to be achieved through conventional evidence-gathering techniques. For the purposes of this appeal, the following paragraphs of the affidavit are noteworthy:

Police Agent

495. Although TROMBLEY has achieved a measure of success in collecting evidence against the Principal Known Persons, he has not been able to learn the identity of or interact with suppliers of the cocaine in Spokane, Washington. Nor has TROMBLEY been able to interact with or identify the persons who are supplying the MDMA that JAWANDA wants to have transported to the United States or the persons in Canada who are going to receive the cocaine that is being imported .
496. Although additional scenarios are planned in which TROMBLEY will discuss the Named Offences with JAWANDA (and specifically the importation of the 40 kilograms of cocaine from Spokane, Washington), for the reasons explained below I do not believe that he will be able to identify the suppliers of this cocaine and as such he will not be able to fulfill all of the objectives of the investigation.
497. At a meeting that took place on January 20, 2015 and at which they discussed the pending importation of 40 kilograms of cocaine from Spokane, Washington, JAWANDA and MANHAS both told TROMBLEY that the only person TROMBLEY would deal with was JAWANDA.... At a meeting that took place on February 7, 2015, CHAVARIE told TROMBLEY that although JAWANDA works with other persons, the only person TROMBLEY would need to deal with was JAWANDA . Accordingly, I do not believe JAWANDA will ever introduce TROMBLEY to the suppliers and intended recipients of the cocaine or to any of his other associates, other than the Principal Known Persons.
498. As set out in paragraph 184.2, on October 8, 2014, JAWANDA told TROMBLEY about a "kingpin" and said that he would introduce TROMBLEY to the kingpin. Since that date, JAWANDA has not followed through with that introduction and has shown no indication that he intends to do so. I believe that if investigators were to direct TROMBLEY to specifically ask for an introduction to JAWANDA's "kingpin", this would cause JAWANDA to become

suspicious that TROMBLEY is a police agent because there is no reason why Trombley would require such an introduction in his current capacity as a transport driver.

499. I do not believe that TROMBLEY's role as the transport driver in the pending cocaine importation from Spokane, Washington will allow him to come into direct contact with the supplier of that cocaine. TROMBLEY'S's role (which may actually be carried out by an undercover operator posing as TROMBLEY's associate) will entail driving to Spokane, meeting with the cocaine supplier's driver, and then immediately driving back to Canada with the cocaine [which would be replaced with a placebo]. TROMBLEY's role will not provide him with the opportunity to interact with anyone higher than his counterpart driver in the United States. There is no reason for TROMBLEY to interact with or speak to persons holding management positions within the cocaine supply organization in the United States.
500. JAWANDA has told both TROMBLEY and [W] that he wants to transport the loads of cocaine into Canada and the loads of MDMA to the U.S. as soon as possible. As a result, I believe there is only a limited amount of time in which investigators will be able to continue to conduct evidence-gathering undercover scenarios involving TROMBLEY. Once investigators take possessions of any drugs, there is no intention to actually deliver those drugs in accordance with JAWANDA's instructions. As such, I anticipate that after TROMBLEY (or an undercover operator) receives the cocaine in Spokane and it is not delivered, JAWANDA will no longer be willing to use TROMBLEY to transport drugs and there will be no further opportunities for TROMBLEY to obtain an introduction to the persons who are supplying controlled substances to JAWANDA's drug trafficking organization.

Undercover Operations

502. As set out above in paragraph 437, in his discussions with [W], JAWANDA has expressly stated that he is part of a much larger drug trafficking network and that he arranges the transport of cocaine and MDMA on behalf of several individuals who investigators have not been able to identify through conventional investigative techniques. I do not believe JAWANDA will ever introduce [W] to his drug suppliers, because JAWANDA has stated that both he and his associates are concerned about [W]'s credibility due to his refusal to provide a copy of his identification. As recently as January 28, 2015, JAWANDA told [W] that his friends were "real nervous" about how Jawanda and [W] met.
503. I believe there is a compelling need to intercept the communications between the Principal Known Persons and their associates, in the absence of [Trombley] and undercover operators, in order to corroborate statements they make to the undercover operators and to show the full extent of the Named Offences by capturing their communications with the suppliers and/or intended recipients of the pending MDMA and cocaine shipments. I believe that the undercover operation and One Party Consent Authorization alone will be inadequate to capture the type of evidence necessary to lead to a successful prosecution of all persons involved in JAWANDA's drug trafficking enterprise, including his suppliers.

504. It is also important to reiterate that although JAWANDA is currently still willing to use [W] to transport drugs as a trial run, investigators do not intend to actually deliver any MDMA or cocaine in accordance with JAWANDA's instructions. Therefore, as with [Trombley], I believe there is only a limited amount of time in which investigators will be able to continue to conduct evidence-gathering scenarios utilizing the undercover operators. Once undercover operators receive the MDMA to transport to the U.S. and the cocaine to transport back to Canada and neither substance is delivered in accordance with JAWANDA's instructions, I anticipate that JAWANDA will no longer be willing to use [W] to transport drugs on his behalf. At that point there will be no further opportunities for [W] (or any other undercover operator) to obtain an introduction to the persons who are supplying controlled substances to JAWANDA's drug trafficking organization or the intended recipients of the drugs being transported.
505. I believe the only way to identify the suppliers and intended recipients of the drugs is to intercept the communications of the Principal Known Persons. I believe that if the Authorization sought herein pursuant to s. 186 is granted, this will allow investigators to intercept JAWANDA, MANHAS, and DASTA when they communicate with one another about the pending cocaine importation from Spokane, Washington, and the pending MDMA export to the U.S. and the other pending cocaine importation from Los Angeles. I also believe that JAWANDA will communicate with the suppliers and intended recipients of the cocaine and MDMA to discuss the arrangements he has made for their transport by [W] and TROMBLEY. Further, I believe that JAWANDA will also communicate with these individuals after he is informed there is a delay in the delivery of the cocaine to Canada [caused by a planned investigative ruse] and once he eventually learns the cocaine and MDMA has been seized by the police.
507. For these reasons, I do not believe the undercover operations and the One Party Consent Authorization alone can produce the evidence necessary to satisfy the investigative objectives and result in the successful prosecution of all persons involved in the Named Offences.

[Emphasis added.]

[23] The authorization was granted on February 13, 2015. It reads, in material part, as follows:

UPON THE EX PARTE APPLICATION, in writing, signed by an agent specifically designated in writing by the Minister of Public Safety and Emergency Preparedness personally for the purposes of Section 185 of the Criminal Code, coming on before me this day; UPON READING the said Application and Affidavit of Constable David DEFRANE, a peace officer, sworn the 13th day of February, 2015, and filed; AND IN THE PRESENCE OF [the agent];

AND UPON BEING SATISFIED that it would be in the best interests of the administration of justice to grant this Application and that the other necessary requirements of Section 186(1)(b) of the Criminal Code have been met;

AUTHORITY IS HEREBY GIVEN to peace officers in the Province of British Columbia and elsewhere in Canada, and to any other person acting under the direction of a Peace Officer for the purpose of investigating the offences hereinafter set out, to intercept communications upon the following terms and conditions:

1. The offences in respect of which communications may be intercepted are:

1.6 Commission of an offence for the benefit of, at the direction of, or in association with the criminal organization contrary to section 467.12 of the Criminal Code.

[Emphasis added.]

[24] The appellant was not a named target in the authorization, but it was alleged at trial that he was intercepted by virtue of speaking with Jawanda.

[25] The appellant challenged the authorization on grounds that the authorizing judge could not have granted the order as there was no basis in the evidence upon which she could conclude that: (1) there were reasonable grounds to believe that the targets met the statutory criteria for a criminal organization, or (2) the statutory requirement of investigative necessity had been met.

[26] The trial judge granted the appellant leave to cross-examine the affiant, Cpl. Defrane, and a sub-affiant, with respect to investigative necessity and the grounds in support of the criminal organization offence.

[27] With respect to the opium distribution scheme, Cpl. Defrane acknowledged in cross-examination that the police had already obtained considerable evidence respecting this offence and that the issue could have been pursued further by W. He testified, however, that having W ask direct questions about past events in relation to the offence would have caused the investigative targets to become suspicious.

[28] Cpl. Defrane also conceded in cross-examination that the comment about Trombley only dealing with Jawanda was made in the context of Trombley expressing concern for his own safety. It was not made in the context of Jawanda telling the agent that the agent's activities would be restricted to dealing with him.

[29] Further, Cpl. Defrane acknowledged that Trombley had not been directed to try to identify the suppliers or recipients of the cocaine, or the kingpin. Cpl. Defrane testified that it would arouse suspicion if Trombley asked for an introduction to people higher up in the alleged organization. He testified that Trombley was posing as a lower-level driver, and it would have set off alarm bells for him to pursue a meeting with suppliers. When it was suggested to Cpl. Defrane that Trombley could have obtained information about the suppliers and recipients of the drugs, he explained that, without an authorization, the police would not know who Jawanda was speaking to, nor would they be able to intercept conversations--including when the transportation of the drugs was delayed as part of a planned investigative ruse.

- [30] With respect to the potential that W might be able to obtain additional information about the plan to export MDMA and import cocaine, Cpl. Defrane acknowledged that an operational plan devised at the end of 2014 contemplated W insisting on meeting with Jawanda's bosses before agreeing to participate in the cross-border transport of drugs. W had been instructed by investigators to offer to meet with Jawanda's unnamed associates to address any concerns they had about W's refusal to provide identification. Cpl. Defrane also acknowledged that, by February 2015, Jawanda had expressed satisfaction with W's participation without requiring him to produce identification.
- [31] Cpl. Defrane testified on the voir dire that he understood that he was required to address the issue of investigative necessity in his affidavit. He recalled no conversation in the presence of the authorizing judge to the effect that a demonstration of investigative necessity was not required. Indeed, he testified that the authorizing judge complimented him on the portion of the affidavit addressing investigative necessity. From this remark, Cpl. Defrane understood that the authorizing judge had found the investigative necessity requirement to have been met.
3. Ruling on the Voir Dire (2019 BCSC 2237)
- (a) General Principles Identified by the Trial Judge
- [32] In addressing the investigative necessity requirement of s. 186(1)(b), the judge held that the requirement will be met where there is, practically speaking, no other reasonable alternative method of investigation, having regard to the nature and purpose of the investigation: *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65 at para. 29 [*Araujo*]. He noted that "the objective of [the police] investigation rightly informs the investigative necessity analysis": *Araujo* at para. 43.
- [33] Addressing the standard of review for a wiretap authorization, the judge relied on *R. v. Garofoli*, [1990] 2 S.C.R. 1421 [*Garofoli*] and *R. v. Pires*; *R. v. Lising*, [2005] 3 S.C.R. 343, 2005 SCC 66 for the proposition that the reviewing judge does not substitute their view for that of the authorizing judge. Instead, they determine, after excising any misleading or erroneous information, whether there remained some evidence that might reasonably be believed on the basis of which the authorization could have issued: *Araujo* at para. 51.
- [34] The judge considered that he was obliged to "ask searching questions about why conventional techniques that were available on the evidence, and were utilized to a certain degree by the investigation, could not have been used still further to meet its complete objectives": at para. 221.
- [35] The judge also considered that his assessment of the efficacy of continuing to use conventional investigative techniques to achieve the objectives of the investigation could not be based on mere speculation. Rather, the inquiry had to be grounded in the evidence.

- [36] For the most part, I do not understand the appellant to take issue with how the trial judge articulated these foundational principles. Rather, he asserts error in principle in the application of the governing framework to the case at bar.
- (b) The Criminal Organization Offence and the Need to Establish Investigative Necessity
- [37] The judge recognized that, where there are reasonable grounds to believe that the offences under investigation were committed for the benefit of, at the direction of, or in association with the criminal organization, an authorizing judge need not be satisfied of the existence of investigative necessity:
- [15] One of the listed offences is committing an indictable offence for the benefit of, at the direction of, or in association with a criminal organization, contrary to s. 467.12. It is one of the offences for which this authorization was sought. Thus, if the authorizing judge could have been satisfied that there were reasonable grounds to believe that that offence had been or was being committed, no demonstration of investigative necessity was required.
- [Emphasis added.]
- [38] The judge found that there was a basis upon which the authorizing judge could have granted the order under s. 186(1.1), given the existence of reasonable grounds to believe that the alleged offences were being committed for the benefit of or in association with a criminal organization. On this issue, he found evidence upon which the authorizing judge could be satisfied that the alleged criminal organization had temporal continuity and a degree of structure.
- [39] Despite coming to this conclusion, the judge was of the view that this finding did not end the matter. He noted that, subjectively, the investigative team understood it needed to satisfy the investigative necessity criterion to obtain the authorization. Further, he concluded that "neither the Crown agent nor the affiant sought to invoke the exemption pursuant to s. 186(1.1) before the authorizing judge, or even advised her that applied": at para. 202. He inferred from the judge's favourable assessment of the way in which the investigative necessity portion of the affidavit had been drafted that she was not aware of the exemption, and did not intend to apply it.
- [40] Despite finding that the evidence before the authorizing judge established reasonable grounds to believe the alleged offences were being committed for the benefit of or in association with the criminal organization, the judge refused the Crown's invitation to uphold the authorization on this basis:
- [264] In my opinion, [s. 186(1.1)] cannot arise by mere operation of law, in circumstances where not only is there no evidence that the judge was directed to and considered it, but there is contrary positive evidence that she was distracted from doing so by explicit representations in the affidavit that s. 186(1)(b) was satisfied, and the invitation to grant an authorization that purported to confirm that this requirement had been met.

- [265] Even if a judge is deemed to know the law, and even if she has granted an authorization in relation to one of the offences listed in subsection (1.1), in my opinion she has not been "satisfied that the authorization is granted in relation to" such an offence for the purposes of that subsection, unless her attention was specifically drawn to the effect of the presence of such an offence by the application and the affidavit, and she was invited to signify that an authorization was granted on that basis.
- [266] Here we know that the judge was not properly informed in that regard, because she complimented Corporal Defrane on his fulfillment of a precondition that the Crown now argues was completely unnecessary, whether she knew it or not.
- [267] To permit such an approach to invoking the operation of s. 188(1.1) would be to undermine the authorization process and the essential requirement that its purported bases be fully disclosed. If an agent wants to rely on the subsection, it is necessary for them, at minimum, to draw the authorizing judge's attention to it and for the affidavit to demonstrate explicitly why the facts of the case justify it. The authorization should then reflect the actual basis on which it was granted.
- [268] If an affiant wishes to address investigative necessity as well, as a matter of prudence, and seek an authorization that confirms that it has also been satisfied, they are of course free to do so. But no matter what approach is taken, the judge must be informed clearly what they are being asked to authorize and on what statutory basis.
- (c) Investigative Necessity
- [41] One of the central issues before the judge was whether portions of the affidavit were misleading because they under-represented the ability of Trombley and W to gather evidence advancing the goals of the investigation.
- [42] With respect to the opium importation investigation, the judge concluded that at the time of the application, the offence had largely been proven using conventional investigative techniques. The judge also concluded that it was misleading to assert that Trombley had not been able to identify the distribution network or ultimate recipients of the opium in circumstances where he had not been directed to pursue that line of inquiry. Had this offence been the stand-alone basis for the application, the judge would have concluded that investigative necessity had not been met.
- [43] The judge also agreed that, with respect to the importation of cocaine from Washington State, the affidavit contained assertions that had the effect of misleading the authorizing judge. He properly considered that these assertions should be excised from consideration "before the actual level of investigative necessity on which the authorizing judge could have based a decision can be determined": at para. 230. The assertions the judge determined to excise from the affidavit included the following:

- that Trombley would not be able to meet the "kingpin" given that he had not been directed to arrange such a meeting; and
- that Trombley was told he would only have to deal with Jawanda, which left the impression that he would not meet anyone else higher up in the distribution chain when Jawanda's comments were intended only to assuage Trombley's concerns about his own safety.

[44] In relation to this aspect of the investigation, the judge concluded that "the affidavit must be considered without regard to the assertions that barriers in the form of Trombley's inability to that point to meet suppliers and higher-ups had arisen despite Trombley attempting to do so, or that statements by Jawanda or Chavarie to Trombley rendered that possibility less likely": at para. 237.

[45] Even so, the judge concluded that:

[234] I do not think it was unreasonable for investigators to proceed and to represent that as the driver, Trombley would likely be confined to contact with his direct counterpart. However trusted Trombley was and however open-ended the pickup arrangements still remained as of the application date, his particular task was specifically to pick up and deliver drugs, and it seems speculative to suggest that that role, in itself, could have been leveraged by him into a more expansive degree of involvement. There is no evidence from which that inference can be drawn.

[46] The trial judge noted that Jawanda had expressed an ongoing sense of urgency in transporting the cocaine. In these circumstances, it would not have been reasonable to base an investigative strategy on the assumption that there would be unlimited scope for further scenarios. The judge also accepted that both Trombley and W could only be used for one transaction as the police would not permit the cocaine to be imported into Canada. Rather, the drugs would be replaced by a placebo for controlled delivery.

[47] With respect to the MDMA/cocaine scheme, the trial judge found that the affiant's stated belief that Jawanda would never introduce W to his associates was undermined by the fact that the police had identified as a potentially viable investigative strategy having W request such a meeting. Ultimately, this was never pursued. Nevertheless, the judge found it speculative to suggest that Trombley and another undercover officer could have served as a backup for the transportation of cocaine from California if W's request to meet with Jawanda's associates aroused suspicion. As the judge put it, "If it carried any meaningful risk of that occurring, the investigators would have been justified in not having [W] make the request": at para. 242.

[48] The judge then turned to the question of whether, having excised the misleading information from the affidavit, the authorizing judge could still have been satisfied that there was, practically speaking, no reasonable alternative method of investigation that would meet the identified objectives. The judge answered this question in the affirmative for the following reasons:

- [247] It is clear that the question of investigative necessity stands or falls, as I have said, on the question of whether, with the misleading information I have identified dispensed with, and [in] light of the true state of affairs as we now know it, the authorizing judge could have been satisfied that, despite the ongoing successful use of Trombley and the undercover officer, there was still, practically speaking, no reasonable alternative method in the circumstances that would meet the objectives of the investigation.
- [249] Even without the restrictions on his ability to meet higher-ups that I have found to be misleading, and despite the degree of trust and confidence reposed in him by Jawanda and his core associates, there remains evidence in the affidavit in the form of Trombley's contemplated role from which it could be inferred that he was unlikely to be placed in a position in which all of the other higher-level suppliers would meet and confide in him.
- [250] As I have said, I think a greater role than one for which he was recruited is speculative on the existing record, and Corporal Defrane's assertion that his likely point of contact would be a counterpart delivery driver is not displaced by the lack of firm pickup arrangements to that point. Despite the earlier comment that he "could meet" a kingpin, there was a reasonable basis to infer, as Corporal Defrane maintained, that seeking such an introduction out solely in his capacity as a driver would likely arouse suspicion.
- [251] There is also no basis beyond speculation that using Trombley in the MDMA/cocaine scenario would have expanded the scope of the transport role for which he had been recruited.
- [252] W.'s role is a different matter. It was an investigational strategy for him to seek out such meetings and, as amplified on review, the identification issue was considered a means of achieving that. Without the misleading obstacle put forward in the affidavit, and with proper disclosure of that directive as an aspect of W.'s operating instructions, it would have been clear to an authorizing judge that his seeking out suppliers and other participants was an available approach.
- [253] Where I think a residual basis remained, however, on which the authorizing judge could have been satisfied that an authorization was the only means of fulfilling the complete objectives, is in paragraph 503 and the inferences available from it. Corroborating the target's admissions to undercover officers and showing the full extent of the named offences by capturing their communications with suppliers and/or intended recipients of pending MDMA or cocaine shipments are specific reasons that go beyond the mere conclusory assertions of the kind rejected in [R. v. Fraser, 2010 BCSC 344] and identify why direct interaction between W. and the known and additional participants would fall short of complete investigational success, as I find it was reasonably defined.
- [254] It was open on the evidence for the authorizing judge to infer that communications involving targets that took place outside of the assailable dynamics of an undercover officer's relationship with a target are inherently more valuable as proof at trial and, more importantly, more valuable than an undercover operation that is restricted to direct

interactions for the admissibility of the statements made. Given Jawanda's description of the additional players, there was a factual basis on which it could have been inferred that the full network of multiple suppliers and cooperating participants could be fully revealed only by communications outside of whatever the undercover officer was directly able to arrange and carry out.

[255] I emphasize that this is a conclusion that arises on the specific circumstances of this case, and is not intended to endow the police with *carte blanche* to support investigative necessity with a mere rote incantation of the need to investigate higher-level suppliers and other participants in any drug case of even moderate seriousness and complexity.

[256] Therefore, in my opinion, even after the misleading material is removed from consideration and the true state of affairs is applied, there did remain a basis on which the authorization could have issued that arises from reliable evidence in the affidavit and the inferences that are available from it.

[Emphasis added.]

[49] In the result, the judge upheld the authorization.

4. Reasons for Judgment (2019 BCSC 2292)

[50] The Crown's case against the appellant was circumstantial. It was not disputed that W made nine purchases of MDMA from Jawanda over a six-month period. W never met the appellant. As previously noted, the central issue at trial was whether the MDMA that W purchased from Jawanda was supplied by the appellant.

[51] To prove the appellant's guilt, the Crown relied on the combined effect of W's evidence, surveillance evidence before and after the transactions between W and Jawanda, intercepted calls between Jawanda and his supplier, statements made by Jawanda to W, and supporting documentary evidence. That evidence is summarized below.

[52] The appellant was the registered user of the phone number in 28 of the 29 calls intercepted as between Jawanda and his supplier (the "Chen phone").

[53] On April 1, 2015 at approximately 8:34 a.m., a police officer called the Chen phone. The officer described the person who answered as having a male voice with an accent from what he defined as "eastern Asia". They spoke for about 10-15 seconds, under the guise of dialling a wrong number. At approximately the same time (8:35 a.m.), an officer conducting surveillance saw the appellant pick up his phone, have a 10-15 second conversation, and hang up. This was referred to as the "drop call".

[54] On June 4, 2015, the alleged supplier asked Jawanda to go to an accountant to sign some documents for "Sam's Concrete". Records from Rogers Communications reflect that Sam's Concrete was the registered subscriber of the Chen phone number. The account was to the attention of Stephen Chen, and the user of the account was identified by the initials S.C.

- [55] The alleged supplier was intercepted having phone calls with Jawanda around the time of each of the nine alleged drug transactions.
- [56] I will briefly summarize the evidence led by the Crown to prove a close connection between, on the one hand, Chen and Jawanda, and on the other hand, the six MDMA transactions between W and Jawanda in which the judge found Chen to have been the supplier. In the other three transactions, the judge was unable to conclude beyond a reasonable doubt that Chen was the supplier.
- [57] On February 14, 2015, W arranged to purchase a kilogram of MDMA from Jawanda. At 6:29 p.m., a call was intercepted between Jawanda's phone and the Chen phone. Jawanda asked the speaker on the Chen phone if he could come and see him. The speaker asked if it had to be that day. Jawanda confirmed that "it's today, buddy's taking off ". The two men agreed to meet at around 7:15 p.m. At 7:11 p.m., a text message was sent from Jawanda's phone to the Chen phone confirming his location. At 8:00 p.m., W met Jawanda at their regular meeting place and purchased one kilogram of MDMA. W confirmed during this meeting that he was going to be out of town for a few days. At 8:51 p.m., Jawanda called the Chen phone and asked whether the speaker wanted to grab "the paperwork". The judge was satisfied that "paperwork" was used as a code word for money. Jawanda and the speaker on the Chen phone agreed to meet the next morning. The next morning, there was a further conversation between the two men, and the speaker on the Chen phone asked Jawanda to drop "it" off at his house.
- [58] On June 24, 2015, the alleged supplier and Jawanda spoke and arranged to meet at "5th and Nanaimo". About 30 minutes later, the appellant was observed walking from a residence on East 5th Avenue and leaning into the window of Jawanda's vehicle. The East 5th Avenue address was the address listed for Stephen Chen in corporate documents for "Sam's Concrete Plumbing 2011 Ltd.", a sole proprietorship. A little over an hour later, Jawanda met with W and sold him one kilogram of MDMA for \$8,500. Although the judge was not satisfied beyond a reasonable doubt that Chen supplied Jawanda with the drugs for this transaction, the evidence is relevant to show the relationship between the two men.
- [59] On July 6, 2015 at 7:42 p.m., the Chen phone called Jawanda. Jawanda said he was out and that he would "grab it" from the speaker. Later that evening, arrangements were made for the speaker to drop "it" off at the house of Jawanda's friend. At 4:09 p.m. the following day, Jawanda met W at their usual spot and purchased two kilograms of MDMA for \$17,000. On July 8, 2015, Jawanda called the Chen phone and said, "I've got it here" and "I can drop it at your house".
- [60] On August 13, 2015, after Jawanda spoke to the alleged supplier and requested "two", the appellant was observed with another man moving a black carry-on suitcase from the address on East 5th Avenue to a vehicle. The suitcase was delivered to an address in Richmond. The next day, Jawanda was observed putting a small, dark-coloured, carry-on suitcase in his Cadillac Escalade. He delivered two kilograms of MDMA to W in a small black

suitcase. W paid him \$17,000. When W asked Jawanda whether the product was "good quality", Jawanda assured him that it was. He told W that the product was from his "main guy" and that they had been doing business for 20 years. After the transaction, Jawanda called the Chen phone and told the speaker that he had "the paperwork" for him. Approximately two hours later, the two men spoke again and Jawanda said he would "be there in five minutes". He asked the speaker on the Chen phone to order him some beef pho. Sixteen minutes later, police officers conducting surveillance saw the appellant sitting with Jawanda eating lunch in a Vietnamese restaurant, Pho Japolo. The appellant had a rectangular bulge in his pocket.

- [61] At 12:09 p.m. on August 18, 2015, Chen was seen leaving a building carrying a brown paper bag. He drove away in a Toyota Sienna. At 1:55 p.m., the Chen phone called Jawanda and told him to "hurry up". At 1:59 p.m., one of the surveillance officers saw Jawanda's vehicle parked beside the Sienna. The surveillance officer did not identify the driver of the Sienna. Later that afternoon, a man gave a white plastic bag to Jawanda who was seated in his vehicle. At 3:38 p.m., Jawanda met W at their regular location. W purchased two kilograms of MDMA for \$16,000. The drugs were in a white London Drugs bag. At 3:42 p.m., Jawanda called the Chen phone. The speaker answered by asking, "It's ready?" After being told that it was, he directed Jawanda to meet him at a supermarket on Cambie. Chen was observed by surveillance officers inside the market between 3:41 p.m. and 3:50 p.m. At 3:51 p.m., the Chen phone called Jawanda. The speaker said, "I'll see you behind your house". At 3:57 p.m., Jawanda arrived at his home. The Sienna pulled in beside Jawanda's vehicle, and the two drivers appeared to have a conversation before departing.
- [62] On August 21, 2015, Jawanda spoke to the alleged supplier on the Chen phone. They arranged to meet at the back of Jawanda's residence. Three minutes before Jawanda met with W to complete the sale, he told the alleged supplier that W was running late. Jawanda told the alleged supplier he would be home in less than ten minutes. During this time, Jawanda met with W and sold him two kilograms of MDMA for \$17,000. Jawanda told W his friend was waiting for him. About seven minutes later, police observed Chen drive to the rear of Jawanda's residence. Eight minutes later, the Chen phone called Jawanda, asking "Where are you now? Come on, man . I'm fucking at the back, burning". Jawanda said he was less than a minute away. The police then observed Jawanda arrive at the back of his residence and meet with the appellant. After a brief meeting, they departed in their respective vehicles.
- [63] On August 25, 2015, Jawanda and the alleged supplier were attempting to meet a third party. Jawanda said he was waiting at the same spot. The alleged supplier confirmed that he was on his way. Nine minutes later, police observed the appellant in his vehicle, parked beside Jawanda in his vehicle. They were speaking to each other through their open driver's side windows. An unknown man driving a Lexus arrived and put a Home Depot box in the rear hatch of Jawanda's vehicle. Before leaving, the appellant and the man in the Lexus stopped and had a verbal exchange at the entrance to the parking lot. The following day, at 9:20 a.m.,

another undercover officer met with Jawanda and paid him \$18,000 for two kilograms of MDMA.

- [64] During a search of Jawanda's home on August 26, 2015, investigators found a promissory note in which Jawanda agreed to pay back Stephen Chen the amount of \$192,000 from the sale of the business "Sam's Concrete Plumbing 2011 Ltd".
- [65] The appellant's fingerprints were never found on any of the items seized after the purchases of MDMA from Jawanda.
- [66] The judge found there was "a convincing body of evidence that Mr. Chen is the speaker identified by his name in the transcripts": at para. 160.
- [67] The judge's reasoning was comprised of two essential building blocks.
- [68] First, the judge concluded that for all of the intercepted calls, the speaker on the Chen phone was the same person. He based this conclusion on the similar manner in which the speaker communicated across the calls, including: the "cryptic terminology" he used; his "distinctively abrupt but jocular manner"; and the similarities in the accent, pitch, and cadence of his speech: at para. 162. The appellant concedes in his factum that this was a permissible way of approaching the issue.
- [69] Second, relying on the inferences that could be drawn primarily from the surveillance evidence, the subscriber information, the "drop call", the intercepted communications, and the other documentary evidence, the judge concluded that the appellant was the speaker on the phone. It followed that he supplied MDMA to Jawanda.
- [70] Applying *R. v. Villaroman*, [2016] 1 S.C.R. 1000, 2016 SCC 33 [Villaroman], the judge noted that Jawanda had described working with multiple suppliers and that some of the communications might have had alternative innocent explanations. As noted, he ultimately concluded that in three of the nine transactions relied on by the Crown, there were reasonable alternative inferences other than that the appellant was the supplier of the MDMA. In the remaining six transactions, summarized above, he found the evidence consistent only with the appellant's role as the supplier of the drugs sold by Jawanda and inconsistent with any other reasonable inference. Accordingly, the appellant was found guilty as charged.

III. Analysis

1. Admissibility of the Wiretap Evidence

- (a) Was the applicant required to establish investigative necessity in this case?

- [71] In my view, the judge erred in concluding that the validity of the authorization turned on whether there was a basis upon which the authorizing judge could be satisfied that continued resort to conventional investigative procedures was unlikely to succeed. Respectfully, it was unnecessary in the circumstances of this case for the judge to embark on this inquiry. I say this for the following reasons.
- [72] To set aside an authorization, the reviewing judge must be satisfied that there was "no basis" upon which it could have been granted: *Garofoli* at 1452; *Araujo* at para. 51; *R. v. MacNeil*, 2013 BCCA 162 at para. 50, leave to appeal to SCC refused, 35407 (10 October 2013).
- [73] The authorization was sought and obtained for a criminal organization offence listed in s. 186(1.1) of the Code. The applicant, therefore, did not need to satisfy the authorizing judge that it was, from an investigative perspective, necessary to grant the authorization.
- [74] On review, the judge correctly stated the test he was obliged to apply, as set out in *R. v. Lucas*, 2014 ONCA 561 at para. 74, leave to appeal to SCC refused, 35974 (22 January 2015): if the authorizing judge could have been satisfied that there were reasonable grounds to believe that the offence had been or was being committed for the benefit of or in association with the criminal organization, no demonstration of investigative necessity was required.
- [75] The judge proceeded to find a basis in the evidence upon which the authorizing judge could come to this conclusion. But, he failed to give legal effect to this finding.
- [76] Instead, the judge concluded that s. 186(1.1) "cannot arise by mere operation of law": at para. 264. He held that the authorizing judge could not simply be taken to have been satisfied that the authorization was in relation to a designated criminal organization offence. Her attention needed to be specifically drawn to the legal effect of such a conclusion, and she needed to be invited to signify that an authorization was granted on that basis. I do not agree with the judge on this point.
- [77] By operation of law, an applicant under Part VI of the Code is relieved from establishing investigative necessity where the authorizing judge is satisfied that the application is in relation to a designated criminal organization offence. By the terms of the order granted, the authorizing judge was so satisfied. The trial judge, sitting as the reviewing judge on the *Garofoli* application, was satisfied that there was a basis upon which the authorizing judge could have concluded that there were reasonable grounds to believe the offences were being committed for the benefit of, or in association with, a criminal organization. The appellant has not taken issue with this finding on appeal. In these circumstances, and as a matter of law, investigative necessity was not a statutory precondition to the issuance of the authorization. The judge erred in concluding otherwise.

- [78] Put differently, even though the judge correctly described his role on review--determining whether there was a basis upon which the authorization could have issued--he failed to confine himself to the resolution of that issue. The judge's finding that there was a basis upon which the order could have issued under s. 186(1.1) should have brought the review to an end. It was unnecessary for him to go on to determine whether the same order could also have been made on a different basis--specifically, pursuant to s. 186(1)(b).
- [79] The difficulty I have in accepting the judge's analysis is highlighted by this counterfactual. Had the judge found no basis upon which the authorizing judge could have been satisfied of the existence of investigative necessity--a precondition for the issuance of an authorization under s. 186(1)(b)--he would have been required to set aside the authorization and conclude that the appellant's s. 8 Charter rights were infringed by the interception of his private communications. This order would presumably have been made even though the judge was satisfied there was a basis upon which the order could have issued pursuant to s. 186(1.1). Such a result would be inconsistent with the deferential standard of review and, in my view, indefensible as a matter of law in the circumstances of this case.
- [80] The judge was, however, right to be concerned about the integrity of the authorization process. The affiant did list a designated criminal organization offence as one of the offences under investigation, and he provided the authorizing judge with the basis for his belief that the alleged offences were being committed for the benefit of, or in association with, a criminal organization. Even so, as a matter of best practice, it would have been preferable for the affiant to have clearly set out the basis upon which the order was being sought and drawn the attention of the authorizing judge to the potential application of s. 186(1.1).
- [81] But, I do not accept the judge's view that the operation of s. 186(1.1) was ousted in this case because the authorizing judge may not have been reminded of the legal implications of her conclusion that there were grounds to believe that the alleged offences were being committed for the benefit of, or in association with, a criminal organization.
- (b) If investigative necessity was a precondition to issuance of the authorization, did the judge err in principle in concluding that there was a basis upon which the authorizing judge could conclude that it had been established?
- [82] Even if the judge was right to proceed on the footing that a demonstration of investigative necessity was required, I am of the view that he committed no error in principle in concluding that the requirements of s. 186(1)(b) were met.
- [83] The appellant argues that, having found that the effect of the affidavit was to mislead on the issues canvassed earlier in these reasons, the judge was obliged (but failed) to consider whether this had a contaminating effect on the reliability of related assertions that were not excised from the affidavit. He submits that such an analysis is critical when the review turns on an affiant's assertions about the viability of conventional investigative techniques, as these are inherently speculative and rest largely on the credibility of the affiant.

- [84] In my view, the appellant has not demonstrated material error on this issue.
- [85] First, after excising from the affidavit information he considered to be misleading, the judge turned his mind to whether the authorizing judge could have been satisfied of the investigative necessity requirement "[in] light of the true state of affairs as we now know it": at para. 247. Having approached the issue in this way, he was satisfied there remained "a residual basis" upon which the authorization could have issued: at para. 253. The language used by the judge suggests to me that he considered whether the excisions tainted the reliability of the information that remained.
- [86] Further, the basis on which the trial judge found that the authorizing judge could have been satisfied of investigative necessity does not appear to me to significantly turn on the affiant's credibility. The residual basis rested on the need to seek corroboration of the targets' admissions to undercover officers, and to capture their communications with the suppliers and/or recipients of the drugs. I do not see how this justification rested on an assessment of the affiant's credibility.
- [87] There was no suggestion of bad faith or deliberate lies on the part of the affiant in this case, and I have been unable to identify any suggestion by the appellant during the voir dire that the excision of misleading information from the affidavit undermined the reliability of the evidence as a whole. His failure to raise this argument in the first instance tells against its merit.
- [88] Further, the judge's conclusion on this issue was based on the specific circumstances of this case. It was not intended to suggest that investigative necessity will be met whenever the police suggest that a wiretap is needed to investigate higher-level suppliers in a drug investigation.
- [89] In my view, the appellant's reliance on *R. v. Monroe* (1997), 90 B.C.A.C. 256, 1997 CanLII 3034, in support of his position on this point is misplaced. In that case, the affiant's proven deceptiveness in the excised portions of the affidavit tainted the reliability of his remaining observations, such that there was insufficient reliable evidence in the excised ITO to support issuance of the warrant. That is not what occurred in this case.
- [90] I am also unable to accept the appellant's submission that the judge erred by effectively placing the evidentiary and persuasive burden of proof on the appellant to refute the affiant's claims of investigative necessity. The appellant's submission on this point hinges on the judge's characterization of his suggestions that the objectives of the investigation could be met by continued reliance on conventional investigative techniques as "speculative": at paras. 242, 250-251.
- [91] It is important to recall on this point that authorization to intercept private communications is presumed to have been properly issued. The appellant bore the burden of demonstrating that the ITO was insufficient: *Campbell* at para. 14; *R. v. Wilson*, 2011 BCCA 252 at para. 63 [Wilson]; *R. v. Sadikov*, 2014 ONCA 72 at para. 83.

- [92] In my view, the judge was justified in rejecting such "speculative" assertions, including that Trombley's role as a relatively low-level transport driver could be expanded in such a way as to identify the suppliers and recipients of the drugs. The judge was required to assess whether conventional investigative techniques were reasonable from a practical perspective, in light of the objectives of the investigation and the evidence set out in the ITO. Relying on the record before him, the judge was entitled to conclude that "[t]here is no evidence from which that inference can be drawn": at para. 234. I do not read this passage--or others like it--as shifting the burden to the appellant to disprove investigative necessity. Rather, the judge's approach reflected the "practical, non-technical, and common-sense basis" on which he was required to conduct the review, and the presumption of validity the appellant was obliged to displace: Wilson at para. 52. The judge was required to determine whether the evidence supported a non-speculative assertion that conventional investigative techniques would be sufficient.
- [93] To the extent that the appellant's submission on this point relies on Villaroman, I find it unconvincing. I agree with the Crown that a Garofoli review is not at all analogous to a trial where the Crown has the burden of overcoming the presumption of innocence. The test on review is limited to an assessment of whether the evidence was capable of satisfying the authorizing judge that the statutory preconditions for making the order were met.
- [94] The appellant also suggests that the judge erred in principle by requiring him to prove that conventional investigative techniques remained a viable way of achieving the objectives of the investigation.
- [95] Again, I am unable to accept the appellant's submission on this point. While I accept that the appellant need not prove that investigative alternatives short of a wiretap authorization remained viable, I am not persuaded that the judge imposed this obligation on the appellant. Indeed, the appellant failed to identify this error anywhere in the reasons given on the voir dire.
- [96] For the foregoing reasons, I am unable to give effect to the appellant's submission that the judge erred in principle in his assessment of the investigative necessity requirement.
2. Alleged Errors in Principle in the Reasons for Judgment
- (a) Insufficiency of Reasons: The "Sheppard" Issue
- [97] There is no merit in the appellant's suggestion that the reasons for judgment were insufficient. I need not discuss in any detail the now well-established propositions of law that govern this area. Suffice it to say that appellate review of the sufficiency of reasons is a contextual inquiry. The central issue is whether the reasons explain the verdict and allow for appellate review: R. v. Sheppard, [2002] 1 S.C.R. 869, 2002 SCC 26 at paras. 24-25.

- [98] In my view, the reasons are factually and legally sufficient. The judge carefully and thoroughly analysed each of the transactions against the complex body of evidence before him to determine whether it had been established beyond a reasonable doubt that the appellant was the speaker using the Chen phone and, therefore, the supplier of the MDMA. The judge's reasons are clear and more than sufficient to permit appellate review.
- [99] The judge did not, as the appellant suggests, move from a conclusion that "manner of speech can be an identifying characteristic in some circumstances, to a bald conclusion that the appellant was the speaker". With respect, this reading of the reasons is neither fair nor reasonable. Rather, having concluded that one person was speaking on the Chen phone, the judge relied on what he considered to be a "convincing body" of circumstantial evidence establishing that the appellant was the speaker and supplier of drugs to Jawanda. The judge's conclusion is both reasonable and entitled to deference.
- (b) Unreasonable Verdict: The "Bergstrom Issue"
- [100] The appellant submits that the distinctive voice patterns of the speaker using the Chen phone--from which the judge concluded that all of the Chen phone intercepts involved the same speaker--did not establish the identity of the speaker. The appellant submits that the judge failed to grapple with this issue and that his reasoning process that led to a finding of guilt reveals "a leap across a gap in the evidence". In support of his position on this point, the appellant relies on *R. v. Bergstrom*, 2008 BCCA 546, an assault case in which there was no direct or circumstantial evidence that the accused threw the punch.
- [101] Although not framed in this way, I understand the appellant's argument to be that the verdict is unreasonable in the sense that it is not one a properly instructed jury acting judicially could reasonably have rendered: *R. v. Biniaris*, [2000] 1 S.C.R. 381, 2000 SCC 15 at paras. 36-37.
- [102] Again, I find no merit in the appellant's submission on this point. In my view, there was a substantial body of evidence--some of it summarized above--upon which the judge could reasonably conclude that the appellant supplied the MDMA for six of the drug sales made to W by Jawanda. The factual inferences drawn by the judge were well-supported in the evidence and entitled to deference on appeal.
- (c) Unreasonable Verdict: The "Beaudry Issue"
- [103] The appellant's argument on this point rests on the judgment of Justice Fish in *R. v. Beaudry*, [2007] 1 S.C.R. 190, 2007 SCC 5 at paras. 83, 97 [Beaudry]. Beaudry stands for the proposition that an appellate court may find a verdict unreasonable if the trial judge has made a finding of fact essential to the verdict that is not logically supported by the evidence, or because the reasons given in support of a verdict are fundamentally incompatible with evidence that has not been contradicted or rejected.

- [104] Justice Fish dissented in the result in Beaudry, but the Court clarified that his reasons accurately reflected the law in *R. v. Sinclair*, [2011] 3 S.C.R. 3, 2011 SCC 40 at paras. 44, 67-69. Although Fish J. also dissented in the result in *Sinclair*, his articulation in that case of the circumstances in which a Beaudry error is committed is authoritative:
- [19] Illogical or irrational reasoning can render verdicts unreasonable under s. 686(1)(a)(i) of the Code, in various ways. Beaudry identifies two. First, a verdict is unreasonable where the judge draws an inference or makes a finding of fact essential to the verdict that is "plainly contradicted by the very evidence from which it was drawn" or upon which it has been made to rest (para. 105). In that case, the essential finding is illogical or unreasonable in light of the evidence relied upon in making the finding. Here, the rule of law speaks the language of logic: From accepted evidence "X", a court cannot lawfully infer "not X".
- [21] A verdict is likewise unreasonable where the judge draws an inference or makes a finding of fact essential to the verdict if that inference or finding of fact is "demonstrably incompatible" with evidence that is neither contradicted by other evidence nor rejected by the trial judge" (Beaudry, at para. 79, per Binnie J.).
- See also: *R. v. R.P.*, [2012] 1 S.C.R. 746, 2012 SCC 22 at para. 9.
- [105] There are two branches to the appellant's argument.
- [106] First, he says that the judge reached the verdict illogically or irrationally by "[c]onflating the issue of similarity of voice between calls and identifying [the appellant as] the speaker" in those calls. In support of this branch of the argument, the appellant notes that, after discussing the voice identification evidence and concluding that each of the calls made to or from the Chen phone involved the same speaker, the judge said this:
- [164] Thus, I find that Mr. Chen, the accused before the court, is the speaker in the calls that have been entered.
- [Emphasis added.]
- [107] I would reject the appellant's first argument as being unsupported by a fair reading of the reasons. It is inconsistent with the framework of principles governing appellate review of reasons for judgment.
- [108] The judge engaged in a detailed consideration of the circumstantial evidence in order to determine whether the appellant was the speaker on the Chen phone. Adoption of the appellant's submission on this point would require us to parse language used in the reasons, divorced from the surrounding context. We cannot do so. Viewing the reasons contextually, I think it abundantly clear that the judge's conclusion that the appellant was the speaker on the Chen phone did not flow directly from his finding that the same person spoke on that phone. Rather, it flowed from that finding and from the web of circumstantial evidence implicating the appellant in the commission of the offence--evidence that the judge spent the better part of 200 paragraphs summarizing and discussing.

- [109] Second, the appellant submits that the judge erroneously relied on identification of the appellant by name in the transcripts of the intercepted communications as evidence that he was the speaker in those calls. I see no merit in this submission.
- [110] At the outset of his reasons, the judge noted that the question of whether the appellant was the person speaking in the intercepted communications was a live issue--this despite portions of the communications being "attributed to him" in the transcription of the recordings.
- [111] While the judge referred to the phone number related to the appellant as "the Chen phone", he expressly recognized that the identity of the speaker on the Chen phone was a point of contention. I agree with the Crown that the judge was "scrupulously careful" to describe the individual speaking on the Chen phone as "the speaker" or "the speaker on the Chen phone".
- [112] I see nothing in the reasons supporting the appellant's submission that the judge made the egregious error of considering attribution on a transcript of an intercepted call as being evidence confirming the identity of the speaker.
- [113] I would not give effect to this ground of appeal.

IV. Disposition

- [114] For the foregoing reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Justice Dickson"

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Prepared on 25 October 2026 · Esheria