
CANADA / JUDGMENT

R. v. Chow

2001 BCSC 1223

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

HER MAJESTY THE QUEEN

AGAINST

SIMON KWOK CHEUNG CHOW

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE EDWARDS

Counsel for the Crown: John Esson

Counsel for the Accused Chow: Peter Leask, Q.C.

Date and Place of Hearing: August 15, 16 & 17, 2001

Vancouver, BC

- [1] The accused ("Chow") was jointly charged with eight other persons, including Wilson Wong ("Wong"), under a direct indictment dated October 15, 1999, with twelve counts including firearms offences, conspiracy to commit extortion and mischief, fraudulent use of credit card data, forging credit cards, fraud and entering into an agreement to receive a criminal rate of interest.
- [2] Chow's trial was severed from that of the other accused.
- [3] Two of the six other accused, Hyunh and Au, pleaded guilty to two counts on the direct indictment and two others, Wong and Cheng, were convicted by a jury on two other counts, after a voir dire at which Clancy J held on February 6, 2001, that "wire tap" evidence obtained under authorizations granted pursuant to Part VI of the Criminal Code on June 4, 1997, by Romilly J ("authorization P3097") and on June 25, 1997, by Dohm ACJ ("authorization P3297") was admissible evidence at their trial.
- [4] I was advised that authorization P3297 was obtained on the basis of information obtained as a result of intercepts made under authorization P3097.
- [5] Authorization P3097 permitted the interception by various means of the communications of seven persons, including Wong, in furtherance of an investigation of theft, possession of stolen property and conspiracy by those persons to commit those offences in relation to the suspected theft of cars for export to Asia. Authorization P3097 permitted the interception of the communications of those seven persons and thirteen other persons, including Chow, who were not suspects in the car theft ring, but were known to associate with some of the seven.
- [6] Chow now challenges the admissibility of the "wire tap" evidence obtained under both authorizations P3097 and P3297 on the basis that authorization P3097 was invalid in respect of the authorization to intercept the communications of Wong as a suspect in the car theft ring.
- [7] Since Clancy J ruled this evidence admissible against Wong himself at Wong's trial, after a fourteen day voir dire at which a battery of counsel representing five accused cross-examined Sgt. Patrick Fogarty, the affiant of the affidavit which provided the basis for the granting of authorization P3097 by Romilly J, the question of whether a second voir dire to determine the admissibility of the same evidence is necessary or appropriate is raised by Crown counsel.

- [8] The questions of whether stare decisis precludes re-examination of the validity of authorization P3097 and whether Chow, who was not a suspect or target in the original investigation for which authorization P3097 was obtained, has status to challenge the validity of authorization P3097 on the basis that it was not validly granted to investigate Wong, were raised by the court and discussed by counsel during submissions, but were not fully argued. I therefore refrain from expressing any opinion on these questions.
- [9] Chow's attack on the validity of authorization P3097 regarding the interception of Wong's communications is based on the assertion that certain information, including that concerning the involvement of Wong in the car theft ring, which Sgt. Fogarty deposed in his affidavit was supplied to him by an unidentified informant "A", was false.
- [10] Wai Mun Teng ("Teng"), an admitted criminal associate of Chow, testified for Chow. Teng testified that he and Wong were underlings of Chow. Teng and Wong knew each other. Teng was not a co-accused with Wong before Clancy J. Teng testified he told Chow's former counsel years ago what he knew about the information attributed by Sgt. Fogarty to informant "A". There was no suggestion Teng could not have testified on Wong's behalf at the voir dire before Clancy J. He did not do so.
- [11] Paragraph 16a of Sgt. Fogarty's affidavit states he was informed by informant "A", that on January 15, 1996, informant "A" "was present at a meeting with ... Teng and two oriental males known as 'Ha Lo Bun' and 'Jeffry'" at which a plan to steal cars was discussed. Ha Lo Bun is also known as Alex Hai ("Hai").
- [12] Teng testified that Eric Yapp ("Yapp") was one of the three others present with him at that meeting. Yapp provided an unsworn statement that he attended the meeting but did not understand the Cantonese language of the other three participants who were the only others there, so Teng summarized the conversation for him. Yapp's statement says he never provided any information to Sgt. Fogarty.
- [13] Defence counsel undertook to call Yapp as a witness on a voir dire if it proceeded. Crown counsel indicated that Sgt. Fogarty acknowledged at the voir dire before Clancy J that Teng was not informant "A". Circumstances disclosed in Sgt. Fogarty's affidavit indicate Hai was not informant "A". Neither counsel suggested "Jeffry" was informant "A", nor does the structure or context of paragraph 16a.
- [14] Defence counsel indicated that if permission were granted he would ask Sgt. Fogarty on cross-examination to confirm that Yapp was not informant "A". Crown counsel took the position such as question was impermissible on the basis of informant confidentiality.

- [15] Assuming that Sgt. Fogarty were to be cross-examined on this point and disclosed that Yapp was not informant "A", one explanation of paragraph 16a is that informant "A" lied to Sgt. Fogarty about attending the meeting himself, but disclosed true details about the meeting informant "A" learned from one of the four persons present. Another possible explanation is that Weng and Yapp lied when they stated only four persons not including informant "A" were present, and informant "A" was in fact present.
- [16] On the basis that informant "A"'s information was false, defence counsel asserted that it might be inferred either that informant "A" did not exist, implying the information attributed to him was merely guess work or fabrication by the police, or that the information attributed to informant "A" by Sgt. Fogarty was really from a variety of sources misleadingly attributed to a sole fictional informant "A". Both of these possibilities, defence counsel argued, provided a basis for the court to order the cross-examination of Sgt. Fogarty to determine if his affidavit had been made in good faith or was deliberately misleading.
- [17] Crown counsel undertook to call a witness if a voir dire were held, a bank security officer involved in the credit card fraud investigation, Frank Pohl, who would testify that he had met informant "A" together with Sgt. Fogarty.
- [18] Accepting, for purposes of analysis only, that Yapp is not informant "A" and that informant "A" is a real not a fictional person, there are at least two other circumstances as noted in paragraph 15 above under which the information attributed to informant "A" in paragraph 16a of the affidavit, could nevertheless be substantially true.
- [19] I find the assertions that informant "A" may be a fictional person and that the information attributed to informant "A" came from a variety of sources, not an individual, are not given sufficient plausibility by the evidence of Teng to warrant the further cross-examination of Sgt. Fogarty for purposes of inquiring further into them.
- [20] Informant "A" says nothing in paragraph 16 about Wong being involved in the car thefts discussed at the meeting referred to in paragraph 16a.
- [21] At paragraph 38e of Sgt. Fogarty's affidavit he says that he was informed by informant "A" that informant "A" was present when Wong "was criticized" for not completing a theft of cars for sale overseas. The critic is not named. The context of paragraph 38 suggests it was Chow. Teng testified that it was not Chow's style to criticize Wong or his other underlings in front of others. Teng's testimony, even if accepted, cannot amount to an denial of informant "A"'s, version. Teng cannot state that a dressing down he did not hear did not occur.
- [22] Paragraph 6b of Sgt. Fogarty's affidavit says he was informed by informant "A" that informant "A" in company with Teng and "other Asian males" was present at the Club Dynasty when Wong stated "his boys" had stolen five brand new green Toyota Camry LE vehicles from a Vancouver dealer on January 12, and that they were being loaded onto container ships for export.

- [23] Teng testified that he never heard Wong make such a statement and that if made at the Club Dynasty it would have been in Cantonese which, since Yapp could not understand it, eliminated Yapp as informant "A". Teng can not say that informant "A", not Yapp, did not hear Wong make this statement. There are at least three explanations for the conflict between informant "A"'s version and Teng's testimony about Teng's presence when the statement was made by Wong. These are: informant "A" was mistaken about Teng's presence, Teng was present but did not hear or does not remember what Wong said or Teng lied about not hearing Wong's statement.
- [24] Paragraph 7 of Sgt. Fogarty's affidavit says four new green Toyota Camrys were stolen from a dealership on January 12, 1996 and recovered by police.
- [25] Documents seized by police link the attempt to ship the stolen cars overseas to Hai, and thus link Hai, the main target of the investigation, with Wong in connection with the theft. Information from an informant "B" also linked Hai and Wong through their mutual association with Chow.
- [26] Paragraph 6c of Sgt. Fogarty's affidavit says he was informed by informant "A" that informant "A" knows Teng and Wong work for Chow who is a "high level criminal" involved in a number of criminal activities (not including car theft), that informant "A" has been involved in some of these activities and that informant "A" has seen Chow directing Wong, Teng and others in these activities.
- [27] Paragraphs 6b and 38e are the only ones which attribute to informant "A" information linking Wong directly to the car theft ring. Neither are significantly undermined by the testimony of Teng, and the veracity of paragraph 6b, insofar as it states cars were stolen and being loaded for shipment overseas is substantially corroborated by the recovery of the stolen cars, evidence they were taken to a shipper and the discovery of documents linking their attempted export to Hai.
- [28] The car theft of green Toyota Camrys occurred. Hai is linked to the cars by documents. Apart from paragraph 6b, Wong is linked to Hai through their common association with Chow. Teng acknowledged on cross-examination that he and Wong were underlings of Chow and that he, Teng, was to be involved in the theft of vehicles referred to in paragraph 16a, though Wong was not. This is consistent with and amplifies the affidavit of Sgt. Fogarty. Since one of Chow's underlings, Teng, was involved in planning a car theft with Hai, it might be inferred the other, Wong, was more likely involved in the theft referred to in paragraph 6b which actually occurred.
- [29] Crown counsel, who did not object to the cross examination of Sgt. Fogarty at the voir dire before Clancy J, took the position that he should not now be further cross-examined, and indeed that there was no basis for a further voir dire into the admissibility of evidence obtained under authorization P3097 in this case.

- [30] In response to that position, defence counsel argued that permission to cross-examine affiants on affidavits filed to support Part VI authorizations is routinely given by this court. He cited as an example the decision of Oppal J on the trial of Chow for first degree murder. In that case, Oppal J granted a voir dire based on assertions by defence counsel that there were three issues going to the validity of the several authorizations in that case worthy of examination on a voir dire.
- [31] The three issues were whether adequate "other investigative means" had been employed before the initial authorization, whether subsequent authorizations had been unnecessarily sought after evidence to support charges other than murder had been obtained and whether there had been "misleading and material non-disclosure" by virtue of the fact one affidavit disclosed that authorization P3097 was granted with respect to a conspiracy to commit murder rather than a conspiracy to commit theft.
- [32] Crown counsel did not concede that a voir dire ought to be called in that case, but opposed it only by stating "there's very little that's been advanced to you" (i.e. to the court). Oppal J then stated he was "satisfied that the defence has met the test set out in R. v. Vukelich" and ordered a voir dire, whereupon Crown counsel did not object to the cross-examination of the affiant in that case.
- [33] Only the last of the three issues, that of false disclosure, has any parallel in this case. Although he gave no reasons, I find it difficult to conceive that Oppal J found the Vukelich test had been met on the basis of the assertion made to him on this third issue.
- [34] Crown counsel relied on the February 17, 2000, decision of K. Smith J, in R. v. Lising and Pires (CC980886 Vancouver Registry) which denied a defence application for a voir dire and permission to cross-examine an affiant in respect of authorization P3596. In this decision, R. v. Vukelich (1996), 108 C.C.C. (3d) 193 (B.C.C.A.) was also considered.
- [35] Vukelich concerned a challenge to a search warrant, not a "wire tap" authorization. The trial judge denied a defence application for a voir dire to examine the validity of the warrant on the basis that "...I don't find myself even mildly suspicious about the information underlying the warrant ... there has not been anything shown that would lead me to believe there is any proper basis to enter upon an inquiry with respect to the propriety of the warrant or the propriety of the information underlying it." The trial judge also denied the defence application to cross-examine the deponent of the affidavit sworn to obtain the warrant.
- [36] The Court of Appeal rejected the argument that a voir dire must be conducted and the deponent cross-examined when it is alleged the affidavit is false and misleading to the knowledge of the deponent, and concluded a paragraph 29, per McEachern CJBC, "that the trial judge did not err in declining to permit cross-examination of the deponent on the question of whether there should be a voir dire". McEachern CJBC continued at paragraphs 30 and 31:

- [30] This leaves for consideration the question of whether the result must be different when the accused alleges that the affidavit in support of the warrant is deliberately false and misleading.... I have no doubt that, in almost all cases, such circumstances, if related to the essence of the case, would ordinarily persuade a trial judge to direct a voir dire, and probably to provide an appropriate Charter remedy: see *R. v. Sismey* and *R. and Dellapenna*, supra. In this case, however, the allegations of falsity were argumentative and conclusory without comparison with the disclosure evidence, and the alleged falsities were not related to the issue of conspiracy. That was not the case in either *Sismey* or *Dellapenna* where, without the impugned passages, there would be no basis for a warrant at all.
- [31] I do not say that deliberately false averments, designed to mislead the authorizing officer, could not lead to setting aside the warrant, but that the foundation for such a drastic result would have to be much stronger than it is in this case.
- [37] I take these passages to mean that the remedy of exclusion of evidence obtained either by search warrant or "wire tap" will normally be considered on a voir dire when the court is satisfied either that without the "alleged falsities" the warrant or "wire tap" would not have been authorized or that the false averments were deliberately intended by an affidavit to mislead the judge who authorized the warrant.
- [38] In *Lising*, Smith J found that paragraph 11 of the affidavit on which authorization P3596 was granted, which dealt with a polygraph test of a "sub-affiant", "appears to be calculated to mislead". On that basis he disregarded that part of the affidavit and found that the balance of the affidavit nevertheless provided a basis on which the authorizing judge "could have granted the authorization", applying *R. v. Garafoli* (1990), 60 C.C.C. (3d) 161 (S.C.C.) at page 188.
- [39] Smith J asked himself "whether, had the authorizing judge known that paragraph 11 ... was calculated to mislead, he could still reasonably have acted on the remaining evidence contained in the affidavit" and decided the authorizing judge "would not have put any significant weight on the opinions set out in paragraph 11".
- [40] It is noteworthy that notwithstanding his finding that paragraph 11 was "calculated to mislead", which might be taken to imply a lack of candor, if not bad faith on the part of the affiant, Smith J did not permit the cross-examination of the affiant, even though, as McEachern CJBC observed in *Vukelich* quoted above, the "drastic result" of setting aside a warrant (or "wire tap" authorization) would require a "much stronger" foundation than the mere assertion of counsel that there had been "deliberately false averments, designed to mislead" placed before the authorizing officer.
- [41] In this case, defence counsel asked me to conclude, based on Teng's evidence, that there was false information attributed to informant "A" about Wong in Sgt. Fogarty's affidavit and argued that Sgt. Fogarty should be cross-examined to determine if he knew the information was false and if he intended it to mislead.

- [42] In *Lising*, notwithstanding a finding by Smith J that information "calculated to mislead" was placed before the authorizing judge, Smith J as reviewing judge did not permit the defence to establish a "stronger foundation" for the "drastic" remedy of invalidating the authorization through cross-examination, even though Smith J treated the allegation that paragraph 11 was calculated to mislead as an attack on the credibility and reliability of the affiant.
- [43] Here, by contrast, there is nothing to indicate that Sgt. Fogarty knew the information provided by informant "A" was false, let alone that Sgt. Fogarty knowingly included false information from informant "A" to mislead the authorizing judge. It would take a "fishing trip" cross-examination by the defence to discover if Sgt. Fogarty knowingly misled the authorizing judge about information attributed to informant "A".
- [44] In light of the fact that the information about the car theft allegedly by Wong's "boys" was corroborated by later discovery of the stolen cars and evidence of the attempt to export them, it is extremely unlikely that such a fishing trip would lead to a disclosure that Sgt. Fogarty had reason to doubt the information from informant "A" about Wong was true.
- [45] In *Lising* a finding by the reviewing judge that the affiant provided information calculated to mislead was not enough to justify a voir dire or such a "fishing trip" cross-examination of the affiant because of Smith J's finding that the reviewing judge would not have been misled by that information.
- [46] As Smith J noted, the issue for the reviewing judge is not whether information attributed to an informant was in fact reliable, but whether defence counsel can demonstrate that the authorizing judge was misled in some material way by "fraudulently or negligently misleading statements" in or omissions from the affidavit, referring again to *Garafoli* at page 188.
- [47] This is because the reviewing judge does not substitute his or her opinion for that of the authorizing judge. If the authorizing judge was not misled by something calculated to mislead, then, according to *Lising*, the fact there was information calculated to mislead the authorizing judge, does not permit the reviewing judge to come to a different conclusion based on the evidence before the authorizing judge minus the evidence found by the reviewing judge to be misleading if the reviewing judge is satisfied the authorizing judge was not misled.
- [48] Here the basis for the defence request to cross-examine Sgt. Fogarty is less compelling than it was for cross-examination of the affiant in *Lising*. The testimony of Teng does not persuade me that informant "A" is a fictional character of Sgt. Fogarty's invention, nor that what informant "A" said about Wong's involvement in the car theft ring was false or known by Sgt. Fogarty to be false.
- [49] There is no basis to conclude Sgt. Fogarty knowingly misled the authorizing judge by disclosing what he attributed to informant "A".

- [50] Wong's link to Hai and Hai's involvement in the export of stolen cars are supported by information not attributed to informant "A". Wong's link to the theft of the Camrys is supported by the corroborating evidence that the theft and attempted export of the cars occurred consistent with informant "A"'s information in paragraph 6b of Sgt. Fogarty's affidavit.
- [51] It is not the reliability of informant "A"'s information, but whether it was included in Sgt. Fogarty's affidavit with intent to mislead which determines whether it should be disregarded as part of that affidavit on this review. Teng's evidence does not persuade me Sgt. Fogarty had the intention to mislead, so there is no basis for disregarding informant "A"'s information.
- [52] There is no question the affidavit, including informant "A"'s information, provided sufficient information for the authorizing judge to link Wong as a suspect to the car theft ring.
- [53] On the basis of the evidence and submissions I have reviewed I am not persuaded there is any basis for requiring the cross-examination of Sgt. Fogarty or for a voir dire to determine the admissibility of evidence obtained pursuant to authorizations P3097 and P3297 at the trial of the accused Chow.

"E.R.A. Edwards, J."

The Honourable Mr. Justice E.R.A. Edwards

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