

CANADA / JUDGMENT

R. v. Chow

2002 BCSC 897

COURT

Supreme Court of British Columbia

DECIDED

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Citation:

R. v. Chow et al

Date: 20020612

2002 BCSC 897

Docket:

102982

Registry: Victoria

IN THE SUPREME COURT OF BRITISH COLUMBIA

HER MAJESTY THE QUEEN

AGAINST

KWOK CHEUNG simon chow aka SIMON CHOW, wilson wong,

david TAI WAI au, kwok chung tam, wall yip yeung,

LIEM THANH NGUY, PEI TIEN LIU aka barry liu,

VICKER SETO, QUINN ALEXANDER VALLANCE,

CHI HANG CHAN aka CHI HONG CHAN

RULING

OF THE

HONOURABLE mr. JUSTICE r. d. wilson

BAN ON PUBLICATION

Counsel for the Crown:

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M. Foster

Counsel for the Accused Seto:

K. Walker

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A. Tam

Counsel for the Accused Yeung:

C. Johnson

Counsel for the Accused Liu:

T. Bulmer

Date and Place of Hearing/Trial:

May 28, 2002

Victoria, BC

- [1] On 10 March 1997, the Vancouver Island District Drug Section of the R.C.M. Police formally commenced an investigation into the importing and trafficking of heroin and cocaine.
- [2] In the course of that investigation, on 23 October 1997, following an ex parte hearing, an authorization was granted for the interception of the private communications of certain named persons. In support of the application for that authorization was led the affidavit of John Michael Dunlop, sworn 22 October 1997.
- [3] The investigation concluded in June 1999 when a number of arrests were made. Two indictments were filed as a result of the investigation. The current indictment, and Victoria Registry No. 102981 in R. v. Wu, Chan, Morales and Tran. A preliminary inquiry was conducted in the matter of R. v. Wu et al on 8 May 2000. At that preliminary inquiry, Constable Dunlop was cross-examined on his affidavit of 22 October 1997.
- [4] R. v. Wu proceeded to trial on the indictment in the spring of 2001. During the course of that trial, application was made to cross-examine Constable Dunlop on the affidavit. That application was granted 16 May 2001 and cross-examination of Constable Dunlop was conducted.

- [5] The authorization of 23 October 1997 was also challenged in another matter, namely, R. Wasfi et al, Vancouver Registry No. CC991290. The trial of that matter proceeded 11 September 2000. Constable Dunlop was cross-examined on his affidavit in that matter as well.
- [6] Thus far, Constable Dunlop has been cross-examined for two and one-half days at the preliminary inquiry, four days in the matter of R. v. Wu et al, and six days in the matter of R. v. Wasfi et al. Cross-examination of Constable Dunlop on the affidavit has thus far extended over twelve and one-half days.
- [7] In the course of a voir dire, in this trial, to hear and determine the validity of the authorization of 23 October 1997, the accused Au, Liu and Seto seek leave to cross-examine Constable Dunlop on that affidavit. Not surprisingly, the Crown is opposed.
- [8] The issues are:
1. Should an order be made that Constable Dunlop attend for cross-examination on his affidavit of 22 October 1997; and
 2. If so, what matters are the subject of that cross-examination?
- [9] The general principles governing the resolution of those issues can easily enough be stated. They have their genesis in two, of a series of, decisions of the Supreme Court of Canada released 22 November 1990: R. v. Garofoli, [1990] 2 S.C.R. 1421 and R. v. Lachance, [1990] 2 S.C.R. 1490.
- [10] Those general principles include the following:
1. Leave must be obtained to cross-examine;
 2. cross-examination is not the general rule;
 3. a basis must be shown by the applicant for leave to support the view that cross-examination will elicit testimony tending to discredit the existence of one of the pre-conditions to the authorization; and
 4. when leave is granted, cross-examination should be limited to questions that are directed to establish that there was no basis upon which the authorization could have been granted.
- [11] Those general principles were implemented to decide those two concrete cases.
- [12] In Garofoli, the affiant on the application for the authorization swore that he had been informed by an informer, who had proved reliable in the past, that, in December 1982, Mr. Garofoli had offered to supply that informer with drugs.

- [13] In support of his application for leave to cross-examine the affiant, Mr. Garofoli filed an affidavit. Among other things, Mr. Garofoli denied the informer's accusation; said he lived in Florida from 1977 to 1983; was not in Ontario in December 1982; was facing charges in Ontario, at the time, and did travel to Ontario for court appearances; police officers in Ontario knew of these circumstances; and, if the affiant had made any inquiries, he would have learned that Mr. Garofoli was living in Florida in December 1982.
- [14] The Court of Appeal refused leave to cross-examine on the affidavit. Mr. Garofoli appealed to the Supreme Court of Canada. The Court of Appeal's refusal was held (five to two) to be reversible error. The court said, at page 1466:

... In view of the degree of reliance by the police on the informant in this case, if the informant is discredited then the factual basis for the authorization is undermined. If it is shown that the informant lied, then it could raise the inference that the police knew or ought to have known that he lied. If the police were not warranted in their belief that the information was true, then the basis for belief that a crime was to be committed disappears.

- [15] In Lachance, the offence was aggravated assault. However, intercepted communications, obtained through an authorization in a robbery investigation, were admitted on Mr. Lachance's trial. The affidavit in support of the application for that authorization was based, in large part, on information from a confidential informant.
- [16] One Hollett was the victim of the aggravated assault. Mr. Hollett had been providing the police with information on Mr. Lachance in connection with the robbery investigation. There was a falling out between Mr. Hollett and Mr. Lachance. Mr. Hollett was solicited by the police "to try and get back in [with Lachance] to get information".
- [17] In the affidavit in support of the application for the authorization, the affiant swore that the practical investigative technique would be to intercept Mr. Lachance's private communications.
- [18] At the aggravated assault trial, it became apparent that Mr. Hollett was the anonymous informant referred to in the affidavit in support. The Court of Appeal refused leave to cross-examine on that affidavit. Mr. Lachance appealed to the Supreme Court of Canada. The Court of Appeal's refusal was held (five to two) to be reversible error.

- [19] The affiant had sworn, in the affidavit in support, this:

Any attempt to involve an undercover police officer in the activities or investigation of these parties would be futile and not result in any further evidence being obtained.

- [20] The court said, at page 1502:

The force of this assertion is considerably weakened by the fact that the police have an undercover informant. While there is evidence to suggest that continued use of Hollett was difficult because he was avoiding the Lachance brothers, we do not know what Sergeant Lamont's belief was in this regard. ...

If Sergeant Lamont's cross-examination impeached his statement in the affidavit as to the use of other investigative techniques, there would be no basis for granting the authorization. ...

- [21] In this case, the applicants have shown a basis for the grant of leave to cross-examine, in three areas.
- [22] First, on the pre-condition that other investigative procedures were unlikely to succeed. The applicants have referred to a number of factors supporting their position, but I will mention only the following.
- [23] Constable Dunlop deposed that physical surveillance, informants and agents, undercover operators and searches, were not likely to provide evidence for a prosecution.
- [24] Counsel refer to Constable Dunlop's assertion in paragraph 10 of his affidavit, that: "counter-surveillance techniques are commonly utilized by persons involved in criminal activities ...". But, nowhere in the affidavit is any conduct on the part of any of the subjects of surveillance characterized as "counter-surveillance" conduct. Nor is there any instance disclosed of any subject of surveillance defeating, avoiding or evading surveillance. The investigating officer had information that the source of the drugs in question was Vancouver. However, there is no evidence of any surveillance attempted, or conducted, in Vancouver or on the Lower Mainland.
- [25] Counsel have learned, from one of the prior proceedings, involving this authorization, that Asian members of the R.C.M. Police are stationed in British Columbia and elsewhere in Canada. But no attempt was made to introduce such a member into this investigation.
- [26] In a prior proceeding in this matter, the point in issue was the presence of a police agent, reporting on Mr. Liu's activities, to the R.C.M. Police, including Mr. Liu's consultations with his counsel.
- [27] I am of the view that cross-examination may elicit testimony tending to discredit Constable Dunlop's assertion that other investigative procedures were unlikely to succeed. Accordingly, leave is granted to cross-examine in that area. The fact in issue is: did Constable Dunlop have probable cause to assert that other investigative procedures were unlikely to succeed. All questions directed to eliciting evidence probative of that fact in issue are permissible.
- [28] Second, counsel say there was not probable cause to assert that these subjects were involved in criminal activity. A host of references were made to numerous entries in the affidavit. And, it is said, apart from inconsistent, and at times erroneous, information from anonymous informers, there is no evidence of criminal conduct on the part of the subjects.

- [29] I am of the view that cross-examination may elicit testimony tending to discredit Constable Dunlop's assertion that the subjects, or any of them, were involved in the importation and trafficking of heroin and cocaine. The fact in issue is: did Constable Dunlop have probable cause to assert that Mr. Au or Mr. Liu were involved in the importation and trafficking of heroin and cocaine. All questions directed to eliciting evidence probative of that fact in issue are permissible.
- [30] Third, Mr. Seto is not named as a target in the authorization of 23 October 1997. It is a precondition of the admissibility of intercepted communications as evidence that a person, if known, be named -- s. 185(1)(e) of the Criminal Code.
- [31] What is disclosed in Constable Dunlop's affidavit is:
1. An Oriental male named Victor sells heroin for David Au;
 2. telephone calls were made from the phone number of one of the Victoria subjects to telephone number 808-6960 registered to Gil Gene Hong, Royal Bank employee, 10871 Hollymont Drive, Richmond, British Columbia.
- [32] In the course of pre-trial disclosure, counsel has learned that the investigating officer's concluded that Mr. Hong's telephone number was believed to be Mr. Seto's Cantel cellular. And, that Canada Customs had concluded that telephone number 808-6960 was the "home number of Vicker Seto's cell phone".
- [33] I am of the view that cross-examination may elicit testimony tending to show that Mr. Seto was "known" to the investigating officers at 22 October 1997. Accordingly, leave is granted to cross-examine on that area. The fact in issue is, did Constable Dunlop have probable cause to know that Mr. Seto was a person, the interception of whose private communications might assist the investigation. All questions directed to eliciting evidence probative of that fact in issue are permissible.
- [34] The applicants also sought leave to cross-examination on a precedent said to have been used by Constable Dunlop in the drafting of the affidavit. Counsel's anxiety is piqued by the notion of "boilerplate", a notion not encouraged by the Supreme Court of Canada in *R. v. Araujo*, [2000] 2 S.C.R. 992.
- [35] More particularly, counsel refer to *R. v. Guilbride*, [2002] B.C.P.C. 70.
- [36] Guilbride involved a trial on an indictment alleging conspiracy to import and traffic in a controlled substance. The prosecution proposed to tender in evidence certain intercepted communications, obtained under an authorization. Mr. Guilbride said that a patently misleading "drafting technique" was used by the R.C.M.P. in the information to obtain the authorization. He said that was an abuse of process. He sought an order staying the prosecution. The "drafting technique" was to assign three names to a single anonymous informer. The whole objective was, "... to make one person look like two or three people ...". This was a drafting technique used on Vancouver Island since 1991.

- [37] The trial judge found the drafting technique an abuse of process.
- [38] The argument here is that the present investigation was conducted by the Vancouver Island District Drug Section. Constable Dunlop is a member of that section. Misleading affidavits have been used by the R.C.M. Police on Vancouver Island. Therefore, cross-examination may reveal that the same misleading technique was utilized in this investigation.
- [39] I do not understand that proposition to fall under the notion of "basis" referred to in Garofoli. On the particular topic, I would characterize what counsel seek to do as an examination for discovery.
- [40] Furthermore, pursuing that train of inquiry has the potential of involving 15 handlers testifying to confirm or deny that there are 15 separate individuals, or, theoretically, one individual with 15 different designations. This gives reality to the risk that unnecessary prolongation of proceedings would result.
- [41] As well, as Oliver Wendell Holmes, J. remarked, a word is but the skin of a living thought. My inquiry is what did Constable Dunlop know. This is a matter of substance. That is not determined by the particular word or string of words he used to express what he knew, a matter of form. Counsel have learned, from previous proceedings, that Constable Dunlop did use a precedent, and did adopt the words in the precedent to express his thoughts. Mischief does not necessarily follow.
- [42] Accordingly, leave is not granted to cross-examine on the precedent because no basis has been shown to support the view that cross-examination will elicit testimony tending to discredit the existence of one of the pre-conditions of the authorization; and it has the potential of creating an unnecessary prolongation of these proceedings.

"R.D. Wilson, J."

The Honourable Mr. Justice R.D. Wilson

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