

CANADA / JUDGMENT

R. v. Cox

2018 BCSC 877

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 877 R. v. Cox

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Cox,

2018 BCSC 877

Date: 20180507

Docket: 27145

Registry: Vancouver

Regina

v.

Harinam Cox, Shamil Ali, Gopal Figueredo, Erlan Acosta,

Ellwood Bradbury and Matthew Stewart

Restriction on Publication: : A publication ban has been imposed under

- s. 486.5 of the Criminal Code restricting the publication, broadcasting or transmission in any way of evidence that could identify a victim/witness/undercover officer, referred to in this judgment by the initials H.C., S.L., and S.G. This publication ban applies indefinitely unless otherwise ordered.

Restriction on Publication: A publication ban has been mandatorily imposed under s. 517(1) of the Criminal Code restricting the publication, broadcasting or transmission in any way of the evidence taken, the information given, the representations made and the reasons, if any, given in respect of the application for judicial interim release (bail).

Before: The Honourable Mr. Justice Silverman

Oral Ruling on Voir Dire #1

Re Admissibility of Intercepted Communications

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Place and Date of Trial:

Vancouver, B.C.

Dates Ongoing

Place and Date of Judgment:

Vancouver, B.C.

May 7, 2018

- [1] THE COURT: These are Oral Reasons. If a transcript is ordered, I reserve the right to edit, although that process will not involve a change in the reasoning or in the decision.
- [2] On this voir dire, two of the six accused have filed notices of application challenging the admissibility of certain intercepted communications, which the Crown suggests were intercepted pursuant to s. 184.4 of the Criminal Code. All of them, all six of them, purport to have an interest in this and consequently, in an important way, everybody's interests are at stake here.
- [3] However, the Crown argues that none of the six have standing to raise a Charter issue. The first issue to be decided, therefore, is that of standing.
- [4] The Crown says neither of the two accused (nor any of the other four) had a reasonable expectation of privacy with respect to these communications and, as such, the communications are not private communications as defined by s. 183 of the Criminal Code. Therefore the Crown argues that it is not required to establish that the provisions of s. 184.4 were met prior to the communications being entered into evidence.
- [5] The Crown -- I will come back to that. One assumes that if, any of the accused overcomes this hurdle and is successful on the issue before me, the Crown will then lead evidence that bears on the issues that arise by and from s. 184.4.
- [6] While the issue to be resolved is one of standing, that issue will be determined by the resolution of the following question: did any of the accused have a reasonable expectation of privacy in the intercepted communications?
- [7] Two other issues that will not be resolved by these Reasons are these: are the recorded voices with attributions written beside them in the transcript the voices of any of the accused? There is no evidence of that, other than the attributions I have referred to. I am told that the Crown witness who was present for the calls, present at the time that the accused were there, will eventually on the main trial give evidence of voice identification, assuming the calls are admissible.
- [8] There are also several other accused who, according to the transcripts, apparently said a few non-incriminating words. Their counsel made brief submissions and admitted voice identification of their clients for the purpose of this argument only, presumably to gain standing to speak.

- [9] The second issue, that will not be decided in this voir dire is whether each or any of the six are responsible for the words of all or some of the other five. The Crown argues that all are involved in a joint venture, although that is certainly not clear from the evidence on this voir dire. Only two accused, the two who filed notices of application, speak for the vast majority of time on the intercepts. With respect to the others, it is not even clear in most instances who is present when the other two are speaking.
- [10] The parties during submissions disagreed about who had the burden of proof on this discrete issue concerning reasonable expectation of privacy. I am satisfied that, because it is and this issue is part of a Charter challenge by the accused, the burden of proof on this issue is on the accused.
- [11] The Crown alleges that on September 17, 2016, the six accused forcibly removed H.C., who I will refer to from time to time as the victim, from his residence in Vancouver. In the course of that kidnapping, two persons were shot and killed. In the course of the police investigation which followed, it is alleged that the kidnappers attempted to communicate ransom demands to S.L. and to S.G. The latter is the victim's ex-wife and mother of their child. Both were contacted on their telephones, which were not encrypted. Both agreed to assist police in negotiating with kidnappers for the victim's release.
- [12] Emergency interceptions pursuant to s. 184.4 were apparently initiated by the police in the early morning hours of the day following the kidnapping. Thirty-one communications over a period of less than 24 hours were captured. They were played in Court on this voir dire. There were transcripts prepared, which counsel and I followed. With the exception of two of the interceptions where the parties to the communication were the victim and S.G., S.L. was a party to each communication where there has been identification. The Crown intends to prove that during the intercepted communications between S.L. at one end and the victim at the other, the victim was apparently in the presence of the kidnappers during the calls, those being the two who have filed notices of application. The disc with the 31 calls has been entered as Exhibit "A".
- [13] Two attempts were made via the various telephone communications through S.L. to arrange an exchange of money for the victim. However, these were unsuccessful. In the meantime, the police identified two vehicles and stopped one, which resulted in the rescue of H.C., and the arrest of three people in the vehicle who are three of the accused. The other three were arrested at a later date.
- [14] The only other evidence before me, other than the calls, is a single typewritten page presented by the defence, by agreement, with the title "Evidence" at the top, followed by a preface to a list. The preface says this: "The Crown allegations include:" and then the list, set out below, follows. For brevity, I will summarize and sometimes paraphrase:
1. After H.C. was taken from the house, the kidnappers attempted to raise a ransom. In order to raise the ransom, the kidnappers contacted four people, including S.L. and S.G.. Two of them, not S.L. or S.G., were contacted by text message. S.L. and S.G. were contacted by

burner phones. The text messages were sent and received on PGP devices. PGP devices are used to encrypt emails using BlackBerry cellular phones. There is a longer explanation. I will not go into it, since we are not dealing with text messages in this case. PGP stands for "pretty good privacy". That is not written in the exhibit, but I am satisfied it is so.

2. Burner phones are phones which are, by definition, used briefly for communication then discarded in order to prevent tracking of the device by the police. Burner phones are also called flip burners. The kidnappers always used flip burners through all of the relevant time periods in this trial. They always used them when they left the Surrey house with H.C.. They destroyed the phones before returning to the house. The burner phones were not registered to any of the kidnappers by name or address.
3. When attempting to meet with the person who it was thought would pay the ransom, the kidnappers used counter-surveillance.
4. H.C. had a criminal record which included convictions for possession for the purpose of trafficking drugs and trafficking in drugs in 2014. At the time of the alleged offence, one of the other two persons out of the four that had been contacted, not H.C. and not S.G., that other person was involved in the drug trade.

[15] Almost exclusively, the subject matter of the communications consists of ransom demands by Ali and Bradbury, who are the two that have filed notices of application, with corresponding threats to H.C.'s life if payment was not forthcoming, what sounds like responses to being hit, that is to H.C. being hit and assaulted, and all of that, along with discussions on how the exchange of money for H.C. would be carried out.

[16] On numerous occasions throughout the calls, the kidnapper on the phone encourages S.L. and/or S.G. to contact third persons, usually unnamed, to help raise the ransom funds that are being demanded.

[17] The law relating to how courts are to determine the issue of whether there has been a reasonable expectation of privacy has advanced considerably as the result of two recent Supreme Court of Canada decisions rendered in December of 2017. They are *R. v. Marakah*, reported at 2017 SCC 59, and *R. v. Jones*, reported at 2017 SCC 60.

[18] Together, these cases address how this issue is to be approached. It must be noted that the factual basis for both those cases deals with text messages, not intercepted telephone calls. Nevertheless, all counsel on this case during argument agree, while the difference in the mediums may lead to different conclusions or results, the principles, the approach to, and the analysis of the intercepted calls will be the same as for text messages as discussed in those cases.

[19] Some of those principles which are applicable here are as follows:

1. Whether the accused had a reasonable expectation of privacy must be asserted in the totality of the circumstances.

2. In conducting the analysis, the contents of the call that is being analyzed with respect to privacy is not relevant. Specifically, the fact that the contents of the calls here are discussions of criminal behaviour is not something that I am entitled to consider in conducting this analysis. One cannot use the fruits of the search, in this case the content of the calls, in order to remedy what might otherwise be an unlawful search.
 3. In considering the totality of the circumstances, four lines of inquiry bear on the analysis. For brevity, I will refer to them as four factors:
 - a) What was the subject matter of the alleged search?
 - b) Did the accused have a direct interest in the subject matter?
 - c) Did the accused have a subjective expectation of privacy in the subject matter?
 - d) If yes, was the accused's subjective expectation of privacy objectively reasonable.
 4. In considering this fourth factor, although there certainly can and must be case-specific variations to factors and to sub-factors, the Supreme Court of Canada suggests considerations of three sub-factors to this fourth objectively reasonable factor. I am satisfied they are appropriate here as well, and those are:
 - a) the place of the search;
 - b) the private nature of the information; and
 - c) the question of control.
- [20] I turn to the analysis with respect to the evidence before me.
- [21] Factor one, what is the subject matter of the search? The Supreme Court of Canada says this must be defined by function, not by physical acts or physical space. Instead, it must be by reference to the nature of the privacy interests which are potentially compromised by the state's actions. It must take a broad and functional approach, examining the connection between the police investigative technique and the privacy interest at stake. Applying those factors here, the subject matter is not a telephone or the telephone. Rather, it is the communications, the calls, the recordings.
- [22] Factor two, did the accused have a direct interest in this matter? The Crown concedes that those whose calls were intercepted have an interest in the subject matter. I say nothing more about that at this point, except that I have already indicated that there is going to need to be some voice identification at some point in the future.
- [23] The third factor, did the accused have a subjective expectation of privacy? Marakah and Jones advance the requirement that an accused must establish a subjective expectation of privacy and, that this is "not a high hurdle".

- [24] While factor four, whether the subjective expectation of the accused is objectively reasonable, need not be addressed until it has been determined that there is a subjective expectation of privacy, I propose to address them together.
- [25] While Marakah held that the accused in that case did have a reasonable expectation of privacy in the text messages that he had sent to another person, the Supreme Court was careful to state that this result was determined by the circumstances of the case. I quote para. 5 from that case:
- [5] The conclusion that a text message conversation can, in some circumstances, attract a reasonable expectation of privacy does not lead inexorably to the conclusion that an exchange of electronic messages will always attract a reasonable expectation of privacy ... whether a reasonable expectation of privacy in such a conversation is present in any particular case must be assessed on those facts by the trial judge.
- [26] And from para. 55 of Marakah:
55. . . . This is not to say, however, that every communication occurring through an electronic medium will attract a reasonable expectation of privacy and hence grant an accused standing to make arguments regarding s. 8 protection. This case does not concern, for example, messages posted on social media, conversations occurring in crowded Internet chat rooms, or comments posted on online message boards. On the facts of this case, Mr. Marakah had a reasonable expectation of privacy in the electronic conversation accessed through Mr. Winchester's device; different facts may well lead to a different result.
- [27] Mr. Winchester, I think it is clear, was the recipient of the text message that Mr. Marakah had sent.
- [28] As I indicated, I prefer to deal with factor four and then my conclusions with respect to three and four together. I turn to factor four, if the accused had a subjective expectation of privacy in the subject matter, was that subjective expectation objectively reasonable?
- [29] As I indicated earlier, there are three sub-factors: (a) place; (b) the private nature of the information; and (c) control.
- [30] With respect to place, the conversations in question do not occupy a "place" in the conventional sense. I agree with the Crown, one way of describing them is that they take place at or, more accurately, through the cell telephones used respectively by S.L. and the accused in the course of communications to and from the parties. There is nothing in that that is going to affect the ultimate decision that needs to be made in this case.
- [31] The second sub-factor is the private nature of the information. Section 8 seeks to protect a biographical core of personal information which persons in a free and democratic society would wish to maintain and control from dissemination to the state. This includes information that tends to reveal intimate details of the life and personal choices of the individual.

- [32] In considering this factor, the focus is not on the actual content of the information seized, such as messages, but rather on the potential of the information to reveal personal or biographical information. The term "personal information" would include involvement in a criminal enterprise. That is from Marakah at para. 54.
- [33] The nature of the privacy interest does not depend on whether, in the particular case, privacy shelters illegal activity. Rather, the focus at this stage is with respect to the impact of the search on the target.
- [34] The third sub-factor, control. In the context of electronic communications, control anticipates that persons exercise meaningful control over the information they send by making choices about how, when, and to whom they disclose the information. They determine for themselves when, how, and to what extent information about them is communicated to others. That is from Marakah at para. 39.
- [35] Also in Marakah, the evidence of the accused made it clear that he wished the communications to be private. In that case, the finding of control in large part noted that the accused chose to send text messages by way of a private medium to a designated person and that he had told Winchester to delete his texts. He, that is Mr. Marakah, gave evidence about all of that.
- [36] The defence argues that there are a number of factors that suggest that there is and was a subjective and reasonable expectation of privacy on the part of the accused. Among those factors, Mr. Buck correctly points out that telephone calls ordinarily leave no permanent record of themselves, unlike texts where that is the purpose of them. Telephone calls are more transient, compared to the permanence of text messages, which will last on the device until a person deletes them.
- [37] The analysis in Marakah and Jones, the defence argues, needs to be interpreted in a way which recognizes that interest and protects privacy in such communications so that people using phones will have the same degree of privacy protection as those who text.
- [38] The defence also points to the use of burner phones intended to keep the police from tracking them, always taking them when they left the home and discarding them before going back home. Evidence of control, evidence of an intention to attempt to be private, the defence argues.
- [39] While there are no texts related to this voir dire, the evidence indicates that when there was texting, they were on PGP devices in order to prevent interception, and even though there are no texts, it says something about the state of mind of the accused seeking to be private.
- [40] Next, while attempting to meet the person who they had hoped would pay the ransom, counter-surveillance was being used.

- [41] Next, H.C. has a criminal record for two drug offences. The significance of this, the defence asks me to infer, is that the accused would have thought and any accused would think in similar situations, this guy is a criminal, he is not going to be involving the police, neither are his friends and associates, because criminals do not do that, it turns them into perceived "rats" and it is much less likely that criminals will be getting the police involved than, for example, the father of a kidnapped child.
- [42] Finally, in several phone calls it is H.C. telling his friends on the phone to not call the police, consistent with what I have just said about there arguably being an evidentiary basis for the belief of the accused that they thought the police would never be involved.
- [43] With respect to whether or not the accused did in fact have a subjective expectation of privacy, I cannot accede to the able submission of the defence. In my view, the evidence leads to the conclusion that they did not have a subjective expectation of privacy. What they had was a subjective hope for privacy. I rely upon the following evidence in coming to that conclusion.
- [44] There is no evidentiary basis for assessing the subjective expectations of any of the accused. There arguably is a basis from which one could infer that when one looks to the burner phones, but in fact the burner phones are not generally used to protect one's privacy. They are used to avoid being tracked down to a particular location.
- [45] There was an evidentiary basis for assessing the subjective expectations in the two Supreme Court of Canada cases, Marakah and Jones. Mr. Marakah himself gave evidence; he testified that he sent the texts to a specific recipient on a specific device. He knew the recipient and he had told him many times to delete the message. The Court accepted that. In Jones, the texts were exchanged using third party names to avoid detection.
- [46] Further, in this case, the accused had taken steps to involve essentially members of the public and they had no control, as a result of the way they did that, over how many and who those members of the public might be.
- [47] There were three non-participants in the kidnapping who were actually involved in the telephone calls themselves. I refer to H.C., who was a prisoner at one end, but listening to either one or more of the accused speaking on the phone, or himself being told to speak on the phone, and then there were the two people, S.L. and S.G.
- [48] The accused did not intend that their communications be private. The whole purpose of the ransom calls was to cause S.L., and to a lesser extent S.G., to communicate their demands to other persons unknown to the accused for the purpose of raising the ransom money.

- [49] In so doing, they gave up any control of who might listen to the phones or receive the information that had been conveyed on the phones. That is evidence that they did not have a subjective expectation of privacy, and I find it to be compelling evidence. There was no intent to create a private electronic space confined to specific people or a number of people that they, the accused, would be able to control.
- [50] I am satisfied that the accused did not have a subjective expectation of privacy.
- [51] With respect to factor four, it is not necessary to deal with that in view of my finding, but I intend to. Assuming that I am wrong in concluding that the accused had no subjective expectation of privacy, I then turn to the last factor and that is whether whatever subjective expectation of privacy they may have had was objectively reasonable.
- [52] I am satisfied it was not. In that regard, I am indebted to the Crown for providing me with a recent case from the Court of Appeal of Newfoundland and Labrador, *R. v. Mills*, 2017 NLCA 12. I am told by the Crown that this case is making its way to the Supreme Court of Canada, and apparently leave has been granted. I propose to read para. 23, and I quote:
- [23] In this case, the analysis focuses on the third and fourth headings identified in *Spencer*; that is, Mr. Mills' subjective expectation of privacy in his communications with "Leann" and whether that subjective expectation was objectively reasonable in the circumstances. Mr. Mills was using electronic social media to communicate and share information with a person he did not know and whose identity he could not confirm. On an objective analysis, as the sender of such communications, Mr. Mills must have known that he lost control over any expectation of confidentiality that he appears to have hoped would be exercised by the recipient of the messages. He took a risk when he voluntarily communicated with someone he did not know, a person he was not in a position to trust. Any subjective expectation of privacy Mr. Mills may have had was not objectively reasonable. In the absence of a reasonable expectation of privacy, section 8 of the Charter was not engaged.
- [53] Those words, and that reasoning, are apposite here and, in my view, it is sufficient to dispose of the issue before me.
- [54] As this is a Charter issue, I have already indicated the burden of proof is on the accused. I am satisfied that, based on the evidence before me, the accused did not have a reasonable expectation of privacy in the calls. With respect to the phrase "private communication" defined in s. 183 of the Code, I come to the same conclusion for the same reasons.
- [55] As I indicated earlier, I draw no conclusions with respect to the question of voice identification or the question of joint venture, both of which will have to be addressed before the question of admissibility can be considered.
- [56] That is the Ruling.

"Silverman J."

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