

CANADA / JUDGMENT

R. v. Dhillon

2018 BCSC 1005

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Dhillon,

2018 BCSC 1005

Date: 20180219

Docket: X079437

Registry: New Westminster

Regina

v.

Simranpreet Singh Dhillon

Gurjinder Singh Sodha

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Before: The Honourable Mr. Justice A. Saunders

Oral Ruling on Voir Dire

re Application to Cross-Examine Affiant

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J.J. Allingham

For the Accused Sodha:

No appearance

Place and Dates of Hearing:

New Westminster, B.C.

February 13 and 14, 2018

Place and Date of Judgment:

New Westminster, B.C.

February 19, 2018

- [1] THE COURT: This is my ruling on an application by the accused, Mr. Dhillon, made in the course of a voir dire into the admissibility of evidence obtained under a Part VI authorization to intercept communications, as issued by Justice Cohen on February 3, 2014. The applicant seeks leave to cross-examine the affiant on the information to obtain, that is, Constable Nay of the RCMP Surrey detachment.
- [2] Mr. Dhillon stands charged with five counts in relation to events alleged to have occurred August 12 to 13, 2012 - including sexual assault with a weapon, robbery, uttering threats, and unlawful confinement - and six similar counts, but also including aggravated sexual assault involving a second complainant, in relation to events alleged to have occurred on October 18, 2012. The accused, Mr. Sodha, is a co-accused in respect of three of the October 2012 offences.
- [3] The ITO was obtained in connection with a police investigation into sexual assaults on a number of sex-trade workers between 2011 and 2013. The "Named Offences" in the ITO consisted of the two subject series of events dating from August 2012 and October 2012, and also an incident involving a third complainant in the spring of 2013. The two accused now before the court on the present indictment, Mr. Dhillon and Mr. Sodha, are two of a group of five acquaintances whom the police believe to have been involved in the assaults, which five persons are identified in the ITO as "Principal Known Persons". A sixth person acquainted with them was identified as someone whom the investigators believed had knowledge of the Named Offences through conversations with some of the Principal Known Persons.

- [4] The applicant asserts two grounds for cross-examination of the affiant. First, it is submitted that the ITO contemplated interception of conversations to be stimulated through a warrantless arrest; that the use of a warrantless arrest for the purpose of stimulating those conversations would be beyond the ambit of the limitations on the power of warrantless arrest created by s. 495(2) of the Criminal Code; and that the contemplated arrests would therefore be unlawful. The applicant says that cross-examination is required in order to test whether the affiant knew or ought to have known that the proposed stimulus technique would be or would potentially be prompted by an unlawful arrest. Second, it is submitted that cross-examination is necessary in order for the defence to test the affiant's assertions as to the investigative necessity of the authorization.
- [5] The grounds on which leave to cross-examine on an ITO may be granted are well established. The order is discretionary. As stated by Justice Sopinka in the majority judgment in *R. v. Garofoli*, [1990] 2 S.C.R. 1421, the applicant bears the onus of establishing some basis for the view that cross-examination will "elicit testimony tending to discredit the existence of one of the preconditions for the authorization": *Garofoli*, at para. 88. Further, leave should be granted when the cross-examination is necessary for the accused thereby to make full answer and defence. However, questioning, if permitted, should be limited to that which is necessary to establish that there was no basis upon which the authorization could have been granted: see *Garofoli*, paras. 88 to 89; and *R. v. Pires and Lessing*, 2005 SCC 66, at paras. 3 and 4.
- [6] I find that the applicant's position concerning the proposed stimulation of intercepts through warrantless arrest is, with respect, misconceived. The limitations on the power of warrantless arrest set out in s. 495(2) apply to hybrid offences - s. 495(2)(b) specifies "an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction"; to summary conviction offences, as specified in s. 495(2)(c); and as specified in 495(2)(a), only to those purely indictable offences that are referenced in s. 553 of the Criminal Code.
- [7] The ITO explicitly lists a number of purely indictable offences, not listed in s. 553, in respect of which the authorizations were being sought against the Principal Known Persons, including the applicant. It is a fair assumption that an arrest that might be used for the proposed stimulus would be for one of those indictable offences. The authorization certainly could have been issued with that possibility in mind. Section 495(2) would have no application to any warrantless arrest effected in respect of those purely indictable offences.
- [8] In this case, the ITO set out a proposed Operational Plan under which, among other things, certain scenarios might be engaged in to stimulate conversations that could be intercepted, were the authorization to be granted. The scenarios included seizure of Dhillon's and Sodha's vehicles; conducting searches under search warrants, where grounds existed to do so, to locate outstanding evidence - including the supposed weapons; obtaining DNA evidence under warrant, where grounds existed; and carrying out stimulating arrests "when feasible and the grounds to exist to do so". There was no onus on the affiant to describe in any

particularity what specific arrests might be undertaken, for what charges. Given that the Operational Plan contemplated legal arrests, the affiant's subjective knowledge, understanding or belief as to what arrests might conceivably be undertaken can be of no assistance.

- [9] What was clearly being contemplated in respect of the potential use of the police power to execute a warrantless arrest was the police being able to stimulate conversation through taking advantage of the circumstances created by a legal arrest. There would be nothing improper in the police exercising whatever advantage might thereby accrue to their investigation; a warrantless arrest for a purely indictable offence would be, if based on reasonable grounds, proper by definition. If such arrests were to occur, and lead to intercepted communication, it would of course be open to a defendant to challenge the grounds for the arrests; but the ITO affiant, describing only a proposed Operational Plan would be in no position to shed light on that question.
- [10] I therefore find no basis for allowing cross-examination of the affiant in respect of this issue.
- [11] The second basis of the application concerns one of the fundamental preconditions of the authorization: the onus on the affiant to properly persuade the authorizing judge that, to use the words of s. 186 of the Code that are operative in the present case, "other investigative procedures have tried and have failed [or] other investigative procedures are unlikely to succeed". The guiding principle, as stated in *R. v. Araujo*, 2000 SCC 65. The governing principle as to whether the investigative necessity requirement has been established is whether it has been demonstrated that there is "practically speaking, no other reasonable alternative method of investigation in the circumstances of the particular criminal inquiry": para. 29.
- [12] In *R. v. Pham*, [2009] O.J. No. 4689, C. Hill J. of the Ontario Superior Court described, at para. 89, a series of what he termed "organizing principles relating to the investigative necessity subject". At subparagraph 89(9), he stated:

In assessing whether "other investigative" techniques, as yet untried, are likely to succeed, the court should concern itself with the police obligation to avail themselves of "prudent, readily available investigative means", not those involving a low probability of success... . A reasonable, common sense approach must be taken . The discussion of the likelihood of other investigative measures can be both hypothetical and prospective. The imagination of any accused and his or her counsel will always be able to suggest a further investigative measure which might have been tried short of Part VI surveillance ... The measures must be reasonable in the circumstances of the particular investigation.

[Citations omitted.]

- [13] In this ITO, the affiant outlined the conventional investigative techniques that had been used to date, and indicated why these techniques had failed or, if continued, would likely fail in meeting the investigative objects. Among them:

- a) shortcomings in the interviews and statements of the two complainants are described;
 - b) some witness interviews had been helpful, but had not led to a possible identification of all persons responsible for the Named Offences;
 - c) neighbourhood inquiries had not been conducted, in part due to the remoteness of the areas;
 - d) extensive surveillance of the Principal Known Persons had been of limited value and could not provide evidence of things that had occurred in the past;
 - e) DNA swabs of various items of clothing and other exhibits had yielded only one match assisting the investigators in determining that Sodha had been involved in one of the Named Offences, but did not identify the person responsible for the alleged aggravated assault on that complainant and did not assist in determining what had happened at the crime scene;
 - f) there had been interviews of the co-accused, Mr. Sodha, and of two other suspects which also yielded no inculpatory information. Constable Nay stated that, based on his experience, suspects often deny or minimize their involvement when interviewed, and he therefore believed it was unlikely that the applicant or the other suspects would provide complete and truthful statements. He believed it was likely that if interviews were repeated with the three suspects who had already been interviewed, they would continue to deny or minimize their involvement;
 - g) the same was said to be likely with respect to the applicant Mr. Dhillon, who had not yet been interviewed. Further, the risk was raised that, as Mr. Dhillon was not aware he was a suspect, if interviewed he would become aware that he was suspected and would then be held less likely to speak freely. Constable Nay noted that even if they provided evidence against each other, the statement of one accused would not necessarily be admissible against another accused. He described the likelihood of each of the four suspects all providing inculpatory statements as "remote"; and
 - h) Constable Nay also stated his belief that if the police attempted to obtain warned statements, they would become aware of what the police do and do not know, which could lead to them conspiring to conceal and/or destroy evidence, including destruction of the weapons the police believe to have been used in the assaults.
- [14] The applicant submits that Constable Nay failed to acknowledge the existence of police interrogation techniques that could be effective at eliciting inculpatory statements from individuals who might otherwise be reluctant to talk. It is also submitted that the affiant said nothing about the possibility of the accused persons being charged separately, such that they would be compellable witnesses against one another, and said nothing about the various means at the disposal of the police to prevent destruction of evidence, such as intense surveillance.

- [15] It is submitted that cross-examination of these missing areas is needed to amplify the ITO in order that it may properly be reviewed by the court.
- [16] I am not persuaded that there is any reality to the contention that cross-examining the affiant in these areas may tend to discredit the existence of one of the preconditions to the authorization. It is virtually inconceivable that cross-examination of the affiant on this rationale would yield anything more than concessions as to the bare possibility that further investigative techniques might possibly bear some fruit, but that is not the test. Common sense tells us that the probability of further efforts bearing fruit was low, to say the least.
- [17] Whatever reasonable beliefs the affiant may have had as to possibilities that could be elicited on cross-examination, and whatever speculation he might be invited to engage in, the uncontroverted and unimpugned factual evidence as to the status of the investigation could have led the authorizing judge to no other conclusion than that no practical alternative, short of issuing the authorization, existed. Practically speaking, the investigation had hit or was soon likely to hit a dead end. The "circumstances of this particular criminal inquiry" were that the police were dealing with alleged offences that had, by the time the ITO was sworn, been committed as far back as approximately 16 to 18 months previously. This was not a case of investigation into an ongoing series of crimes or conspiracy. There was no ongoing criminal activity to monitor. The means of carrying forward the investigation were limited accordingly.
- [18] In all, the ITO on its face provided a comprehensive explanation as to the limitations of the investigative techniques that had been undertaken, and a persuasive, compelling explanation of the necessity of the authorizations. The rationale as to the investigative necessity laid out by Constable Nay is thorough and persuasive. Its logic is self-evident.
- [19] The application to cross-examine is therefore dismissed.
- "A. Saunders J."

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