

CANADA / JUDGMENT

R. v. George

2020 BCSC 210

COURT

Supreme Court of British Columbia

DECIDED

20 January 2020

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2020 BCSC 210 R. v. George

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. George,

2020 BCSC 210

Date: 20200120

Docket: 41589-2

Registry: Campbell River

Regina

v.

Isaiah Tarcisius Tayden George

Restriction on Publication: Pursuant to 486.4(2.1) C.C.C.

Before: The Honourable Mr. Justice MacKenzie

Oral Ruling on Voir Dire #1

Re s. 8 Charter violation

Counsel for the Crown:

B.A. Goddard

Counsel for the Accused:

L. Stansfield

Place and Date of Trial/Hearing:

Campbell River, B.C.

January 13-17 and 20, 2020

Place and Date of Judgment:

Campbell River, B.C.

January 20, 2020

- [1] THE COURT: Mr. George is an indigenous male in his early twenties. He is charged with sexually assaulting a young indigenous female acquaintance on September 1, 2018, her 19th birthday, after a night of celebration on the part of Mr. George, the complainant, and several of their friends.
- [2] At the commencement of the trial, this voir dire was declared to determine the validity of a penile swab police obtained from Mr. George shortly after his arrest in the early morning hours of September 1. On this application, the defence argues that while the arrest for sexual assault was lawful and the police had reasonable grounds to conduct the penile swab of the applicant, Mr. George, the swab was conducted in an unreasonable manner. As a consequence, the defence submits that Mr. George's s. 8 Charter right to be free from an unreasonable search and seizure has been violated, and the evidence of the complainant's DNA found on Mr. George should be excluded pursuant to s. 24(2).
- [3] Mr. George did not testify on the voir dire.
- [4] There is little or no dispute as to the facts that are relevant to this issue. Mr. George was arrested a few minutes before 6:00 a.m. on the day in question, shortly after the complainant called police from a 7-Eleven store at about five minutes to five in the morning. The police attended the 7-Eleven and obtained information from the complainant, who alleged that Mr. George had had vaginal intercourse with her without her consent.
- [5] As a result of this information, the arresting officer, Constable Purves, determined it would be appropriate to obtain a penile swab from Mr. George with a view to obtaining the complainant's DNA, obviously significant evidence that would assist in the investigation of the complaint of sexual assault. Constable Purves drove Mr. George to the Campbell River RCMP detachment, about five minutes from the apartment where Mr. George was arrested. Constable Purves went inside and spoke to his supervisor, the dayshift watch commander, Constable Weihs, who had just come on duty. Constable Purves advised Constable Weihs of the information provided by the complainant about vaginal intercourse and the necessity for a penile swab. Constable Weihs agreed with Constable Purves's belief that a swab could very well provide important evidence in support of the complainant's allegation, if in fact her DNA was found as a result of the penile swab.

- [6] On the voir dire, Constable Purves testified he had not been aware at that time of the 2016 Supreme Court of Canada decision in Saeed, nor had he been involved in the taking of a penile swab prior to this occasion. As a result, he asked Constable Weihs about the procedure.
- [7] Constable Weihs testified that he "knew there were some new changes" with respect to how the police were to conduct the penile swab, but he, too, was not aware of the specific factors outlined in Saeed. In any event, Constable Purves brought Mr. George into the booking area. His handcuffs were removed and Constable Purves testified that, given the nature of the allegation, he believed it was important to seize Mr. George's clothing, again for possible forensic analysis, given the clothing Mr. George was wearing was consistent with the information the police had received from the complainant.
- [8] As such, at the booking-in counter, Constable Purves removed a sweater vest and handed it over to another officer. Mr. George who, according to the police, was quite intoxicated, then placed his head on the counter. Constable Purves asked Mr. George if he was wearing underwear. Mr. George apparently said boxers, but none were located.
- [9] This procedure was captured on the video camera that records what goes on once a detained person is brought in from the sally port into the booking area and in the near vicinity. Due again to the nature of the allegation, Constable Purves then wanted to seize the green shorts Mr. George was wearing, clothing again consistent with the information received from the complainant as to what her alleged assailant was wearing.
- [10] In order to afford Mr. George privacy, Constable Purves escorted him into a room across from the booking counter, which police have called on the voir dire the "private room". The video camera that records everything that goes on in the booking area also records what goes on in the private room, but there is a taped-off area in the far corner of this room where a detainee is told to stand, such that that person is blocked from view on the video camera. All that is visible on the video is a blurred image, which shows the blurred outline of what could be a body, but clearly no details whatsoever are visible when viewing the video.
- [11] Mr. George was instructed to stand in this taped-off obscured area and he removed his green shorts. At this point in time, the officers acknowledge he was undressed. A moment later, Constable Purves obtained a white hazmat suit or "bunny suit", to use the expression used by the police. Constable Purves gave the suit to Mr. George who, with the assistance of Constable Purves, put it on and zipped it up in the front. Mr. George and Constable Purves then left the private room and walked the short distance to the booking area.
- [12] Mr. George sat on a bench across from the counter, and throughout this procedure, everyone agrees Mr. George was compliant, cooperative, and presented no problems to the police throughout the procedure. Although, as defence counsel has pointed out, Constable Weihs felt, for what it is worth, that Mr. George was, at least when he was testifying in court, a little "mouthy", because he was asserting his rights, there is no evidence that he expressed that concern directly to Mr. George and it plays no part in the issue I have to decide this

afternoon.

- [13] As I said, because Constable Weihs was aware of some changes to the proper procedure when police seek a penile swab, and because there was no identification officer on duty at that hour in the morning on the Saturday of the Labour Day weekend, he called the on-call identification officer in a nearby jurisdiction. Constable Weihs testified on the voir dire that this officer advised him the police were now to direct an accused to do the penile swab themselves, rather than the police taking the swab. As defence counsel has pointed out, this apparently was the only information Constable Weihs received about the new "proper procedure."
- [14] Constable Weihs then passed this information onto Constable Purves, who was standing next to Mr. George, who was still sitting on the bench near the booking counter. Constable Weihs then went to get a penile swab kit. He gave this to Constable Purves, along with some "basic instructions on how to obtain the sample."
- [15] Constable Purves then told Mr. George what was required of him in order to obtain a sample. Unlike the video, as I say, in the private room, the camera that records events outside the private room also has audio. As a result, the court was able to hear the following exchange between Constable Purves and Mr. George.
- [16] Constable Purves said, "Okay, Isaiah, this is a DNA collecting sample. There are two swabs in here. What you and I are going to do are go into this room here. You're going to unzip your bunny suit and then I'll give you a swab, and then I want you to grab your penis, pull back on your foreskin, and you're going to swab around your penis for me. Then you're going to hand the wooden stick back to me."
- [17] Mr. George said, "Okay." Constable Purves said, "Does that make sense?" And Mr. George said, "Perfect."
- [18] Constable Purves, Mr. George, and Constable Weihs then went into the private room. Constable Weihs testified he "was assisted or assisting" Constable Purves by getting the kit and giving Constable Purves the swab.
- [19] Mr. George, in the private room, unzipped the suit below his genital area and, based on the blurred image on the video and what can be seen near the bottom of that blurred rectangle, I am prepared to conclude, as defence counsel has suggested, that it would appear the suit went down to Mr. George's ankles.
- [20] Constable Weihs gave the swab to Constable Purves, who gave it to Mr. George. Constable Purves testified he observed Mr. George to swab his penis. Mr. George handed the swab back to Constable Purves, who in turn gave it back to Constable Weihs. The process was repeated for the second swab. The kit was then stored properly and eventually sent for analysis.
- [21] Neither officer touched Mr. George with respect to the taking of the penile swab, and the whole process from start to finish, according to the officers, took less than three minutes.

- [22] Again, throughout the whole process, Mr. George was cooperative and compliant and had no questions about the procedure or the purpose for taking a penile swab at the direction of the officer. Once the process was complete, Mr. George was taken to what is called the lawyer room, where he exercised his right to counsel. Once the call was completed, he was placed in a cell and in due course appeared before a Justice of the Peace. Mr. George was remanded in custody pursuant to s. 516, appeared in Provincial Court three days later, and in due course was released with conditions.
- [23] It is clear that the obtaining of biological or forensic evidence by way of a penile swab clearly involves a significant degree of intrusion on a person's privacy, a significant effect on that person's dignity, and the potential for humiliation.
- [24] In Saeed, Justice Moldaver stated at 54:
- [54] There can be no doubt that requiring an individual to expose and swab his genitals is an intrusion on an accused's privacy. Much like a strip search, a penile swab has the potential to be a "humiliating, degrading and traumatic experience" for the accused (Golden, at para. 83). A penile swab may be all the more humiliating because it requires more than a mere visual inspection of the accused's genitals.
- [25] Justice Moldaver then goes on to note that the obtaining of a penile swab is with respect to searching for someone else's DNA and clearly, in his decision, found that to be a crucial and significant factor. It is not for me to analyze that because it is clear that a penile swab, if done in the proper circumstances, does pass constitutional muster.
- [26] As a result, Justice Moldaver has provided guidelines as to when and how a penile swab may be taken, similar to the guidelines outlined by the court in Golden when considering the proper procedure for a strip search of an accused.
- [27] In Saeed, Justice Moldaver outlined the three general requirements or preconditions for a search incidental to arrest. At paragraph 37, he states:
- [37] The existing general framework for a valid search incident to arrest purports to authorize a broad range of searches. It requires only that (1) the individual searched has been lawfully arrested; (2) the search is truly incidental to the arrest in the sense that it is for a valid law enforcement purpose related to the reasons for the arrest; and (3) the search is conducted reasonably
- [28] One could add, in addition to these requirements, that when it comes to penile swabs and strip searches, there must exist reasonable and probable grounds to believe the search will reveal and preserve evidence of the offence for which the accused was arrested.
- [29] As I noted at the outset, the defence acknowledges three of these four requirements have been met in the present case, but submits that the swab was not conducted in a reasonable manner.

- [30] Borrowing on the guidelines enunciated by Justice Iacobucci in the 2001 decision of *Golden*, where that court posed at paragraph 101 several "questions" that "provide a framework for the police in deciding how best to conduct a strip search incidental to arrest," such that it would be in compliance with the Charter, Justice Moldaver in *Saeed* likewise indicated that there is a need for explicit guidelines to ensure, as far as possible, that the search is conducted in the least humiliating manner. The court indicated in *Saeed* that detailed guidelines ensure that when a penile swab is taken, it is conducted in a manner that interferes as little as possible with the privacy and dignity of the person being searched.
- [31] At paragraph 78, Justice Moldaver noted or outlined a number of factors to "guide police in conducting penile swabs incident to arrest reasonably." At paragraph 78, there are 10 individual factors which Justice Moldaver says the court should be aware of when determining whether a penile swab was taken reasonably. I do not see the need to read all 10 factors. If my decision is to be reviewed, I note all 10 factors outlined at paragraph 78 in *Saeed*.
- [32] After providing some further explanation about where a swab should be taken, for example, whether it can be taken outside of a police station if there "is some valid reason for doing so," and that any force used to obtain a swab must be the minimum amount necessary, Justice Moldaver stated in the following paragraph, paragraph 81:
- [81] As a general rule, the police must explain to the accused the procedure for taking a swab before it is taken, to ensure the accused understands the nature of the procedure and the steps it involves. Reviewing the procedure with the accused in advance can only help to keep the procedure quick and efficient. Giving the accused the option of taking the swab himself enables the accused to minimize the intrusiveness of the swab. A detailed record of how the swab was conducted is important for after-the-fact review of these searches to be effective (*Fearon*, at para. 82). And it is likely to focus police officers' attention on whether their conduct is reasonable (*Fearon*, at para. 82).
- [33] When determining whether a penile swab procedure will pass constitutional muster, it is important to remember that although meeting these guidelines will often ensure the swab is performed in a reasonable manner, Moldaver J. emphasized at paragraph 82, as I have just noted, that they are not determinative in every case. The court emphasized that "at bottom," whether a particular penile swab incidental to arrest complies with s. 8 depends on the facts of each individual case, finally noting the onus is on the Crown to establish, given the totality of the circumstances, that the swab was conducted in a reasonable manner.
- [34] In the present case, the defence submits that the police failed to comply with several of what counsel describes as "the essential requirements" for a penile search to be deemed reasonable and, as such, there has been a s. 8 Charter violation.

- [35] In reply, the Crown submits that unlike the four requirements that must be met for such a search to be valid, the 10 Saeed factors are not "constitutional imperatives," but rather factors that guide the police, as well as the courts, in an after-the-fact consideration as to whether the search was, in fact, carried out in a reasonable manner. That is, they inform the question of reasonableness.
- [36] In this regard, I note that Justice Cromwell in Fearon stated that while detailed notes are constitutionally imperative when it comes to cell phone searches, when referring to strip searches, the court in Golden "encouraged that notes be kept in the context of strip searches," because having a clear picture of what was done is important in order to have after-the-fact judicial review be effective.
- [37] While the Saeed factors are not constitutional imperatives, the reason for these guidelines is clear. If the police fail to adhere to these guidelines, the result could very likely be an after-the-fact judicial conclusion that the swab was not obtained in a reasonable manner, or that there is an insufficient record as to what occurred during the procedure, thereby precluding effective judicial review of the procedure itself.
- [38] Being guided by these principles, I now turn to the specific factors the defence says the police did not comply with and, as such, the procedure they adopted in obtaining DNA from Mr. George's penile swab was not done in a reasonable manner.

- [39] First is Factor 4 which, in Saeed, is:

The accused should be informed shortly before the swab of the nature of the procedure for taking the swab, the purpose of taking the swab, and the authority of the police to require the swab.

- [40] In this particular case, I am satisfied Constable Purves adequately and properly informed Mr. George of the nature of the procedure for taking the swab. In fact, it was quite detailed, as captured in its entirety on the audio-video, as I have already referenced. Constable Purves did not, however, specifically state to Mr. George that the purpose of taking the swabs was to obtain the complainant's DNA, which he had reasonable grounds to believe would be on Mr. George's penis, given the allegations. Clearly the best evidence, given this type of allegation and the fact that, as the Supreme Court of Canada has clearly stated, sexual assault cases are notoriously difficult to prove.
- [41] Nor did any officer advise Mr. George of under what authority the police were entitled to require Mr. George to submit to a penile swab. On this point, the Crown says there was no need to inform Mr. George of the common law authority to obtain a penile swab as a search incidental to arrest, in order to collect potential DNA belonging to an alleged victim of a sexual assault, as Mr. George neither resisted nor had any questions of the officers as to what the procedure was about or how he was to perform the swab.

- [42] The Crown contrasts the situation in the present case with the circumstances in Saeed where Mr. Saeed, in broken English, inquired, "Is this legal?" prompting the officer to explain there is authority for requiring a penile swab. On this point, there is no doubt that best practices would have the police recite the purpose and authority for requiring an accused to provide a penile swab, much like the number of Charter warnings and right-to-silence cautions that permeate every lawful arrest. It would not be an onerous task. Why it did not occur in this case is because neither Constable Purves or Constable Weihs were aware of the Saeed guidelines.
- [43] While I agree with defence counsel that the police have a duty to ensure that they are aware of all legal principles when it comes to investigatory procedures and requirements, omitting to inform Mr. George of their authority to obtain a penile swab in these particular circumstances or to state the purpose of such a swab does not, in my view, render the procedure unreasonable.
- [44] The next concern expressed by the defence is Saeed Factor Number 5, and that is, that an accused person should be given the option of removing their clothing and taking the swab themselves.
- [45] In this particular case, Mr. George was not given the option of the officer taking the swab of his penis, as opposed to directing Mr. George to do it himself. I do not find that the lack of this option being specifically given to Mr. George is of any material consequence when determining whether the overall procedure adopted by the police in this case was reasonable.
- [46] The purpose of giving a detainee the option of doing it themselves is to mitigate the privacy concerns that accompany a penile swab. Here Mr. George conducted the swab himself, albeit at the direction of the police, which is the least intrusive interference to his privacy and dignity. It would be a completely different story if the option was not given to Mr. George and the police then took it upon themselves to conduct the penile swab, contrary to the direction of the court in Saeed.
- [47] Factor Number 7 relates to the issue of:
- There should be no more police officers involved in the swab than are reasonably necessary in the circumstances.
- [48] On this point, the defence says there was no reason why Constable Purves could not have been the sole officer dealing with Mr. George when taking the penile swab. The defence points out that Constable Purves was on his own when he gave Mr. George the white hazmat suit, and could easily have retrieved the swabs himself and passed them to Mr. George without the assistance of Constable Weihs.
- [49] Conversely, the Crown points out that Constable Weihs was the officer in charge, knew there had been some change in what was required for a reasonable penile swab, called the identification officer for instructions, and was the officer who actually obtained the two

swabs. The Crown says it makes obvious sense for Constable Weihs to retain control of the swabs, pass them to Constable Purves, and then retrieve them once Mr. George had taken the swabs, and then secure the samples. Again, as Constable Weihs testified, he assisted Constable Purves in the whole procedure.

[50] In addition, the Crown points out the fact that there was a second officer who was in the presence of Mr. Saeed, who did absolutely nothing during that procedure except to observe what was going on, and that that did not cause the majority any concern in Saeed. On this particular point, I also note that in one of the authorities provided by the defence, the Alberta Queen's Bench decision of Cortes Rivera, the court there found that the presence of the third officer "exceeded by one officer" the guideline in Saeed: see paragraph 122. It would appear, as far as that court is concerned, that Saeed says two is permissible but three is too many. Whether or not I agree with that analysis or not does not matter.

[51] What I am required to determine is whether or not there were more officers present than are reasonably necessary in the circumstances. Again, each case is fact-specific.

[52] The presence of both officers in this case does not, in my view, undermine the reasonableness of the procedure, and in fact I am satisfied that having two officers in the room with Mr. George was not unreasonable or more than was reasonably necessary.

[53] Factor Number 8 is an issue raised by the defence and that is that:

The swab should be carried out in a private area such that no one other than the individuals engaged in the swab can observe it.

[54] On this point, the defence submits that as the door to the room where the swab took place was not completely closed, it was possible someone could have looked through the open door and observed Mr. George standing in the far corner, in the designated area where the camera cannot make out what is occurring, with his back to the door and being involved in the swabbing process.

[55] Again, it would have been simple for the police to close the door completely while the swab was being taken. They did not do so. They suggested it was early on Saturday morning, there were few officers in the area, one guard, and they were all male personnel. Constable Weihs testified that he believed no other persons, other than Constable Purves and himself, would observe the process.

[56] On this point, in the absence of any evidence that any other person did observe what was going on in the private room, apart from these two officers, I am not satisfied that because the door to the hallway was not closed, again does not undermine the reasonableness of the procedure.

[57] Factor Number 9 in Saeed states:

The swab should be conducted as quickly as possible and in a way that ensures that the person is not completely undressed at any one time ...

- [58] Here there is no suggestion that the swab was not taken as quickly as possible. It was within moments of Mr. George being arrested, taken to the station, and taken into the private room.
- [59] As far as Mr. George's state of dress is concerned, the defence says the police should have refrained from seizing Mr. George's sweater and shorts until after the genital swab was performed. The defence says the police could have let Mr. George keep his sweater and shorts on and then had him take the swabs. Once again, I agree with defence counsel that this procedure would have been preferable, such that the situation would have been more akin to what occurred with Mr. Saeed, where Mr. Saeed was clothed but took his pants down in order to conduct the swab himself.
- [60] In the present case, Mr. George had to unzip the suit he had been given to wear, take his arms out of the suit, take the suit down below his genitals and, as I have said, in all likelihood down to his ankles, according to the movements that can be seen on the blurred video, take the two swabs, pull the suit back up, and with the assistance of Constable Purves, put his arms back in and zip up the suit. On this particular point, the Crown points out, and I am prepared to accept that at no time did Mr. George have to step completely out of the suit.
- [61] In the final analysis on this point, I am not persuaded it is necessary to determine whether or not, in these circumstances, Mr. George was completely or partially undressed. Rather, what is required is to determine whether this aspect of the procedure adopted by the police, either standing alone or in combination with any of the other alleged violations of the Saeed factors, is such that it renders the taking of the swabs an unreasonable procedure and hence a violation of Mr. George's right to be free from an unreasonable search and seizure. Again, it would have been preferable to have Mr. George perform the two swabs while he had his sweater and shorts on, and then lower his shorts to complete the task. However, once again, I do not find that this particular procedure in these circumstances was unreasonable, given the very brief period of time the suit was unzipped to allow the procedure to take place.
- [62] I now turn to the final Saeed factor, that is, has there been a proper record of the reasons for and the manner in which the swabbing was conducted?
- [63] On this point, the defence understandably emphasizes the paucity of police notes, especially with respect to the manner in which the swabbing was conducted, even though there was a complete audio-video recording of the entirety of the swab procedure, again, from the moment Mr. George entered the booking area to the conclusion of the procedure.

- [64] To say Constable Purves's notes are brief is perhaps the ultimate understatement. The only contemporaneous notes made by Constable Purves on this procedure is, "0612 two swabs taken of George's penis." As a result of this, Constable Hobbs, the officer in charge of this investigation, asked for a supplemental report from both Constable Purves and Constable Weihs outlining what occurred during the penile swab. Constable Weihs provided an update, but nothing was forthcoming from Constable Purves.
- [65] Constable Hobbs said he asked for this supplementary memorandum in October. Constable Weihs provided this supplement and said these were his notes and that he made them September 1st. They have some detail that is consistent with what is observed and heard on the video recording. However, Constable Hobbs testified that he asked for this additional information in October and that all he had in September when he prepared the RCC was that a swab was taken and nothing more.
- [66] On this particular point, I accept the defence submission that Constable Weihs must be mistaken with respect to when he prepared that supplemental material. However, once again, I am not satisfied that that particular issue is of significance with respect to the issue I have to decide today. That is because, as the Crown has submitted, the audio-video does provide a complete record and is the best evidence as to what occurred and the manner in which the swabbing was conducted. The video provides a complete picture as to how the procedure took place and permits meaningful, after-the-fact review of the constitutionality of the search in this particular case.
- [67] The situation in this case can be contrasted with the circumstances in Cortes Rivera, where the police there could not recall any details about the procedure, such as whether or not the accused was naked or not during the penile swab. In addition, the police gave conflicting evidence on this question. Moreover, there were no notes taken by the officer who took the swab himself as to the conversation or the steps he took in taking the swab. In those circumstances, the court found there had been a s. 8 breach because it was not satisfied there was an accurate and clear record whether or not the swab was taken in a reasonable manner. Again, that situation is different than the present situation.
- [68] Once again, the 10 Saeed factors are there to guide the police to ensure, as far as possible, that the swab is performed in a reasonable manner, but again, as Justice Moldaver pointed out, the factors are not determinative in every case.
- [69] In these particular circumstances, I am persuaded, notwithstanding the able submissions of defence counsel, that the penile swab was performed in a reasonable manner and that the two officers who were involved in the swab in this case were, in my view, sensitive to the need to preserve Mr. George's privacy and dignity. Again, while it was not a perfect procedure and can leave room for improvement in the future, I am satisfied, having regard to the totality of the evidence, that there is sufficient evidence for me to perform an effective, after-the-fact judicial review when considering whether the police conducted the swab in a reasonable manner.

[70] I am satisfied that the Crown has established that the penile swab was in fact performed in a reasonable manner, that is, these officers acted reasonably to preserve Mr. George's privacy and took reasonable steps to minimize the intrusion on his privacy during the taking of the swabs. I therefore conclude that the search did not breach Mr. George's s. 8 Charter right to be free from an unreasonable search.

"The Honourable Mr. Justice B.D. MacKenzie"

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Prepared on 27 October 2026 · Esheria