

CANADA / JUDGMENT

R. v. Gill

2020 BCSC 2030

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2020 BCSC 2030 R. v. Gill

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Gill,

2020 BCSC 2030

Date: 20201217

Docket: X080640

Registry: New Westminster

Regina

v.

Samandeep Singh Gill

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These Reasons have been edited for publication purposes

Before: The Honourable Mr. Justice D.M. Masuhara

Ruling on Over-seizure

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Place and Dates of Hearing:

New Westminster, B.C.

November 16-20, 2020

November 16, 2020

December 3, 2020

Place and Date of Judgment:

New Westminster, B.C.

December 17, 2020

I. Introduction

- [1] These reasons are in respect to the decision with a brief summary made on December 3, 2020. The subject matter is a defence application asserting a violation of the accused's s. 8 Charter rights against unreasonable search and seizure, and seeking exclusion of evidence pursuant to s. 24(2). The application relates to the execution of a search warrant on the accused's residence, and in particular to the seizure of cell phones and a video surveillance system not listed in the warrant.
- [2] The accused is charged with second degree murder and attempted murder. On April 27, 2011, Mr. Manbir Kajla was shot and killed when he left his vehicle to speak to another driver with whom he had collided. The driver shot Mr. Kajla and is also said to have shot at his wife but fortunately missed. The Crown alleges that the accused was the shooter.
- [3] The subject search was conducted on May 14 and 15, 2011 by the RCMP's Integrated Homicide Investigation Team (IHIT) pursuant to a duly authorized search warrant for the residence of the accused, Mr. Samandeep Gill - 12726 - 67B Avenue, Surrey (the "Residence"). The seizing of the relevant items occurred solely on May 15.
- [4] The occupants of the Residence at the time included the accused, his grandmother Swaran, his mother Jaswinder, his sister Equbal, and his brother Sandeep. There were also two tenants in a basement suite. All were in the Residence when the police arrived to conduct the search. Nobody other than the accused was a suspect in the investigation.

- [5] The defence asserts that the seizure of nine cell phones and a home surveillance (SVAT) system, none of which were listed in the search warrant, was not based on reasonable and probable grounds. They allege that this constitutes an over-seizure contrary to s. 489(1) of the Criminal Code and in violation of the accused's s. 8 Charter rights against unreasonable search and seizure. The defence further argues that the manner of search was unreasonable as it demonstrated a disregard for the rights of the accused and his family.
- [6] The Crown has advised that it is not relying on the "plain view" doctrine, arguing that the impugned seizures met the standard set out in s. 489(1) of the Code. The Crown contends that reasonable and probable grounds existed for seizure of the cell phones and SVAT system, and that the search was carried out in a reasonable manner.
- [7] Staff Sergeant (then Constable) Marnie Gorgichuk was the file coordinator for the subject investigation and part of the command triangle for the search. She directed the assigned officers in the search of the accused's residence and was the officer who seized the subject items. Her testimony is central to this application and is discussed below.
- [8] At this stage, the determination sought is whether there was an over-seizure contrary to s. 8 of the Charter. If found, a s. 24(2) application will follow. Given that I have found question of whether the seizure was contrary to law to be determinative, I have not ruled on the reasonableness of the manner of search.

II. Legislation

- [9] Section 489(1) of the Criminal Code, R.S.C. 1985, c. C-46, sets out the scope of items not specified in a search warrant that may be seized in the course of that warrant's execution:

Seizure of things not specified

489(1) Every person who executes a warrant may seize, in addition to the things mentioned in the warrant, anything that the person believes on reasonable grounds

- (a) has been obtained by the commission of an offence against this or any other Act of Parliament;
 - (b) has been used in the commission of an offence against this or any other Act of Parliament;
or
 - (c) will afford evidence in respect of an offence against this or any other Act of Parliament.
- [10] In this case, the provision in issue is s. 489(1)(c). The Crown bears the burden of proving that S.Sgt. Gorgichuk believed on reasonable grounds that the cell phones and SVAT system would afford evidence of the offence. This standard has both subjective and objective elements: (1) S.Sgt. Gorgichuk must have subjectively believed that she had reasonable and probable grounds to seize the subject items; and (2) those grounds must in fact have been reasonable and probable. Reasonable and probable grounds are established at "the point where credibly-based probability replaces suspicion": *Hunter v. Southam*, [1984] 2 S.C.R. 145

at 167.

III. The Warrant

[11] The subject warrant authorizing a search of the Residence and seizure of certain items was issued on May 14, 2011. The warrant states:

[T]here are reasonable grounds for believing that the following offences have been committed:

Murder, contrary to section 235 of the Criminal Code of Canada.

AND THAT there are reasonable grounds for believing that the following items will afford evidence of the offence:

- a) a 9 millimeter handgun;
- b) 9 millimeter ammunition;
- c) Dark coloured top outer clothing such as jackets, sweaters, hoodies, and rain gear belonging to Samandeep GILL suitable for the analysis of gun shot residue;
- d) Receipts for April 27, 2011 and April 28, 2011;
- e) Cellular telephone bills for Samandeep GILL;
- f) Samandeep Gill's cellular telephone; and
- g) Documents proving residency for Samandeep GILL.

IV. Witnesses

[12] At the request of the defence, the Crown presented the following witnesses:

1. S.Sgt. Gorgichuk: File coordinator for the investigation into the subject murder. She was a member of the investigating team who worked closely with the primary investigator and team commander. S.Sgt. Gorgichuk maintained and supervised all documents involved with the investigation and her duties included making notes regarding the investigation. She attended the briefings on the morning of the search and took part in the search in the role of assigned scene officer. This role included locating and seizing items in the Residence.
2. Cpl. Brintnell (ret.): Member of the investigative team who swore the ITO for the subject search warrant as well as for a vehicle suspected to have been driven by the suspect. On the evening the warrant was executed, Cpl. Brintnell interviewed and recorded the questioning of the accused's 49-year-old mother, Mrs. Jaswinder Gill, in the back of an unmarked police vehicle. S.Sgt. Gorgichuk was present for most of the questioning. Cpl. Brintnell left the scene later to attend to obtain a revised search warrant for the vehicle when he learned that the licence plate number provided in the original warrant was incorrect. Cpl. Brintnell participated in a search of the Residence the following day as well, during which he located two dark hoodies in the garage of the Residence.

3. Sgt. Burwell: Photographed Residence during the course of the search.
4. Inspector Lee: Team leader of the investigation at the time of the search. Inspector Lee was in attendance on the first day of the search, during which he interviewed the accused's brother following his detention. The brother provided a phone number for the accused.
5. Sgt. Naldrett: Assisted in the search of the Residence and was the officer responsible for arresting Mr. Gill and transporting him to the Surrey RCMP detachment.
6. S.Sgt. Fishbook: Member of the ERT that was responsible for securing the Residence for the search. Sgt. Fishbook testified that it was the RCMP's intention to detain all occupants as they exited.

V. S.sgt. Gorgichuk's reliability and credibility

- [13] The testimonial reliability and credibility of S.Sgt. Gorgichuk (the "Officer"), is a key issue in determining the reasonableness of the subject search and seizure. As such I will consider it first.

A. Discussion

- [14] My assessment has taken into account the fact that the events in question took place in 2011. One expects the Officer's recall regarding the search to have faded. However, I nonetheless find her testimony problematic for the reasons that follow.

1. Credibility

(a) Cell phone seizures

- [15] Certain exchanges upon cross-examination call the Officer's credibility on the topic of the cell phone seizures into question.
- [16] The Officer acknowledged on cross-examination that she had been aware that a family lived in the Residence, that they had a privacy interest in the home, and that there would likely be several cell phones in the home. While the Officer would not agree that it was her plan to seize all of the cell phones she found, she stated that seizing all of the phones was the necessary response to her inability to identify their ownership.
- [17] However, the Officer subsequently indicated that she made no efforts to identify which of the phones belonged to the accused even though numbers for the accused's cell phone were obtained via questioning from Jaswinder and Sandeep Gill. In fact, she testified that she never asked other members of the search team to advise her if they obtained information that would aid in identifying the accused's cell phone. This is in spite of the fact that: (1) Cpl. Brintnell testified that, in pre-search briefings, specific questions to be asked of family members were determined, including what rooms they used and what their phone numbers were; and (2) the seizure of the phones took place on the second day of the search, while the interviews of Jaswinder and Sandeep Gill took place on the first day. Given this context, I

cannot accept that the Officer had "no way to know" who the phones belong to, or who used what room. Asking for the input of the interviewing officers would have been a natural means by which to obtain this information.

[18] The Officer ultimately testified that even if she had been apprised of a phone number for the accused, she would not have dialed it because (i) calling the phone was not common practice, and (ii) doing so could jeopardize data on the device. I found the latter comment to be a stretch. Defence counsel subsequently put it to the Officer that calling a phone could not possibly jeopardize its content, and she ultimately agreed. I note the Crown did not address this evolving testimony.

[19] The reliance of the Officer on her inability to identify ownership of the phones to justify her seizure is problematic given the lack of effort to identify them prior to seizure. The tension between these elements of her testimony negatively impacts my appraisal of her credibility and bona fides.

(b) Video of the incident

[20] The Officer's justification for seizing a black hoodie from the house was based in part on her having seen dark clothing on the suspect in a video recording of the shooting. When the video was played she stated that she could see dark clothing on a figure that is moving in the video. Given the extremely unclear and grainy quality of the video, I am unconvinced that she could have confidently drawn any such conclusion.

[21] Challenged on this, the Officer stated that she had seen enhanced clips of the video as well as "tons of" enhanced screen shots. The disclosure of materials to the defence did not include any such screen shots and from further discussion between defence and Crown it seems that "tons of screen shots" or enhanced video clips did not exist. The Admission of Facts states that:

Two enhanced still images were taken by the police from Video 00765 (Exhibit 10). Those still images are attached as Exhibit A to these admissions. Exhibit A depicts 'zoomed in' images of one of the two vehicles. The driver of the vehicle, their clothing, or the clothing, of any other person is not captured in the still images.

No enhanced version of Video 00765 (Exhibit 10) was created.

The Forensic Video Analysis Unit at Surrey RCMP detachment was available to provide investigators with a clearer viewing of Video 00765 than was played for the Court during the cross-examination of Sgt. Marnie Gorgichuk.

No other video captured the shooting incident, or the occupants of either of the two vehicles.

(c) Defensiveness

- [22] When confronted with evidence contradicting her testimony, the Officer had great difficulty acknowledging her errors. Rather, she became argumentative and evasive. When defence counsel challenged her assertion that calling a cell phone number to ascertain the sought after cell phone could jeopardize its contents, the Officer provided several explanations before ultimately conceding that it could not compromise the information on the phone.
- [23] With regards to the Toyota "4Runner" allegedly driven by the accused on the night of the shooting, the Officer was not prepared to acknowledge that she was wrong about which family member was its registered owner. She also would not admit that Jaswinder Gill had been "detained" even though the testimony of one of her colleagues confirmed that "detention" of the family following their removal from the house was the plan all along.
- [24] In a similar vein, when asked which family member she believed to have used each bedroom, the Officer stated incredulously that anyone in the Residence was using all of the bedrooms. She also engaged in defensive and unconvincing attempts to explain her more speculative testimony regarding changes that may have been made to the search flow chart and Jaswinder Gill's knowledge (or lack thereof) that her interview with the police was being recorded.
- (d) Other issues
- [25] Finally, the Officer's testimony on other points was neither credible nor reasonably nuanced. Her testimony that Jaswinder Gill was free to leave at any time during her interview did not meaningfully acknowledge the effect that being removed from the house and escorted to the backseat of an unmarked police car by armed ERT members and by two officers who commanded that she tell the truth would have had on her perceived right and ability to leave. The glib suggestion that she could have left at any time seemed disingenuous.
- [26] Similarly, the Officer's testimony that the presence of phones without SIM cards is an indicator of criminality seems shallow and disingenuous given typical practices of SIM card transfer. It is common practice among individuals who have owned more than one cell phone to transfer one's SIM card from an old phone to a newly purchased one. To suggest that the presence of phones without SIM cards indicates criminality is to engage in advocacy by impugning the character of the accused.
- [27] The Officer engaged in similar advocacy when she testified that the appearance of bullet holes in the garage of the Residence was an indicator of criminality. Being a victim of a shooting does not indicate violent or criminal behaviour, and suggestions to the contrary cast unwarranted aspersions upon the accused.

2. Reliability

- [28] The Officer's testimony included several errors regarding basic facts of the case at bar. Perhaps most significant was the Officer's misidentification of the moving figure as the shooter in video footage of the incident. The person she identified as the shooter in the video was in fact the deceased. Given that the person she identified as the shooter was outside his vehicle, an inference can be drawn that the Officer was also unaware of the important fact that the shooter is not alleged to have left his vehicle.
- [29] Another troubling error involved the Officer's repeated use of the plural "cell phones" on the first day of her testimony when describing what items were authorized for seizure. While a single such error would not be cause for concern, its repetition inevitably raises doubt as to whether the Officer was aware of the content of the search warrant.
- [30] Finally, the Officer indicated that she was unaware that that the victims had been married in Canada on the day of the crime. Though this was not a legally relevant fact in the murder investigation, it is a memorable and basic fact about the victims that one would expect a file coordinator to remember.
- [31] In isolation, each of these mistakes might not be sufficient to impact an assessment of witness unreliability. However, given the number and significance of these errors, I find that they weigh against the Officer's reliability.

B. Assessment

- [32] Though I do not attribute the aforementioned testimonial shortcomings to any conscious desire to mislead the court, it seems that the Officer fell victim to what was described by Hill J. in *R v. Cook*, [2008] O.J. No. 4765 (S.C.) at para. 45 as "the natural, but distorting, product of hindsight reflection on justification for the seizure".
- [33] The Crown has argued that the Officer's errors were not significant and do not indicate a broader pattern of unreliability and lack of credibility. As such, they suggest that they should not be used to draw negative conclusions about the integrity of the rest of her testimony.
- [34] I do not agree that compartmentalization is warranted in these circumstances. The issues I have identified with the Officer's testimony are present in and bear upon her discussion of every issue canvassed. She came across as disingenuous at times, engaged in advocacy, and was evasive when confronted with evidence that plainly contradicted her previous testimony. This extended to her discussion of the seizure and identification of cell phones present in the Gill residence. She also lacked knowledge of certain basic facts that one would expect a file coordinator to be familiar with.
- [35] These issues cast a shadow over the rest of her evidence, and make it difficult to extend the benefit of the doubt where the Officer's answers raise questions as to her grounds to seize the phones and SVAT system.

VI. over-seizure: POSITIONS OF THE PARTIES

A. Defence position

- [36] As the defence notes, seizure of items in the execution of a search warrant that are not the subject of the warrant is a presumptive s. 8 Charter breach. In such cases, the Crown must prove that the search was lawful pursuant to s. 489(1) by showing that it (1) was authorized by law, (2) the law is reasonable, and (3) the manner in which the search was conducted was reasonable: *R v. Collins*, [1987] 1 S.C.R. 265 at para. 23. The determinative issue in this case is the first requirement, whether the search and seizure was authorized by law.

The search was not authorized by law

- [37] The defence submits that seizure of the cell phones and SVAT system cannot be justified under s. 489(1) of the Criminal Code. The defence argues that the Officer met neither the subjective nor the objective standards under s. 489(1) because she did not believe (subjective) on reasonable and probable grounds (objective) that the seized cell phones and SVAT system would afford evidence of an offence. They allege that items were seized indiscriminately from all areas of the house without sufficient consideration of their connection to the accused.
- [38] The defence argues that the Officer admits to no more than a suspicion that the seized cell phones would provide evidence of an offence. Mere suspicion falls below the threshold of reasonable and probable grounds: *Hunter* at p. 167. In support of this argument, the defence notes the Officer's repeated statement that she had no way of knowing whether any of the seized cell phones belonged to the accused. The defence argues that this shows a misunderstanding of what the search warrant authorized and the applicable legal test under s. 490(1) by indicating a belief that the possibility that an item beyond the scope of the warrant might provide evidence of an offence is sufficient for seizure.
- [39] The defence also notes the Officer's statement that she tried to "ensure that the [SVAT system] actually worked, . . . and that whether or not there was evidence on it on the night of the offence". They argue that this indicates that, without this unauthorized search of the SVAT system, the Officer did not subjectively believe upon reasonable and probable grounds that it would afford evidence of the offence.
- [40] According to the defence, because the Officer did not even subjectively believe she had reasonable and probable grounds, her grounds for seizure cannot be objectively reasonable. However, even in the absence of the Officer's testimony, the defence argues that it was not probable that each of the cell phones seized from the residence would afford evidence of the offence. Given the number of people who lived in the residence, the defence contends that the likelihood of any single phone of unidentified ownership providing such evidence was low.

B. Crown Position

- [41] The Crown argues that the accused's section 8 Charter rights were not infringed. They argue that the search was both authorized by law and reasonably carried out.

The search was authorized by law

- [42] The Crown submits that in seizing items not listed in the subject warrant, the police were operating within the bounds of s. 489(1) of the Criminal Code. They contend that the Officer's decision to seize the cell phones and SVAT system was made under subjective belief of reasonable and probable grounds that they would afford evidence of an offence.
- [43] The Crown argues that the standard of reasonable and probable grounds is best understood as described by Major J. in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743 at para. 15, as "encompassing all materials which might shed light on the circumstances of an event which appears to constitute an offence". They argue that this is a broad standard that was met by the police during the search.
- [44] Regarding the cell phones, the Crown submits that the "only reasonable option" was to seize all nine cell phones when it was unclear which belonged to the accused. In their written submissions, they argue that the same reasoning would apply to the hypothetical locating and seizing of multiple 9mm handguns, of which only one was listed on the warrant. The Crown submits that there is an important difference between reasonable belief regarding ownership of a phone and reasonable belief that a phone or its contents "might shed light on" an offence.
- [45] On the issue of the SVAT system, the Crown submits that the Officer's "search" of the device simply amounted to an attempt to determine whether it worked and if it was recording. As such, they suggest that it was not an unlawful search, and that the subsequent seizure was justified.

VII. Analysis:

A. Was the search authorized by law?

- [46] The Officer's statements regarding the seizure of the numerous cell phones and the SVAT, as elicited in cross examination and referenced by the defence in argument, lead me to conclude that the officer did not have the requisite belief or objectively reasonable grounds to seize them. Based on her testimony and her approach to seizing the cell phones without reflecting on the fact that there were others residing in the Residence, I find it likely that she had a misunderstanding of what she was authorized to seize and of the privacy interest that individuals have in their homes and cell phones. I find that her testimony also reveals that she had a misunderstanding as to the standard for seizing items not listed in the warrant

1. Cell phones

- [47] The Officer explicitly stated in her testimony that she had no idea whether any of the individual cell phones belonged to the accused. With respect, the Crown's argument that an inability to discern the ownership of a given phone is different from an inability to discern if it could afford evidence regarding an offence is not convincing. One wonders what evidence of the shooting could be expected on reasonable and probable grounds to show up on a phone belonging to an individual other than the accused.
- [48] As such, I find that the Officer's admission that she had no idea who any of the phones belonged to indicates that she did not subjectively believe she had reasonable and probable grounds to expect any phone she seized to afford evidence in respect of the offence. Her evidence suggests she believed merely in the possibility that each phone might provide evidence, falling below the "credibly-based probability" standard. In fact, her evidence suggests that she may have mistakenly believed that she was warranted to seize multiple phones in the first place.
- [49] Regardless, it is clear that the Officer did not consider each of the phones separately in deciding whether it might afford evidence. Rather, she seized every cell phone that she found in the Residence on the mere possibility that each might afford evidence. As stated in Cook at para. 37, a mere possibility does not amount to a credibly-based probability. Therefore, I find that the seizure of the phones fails the subjective prong of the s. 489(1) test.
- [50] I also find that the seizure of the cell phones fails the objective prong of the s. 489(1) test. Beyond the fact that the Officer does not appear to have believed that she had reasonable and probable grounds to seize the phones, the circumstances of the search do not indicate that there was a credibly-based probability of the individual phones bearing evidence. The Residence was inhabited by several family members of the accused, and it was unclear to those conducting the search which family members used particular rooms. Nonetheless, phones were seized in all areas of the house, indiscriminately. There could not have been reasonable and probable grounds to expect each of these phones of uncertain ownership scattered around the house to afford evidence in respect of the offence. Thus, the seizure of the cell phones fails the objective prong of the s. 489(1) test.
- [51] I also question the failure to obtain a further authorization for the circumstances in respect to the number of cell phones found throughout the house and the SVAT. Given that the items had been located on the first day of the search, the ability to apply for a further authorization was clearly available: Cpl. Brintnell did just that when he learned that the licence plate numbers for the Toyota "4Runner" had been transposed on the original warrant. Moreover, the Officer testified that she knew that such an option was open to her and had experience with it having been done in the past.

- [52] The Crown analogized to a hypothetical circumstance of finding nine 9mm handguns during the search and the seizure of them being justified under s. 489(1). There was little context provided to this hypothetical, but I note that there is a considerable difference between handguns and cell phones in a case like the present. The analogy here in my view does not apply.
- [53] It is worth noting that the standard set out in *CanadianOxy*, cited by the Crown to suggest a lower standard than the "credibly-based probability" described in *Hunter*, requires there to be a rational connection between the each seized phone and the accused, the offence, and his alleged culpability. It is unclear what this rational connection could be in the absence of identifying information, and I do not understand that decision to be imparting a lower standard for reasonable and probable grounds.
- [54] Given all of the foregoing, I find that the seizure of the cell phones constitutes an over-seizure under s. 489(1).

2. SVAT System

- [55] The Officer's testimony similarly indicates that she did not subjectively hold reasonable and probable grounds for seizure of the SVAT system. Her viewing of the SVAT system's contents and subsequent seizure of the device suggests a lack of appreciation for the legal standards that govern search and seizure.
- [56] The fact that the Officer needed to search the device in order to determine whether or not it would afford evidence of the subject offence indicates that she did not subjectively believe she had reasonable and probable grounds for seizure without searching the device. Her actions amount to a tacit admission that she believed there was a possibility that the device would afford evidence rather than a credibly-based probability. Understandably, without knowing more about the operation of the device it would have been impossible to objectively determine its likelihood of affording evidence of the offence (and its rational connection to the accused, the commission of the offence, and his alleged culpability, as required by the terms of *CanadianOxy*).
- [57] The ensuing search upon which she justified the seizure was contrary to law, as it was conducted without seeking further judicial authorization. This is in spite of the fact that the Officer explicitly recognized in her testimony that searching the contents of electronic devices (such as the cell phones) would require further authorization.
- [58] Thus, the seizure of the SVAT system fails the subjective and objective prongs of the s. 489(1) test. It constitutes an over-seizure under s. 489(1).

B. Was the search carried out in a reasonable manner?

- [59] Though submissions have been provided regarding the manner of the search, given my finding that reasonable and probable grounds have not been established it is not necessary to address the manner of the search.

C. Assessment:

[60] Based on all of the above, I find that the requisite belief and objective grounds required under s. 489(1) for the seizure of the subject items, namely the cell phones and the SVAT system, have not been established. I note that even if the Officer had clearly expressed subjective belief in reasonable and probable grounds, I would have difficulty accepting her testimony due to the issues of credibility and reliability I have identified with regards to her testimony. In the result, I find that there was a breach of s. 8 of the Charter.

VIII. Conclusion

[61] The seizure of the nine cell phones and the SVAT system constitute an over-seizure in contravention of the accused's s. 8 Charter rights.

"The Honourable Mr. Justice Masuhara"

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