

CANADA / JUDGMENT

R. v. Gill

2024 BCCA 63

COURT

British Columbia Court of Appeal

DECIDED

26 February 2024

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2024 BCCA 63 R. v. Gill

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Gill,

2024 BCCA 63

Date: 20240226

Docket: CA47373

Between:

Rex

Appellant

And

Samandeep Singh Gill

Respondent

Restriction on publication: Pursuant to s. 486.5(1) of the Criminal Code, information that could identify the person named as the victim on the charge of attempted murder shall not be published, broadcast or transmitted in any way. This publication ban applies indefinitely unless otherwise ordered.

Before:

The Honourable Mr. Justice Groberman

The Honourable Justice Griffin

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated

March 4, 2021 (R. v. Gill, New Westminster Dockets 80640-3 and 80640-4 and Voir Dire Rulings 2020 BCSC 2030, 2021 BCSC 152, and 2021 BCSC 377).

Counsel for the Appellant:

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Counsel for the Respondent:

M.A. Nathanson

Place and Date of Hearing:

Vancouver, British Columbia

November 9, 2022

Place and Date of Judgment:

Vancouver, British Columbia

February 26, 2024

Written Reasons by:

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Justice Griffin

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

In a murder investigation, police obtained a warrant to search a house where the accused resided along with members of his extended family. The warrant specifically authorized a search for the accused's cellphone, but did not mention any other cellphones, nor did it refer to any surveillance devices. During the search, the police seized nine cellphones, without regard to whom they belonged to. They also seized a video surveillance device. When their authority to detain the seized items expired, they continued to hold them, deliberately refraining from seeking an extension. More than six years later, the police obtained authority to search the cellphone, and found, to their surprise, that it contained an audio recording of the murder. At trial, the Crown sought to tender the recording, other information derived from three of the phones, and surveillance videos from the seized surveillance device. The trial judge found that both the initial seizure and the retention of the phones and the surveillance device were unlawful and violated the accused's Charter rights. He excluded the evidence, and the accused was acquitted. The

Crown appealed. Held: Appeal dismissed. The trial judge made no reversible error in finding that the initial seizures were unlawful, as was holding them after authority to do so expired. The trial judge's decision to exclude the evidence was within his discretion.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

- [1] The Crown appeals from Mr. Gill's acquittal on one count of second degree murder and one count of attempted murder. It seeks to have the matters remitted to the Supreme Court for a new trial, contending that the trial judge erred in excluding evidence. For reasons that follow, I would dismiss the appeal.

Overview of the Voir Dire Rulings Leading to the Exclusion of Evidence

- [2] The verdicts came after the trial judge ruled that the seizure and continued detention of three cellphones and a surveillance system by the police violated the accused's right to be secure against unreasonable search or seizure under s. 8 of the Canadian Charter of Rights and Freedoms [the Charter]. The judge considered that admitting critical evidence from those seized items would bring the administration of justice into disrepute. He therefore excluded the evidence under s. 24(2) of the Charter. Following that ruling, the Crown consented to a re-election by the accused to be tried by judge alone and called no evidence. Mr. Gill was, accordingly, found not guilty of the charges.
- [3] There were three voir dres leading up to the judge's ruling. In the first (2020 BCSC 2030), the judge found that the police had seized items -- several cellphones and a home surveillance system -- that were not specifically mentioned in the search warrant. He considered that those items were not authorized to be seized under the provisions of the Criminal Code, R.S.C. 1985, c. C-46, and found that the seizure violated s. 8 of the Charter.
- [4] In the second voir dire (2021 BCSC 152) the judge considered the failure of the police to obtain an extension when they elected to hold the seized items beyond the period authorized by the initial order. The judge found that the unauthorized detention was also a violation of s. 8 of the Charter.
- [5] In the third voir dire (2021 BCSC 377), the judge considered whether the violations of s. 8 should result in the exclusion of evidence. After considering the factors set out in *R. v. Grant*, 2009 SCC 32, he found that the evidence should be excluded.
- [6] On this appeal, the Crown takes issue with all three of these voir dire rulings. In respect of the lawfulness of the initial seizure, it says that the judge erred in finding that the seizure of the cellphones was unauthorized. It accepts that the seizure of the surveillance system was improper but says that there were objectively reasonable grounds for that seizure, and that the existence of such grounds weighed against exclusion of the evidence under s. 24(2) of the Charter.

- [7] In respect of the detention of the seized items, while the Crown acknowledges that the continued detention of the items was not in accordance with s. 490 of the Criminal Code, it says that non-conformity with that provision did not amount to a breach of the Charter.
- [8] Finally, the Crown contends that the judge erred in determining that the appropriate remedy for the Charter violations was the exclusion of the evidence. It says that the judge overstated the impact of any Charter breaches on Mr. Gill's right to privacy. Properly analysed, it says, the impact of the Charter breaches was minimal, and the evidence ought to have been admitted.
- [9] Before turning to an analysis of the voir dire rulings and the issues on the appeal, I will briefly describe the events giving rise to the charges, and the steps taken by the police in seizing and detaining items from Mr. Gill's residence.

Events Giving Rise to the Charges

- [10] On April 27, 2011, the deceased was driving a vehicle on 128 St. in Surrey just after 11:00 p.m. His wife was the passenger in the vehicle. Ahead of them was a white Toyota 4Runner that was being driven erratically. As the deceased attempted to pass the vehicle, it swerved toward his vehicle, contacting the front bumper with some force. After this minor collision, the deceased moved his vehicle in front of the 4Runner, cutting it off and coming to a stop. The 4Runner came to a stop behind him. The deceased got out of his vehicle and walked toward the 4Runner. A few words were exchanged between the deceased and the driver of the 4Runner. The driver had a loaded handgun, and, without warning and without exiting his vehicle, shot the deceased.
- [11] The deceased's wife had also exited the vehicle and walked toward the 4Runner. As she approached, she saw the driver aim a handgun at her. She ducked, and though the driver took shots at her, they did not hit her. The driver of the 4Runner immediately drove away, and the woman called 911.
- [12] Emergency personnel attended quickly and attempted to save the deceased's life, but he died shortly after being transported to hospital. An autopsy revealed that two bullets had entered his body. One passed through his heart, and the other hit several organs. Each bullet caused damage that would have been fatal on its own.

The Search Warrant

- [13] The Integrated Homicide Investigation Team ("IHIT") investigated the shooting. On May 9, 2011, it received information to the effect that Mr. Gill had been driving his sister's 4Runner at the time of the killing and that she had subsequently made efforts to hide the vehicle.
- [14] Further investigations by IHIT established that the registered owner of the 4Runner was not actually the respondent's sister, but rather the sister's husband. The vehicle matched the description of the vehicle that the shooter was driving.

- [15] The deceased's wife was able to make a somewhat uncertain identification of Mr. Gill as the shooter in a photo lineup. The police also learned that a person matching Mr. Gill's description may have threatened another driver earlier in the day.
- [16] This, together with other information, led the police to seek a warrant to search Mr. Gill's residence and the vehicle owned by his brother-in-law.
- [17] The information to obtain the search warrant for the residence did not mention a surveillance system (indeed, the presence of the system was probably not known to police when the information was sworn). While the information indicated that it was being sworn in support of a warrant to search the house for, among other things, Mr. Gill's cellphone, the affidavit did not expressly indicate what relevance the phone might have to the investigation. Presumably, the deponent considered it obvious that a cellphone might contain a record of calls made and received around the time of the shooting, and the contents of any text messages that were exchanged concerning the events. In addition, if the cellphone had been with the shooter at the time of the killing, the phone's International Mobile Equipment Identity ("IMEI") number and the number of the installed Subscriber Identity Module ("SIM card") might be useful in establishing his presence at the murder scene.
- [18] In any event, the police were successful in obtaining a search warrant that specifically authorized the police to seize "Samandeep GILL's cellular telephone". No other cellphones were mentioned in the warrant.

The Search

- [19] The search of the residence was conducted on May 14 and 15, 2011. There were, it appears, five adults living in the home: Mr. Gill, his grandmother, his mother, and two of his siblings (a brother and a sister). All except the sister were present at the time of the search. In addition, there were two tenants who occupied the basement of the house.
- [20] The home was in a disordered state. Belongings of different people were found together in several of the rooms, and belongings of particular individuals were found in more than one room. According to the police, the disorder rendered them incapable of determining which resident resided in which of the five bedrooms in the house.
- [21] The police seized all cellphones found in the house, a total of nine devices (six of which did not contain SIM cards).
- [22] They interviewed several of the residents (only Mr. Gill was a suspect) and asked questions about Mr. Gill's phone number. While both Mr. Gill's mother and his brother provided the police with numbers, those numbers did not match. Both numbers had the same area code, the same initial digit, and the same four final digits. The second and third digits were not the same, although in both cases, those digits included a "6". It is not clear whether the mother and brother were referring to different phone numbers used by Mr. Gill, or simply got the number wrong, but the latter explanation seems more likely.

- [23] Documents found in the home provided a third possible cellular number for Mr. Gill. It largely matched the numbers provided by the mother and brother, in that it also had the same area code, and the same initial digit and the same final four digits. The second and third digits also included a "6".
- [24] During the search, the police noticed security cameras, and located and seized a home security system manufactured by a company known as "SVAT" (the "SVAT device").

Events After the Search was Conducted

- [25] On May 19, 2011, four days after the search concluded, the police complied with ss. 489.1(1) (b) and 489.1(3) of the Criminal Code by filing a report in Form 5.2 setting out the items seized from the residence. On May 24, they applied under s. 490(1)(b) for an order allowing them to detain the seized items, and a justice granted the order on May 25. Section 490(2) of the Criminal Code prohibits the detention of items for more than three months unless an application is made for continued detention, or criminal proceedings are commenced.
- [26] On May 25, the police obtained a production order for records pertaining to the cellular phone number that they had found written down in the home. The records showed that the phone to which the number was attached (an iPhone) was in the area of the shooting at the time of the offence, and at Mr. Gill's residence shortly thereafter. There were nine incoming and ten outgoing voice calls in the 40-minute period following the shooting, as well as seven incoming and ten outgoing text messages.
- [27] On June 6, 2011, the police obtained subscriber information for the seized phones. The iPhone was registered to Mr. Gill's brother-in-law. The police interviewed him, and he advised that the phone in question was used by Mr. Gill.
- [28] Some other information was uncovered in the days following the search. The police viewed some of the recordings on the SVAT device, allegedly so that they could determine whether it was functional. The surveillance contained a video showing a man leaving Mr. Gill's residence in a white 4Runner in the hour prior to the shooting.
- [29] Samples taken during the search of Mr. Gill's brother-in-law's 4Runner were analysed, and were found to contain gunshot residue.
- [30] Despite the progress made in the investigation, it appears to have been put on hold. There is no real explanation for that, apart from a suggestion that it was a very busy time for IHIT, and there were other priorities.
- [31] It does not appear that the police conducted any further investigations with respect to the seized items within the three-month period of authorized detention. They failed to make an application to extend the detention period. The evidence indicates that the failure was deliberate, and that it was IHIT policy at the time not to apply for extensions, so as to avoid tipping off suspects as to the state of investigations.

- [32] In 2016, the file was transferred to the RCMP Unsolved Homicide Unit, but that unit did not immediately take any steps in respect of the seized items. In January 2018, a without notice application was made to authorize further detention of the cellphones and the SVAT device, and a two-year extension was granted. In argument, the Crown acknowledged that any extension would be without prejudice to Mr. Gill's right to argue that the continuing detention of the devices from August 2011 until early 2018 had been unauthorized.
- [33] On February 28, 2018, the police obtained an order to examine the iPhone. To their surprise, they found that it contained an audio recording of the shooting. The recording is one and three-quarter minutes in length. It includes the voices of two men (Mr. Gill's voice was identified by his brother-in-law) and a screaming sound that appears to be from a woman. Several gunshots are heard. It is not clear how the recording came to exist, but the Crown theory was that the accused had both the iPhone and a Blackberry with him at the time of the shooting, and pocket dialled the iPhone from the Blackberry.
- [34] The audio recording was crucial to the case, as it identified the accused as the person involved in the shooting. The SVAT data was also important, as it showed comings and goings from the home that were consistent with the iPhone's transfers from one cell tower to another.
- [35] In May 2018, Mr. Gill was charged with the second degree murder of the deceased and with the attempted murder of the deceased's wife.

First Voir Dire Ruling (2020 BCSC 2030) ("Over-seizure Ruling")

- [36] At trial, the Crown proposed to tender evidence of the audio recording of the murder, as well as incidental information obtained from the iPhone and two Blackberry cellphones. It also planned to tender video excerpts obtained from the SVAT device. Mr. Gill challenged the admissibility of the cellphone and SVAT device evidence on the basis that their seizure violated s. 8 of the Charter. The Crown took no issue with Mr. Gill's standing to advance an argument under s. 8.
- [37] The law is clear that a seizure, other than one conducted under a search warrant, is presumptively unreasonable. To make evidentiary use of items seized in such a seizure, the Crown must ordinarily show, among other things, that the search was authorized by law: *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.
- [38] The parties are agreed that, in this case, the only legal bases on which the seizure of the items might be justified are those set out in s. 489(1)(c) of the Criminal Code:

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

- (c) will afford evidence in respect of an offence against this or any other Act of Parliament.
- [39] In the judge's view, none of the seized cellphones could be said to have been "mentioned in the warrant". He therefore analysed the issue of whether the police believed that the seized phones would afford evidence in respect of the offence, and, if so, whether that belief was based on reasonable grounds.
- [40] The conclusion that none of the cellphones were "mentioned in the warrant" is not directly challenged on this appeal. Nonetheless, in my view, some comment on it is justified.
- [41] The judge appears to have placed considerable weight on the fact that the word "telephone" in the warrant was singular. I am not fully convinced that the use of the word "telephone" rather than "telephones" was of significance. The rationale for including Mr. Gill's cellphone in the warrant was that it was anticipated that a cellphone that he used and carried would contain important evidence. That rationale would have applied equally to any cellphone he used and carried, even if he had multiple cellphones. Neither the police nor the justice who granted the warrant appear to have turned their minds to the possibility that more than one cellphone might conform to the description in the warrant.
- [42] While it is not necessary to answer the question on this appeal, I would be inclined to think that, in this situation, any cellphone that fit within the description in the warrant could properly have been seized under it, and if more than one such device was found, the seizure of all such devices would have been acceptable.
- [43] The real problem with the seizure here, then, was not that it included more than one cellphone. The major problem--which was also recognized by the judge--was that the police did not, in seizing cellphones, confine themselves to devices that belonged to Mr. Gill. Instead, they seized every cellphone located in the house. They candidly admitted that they did not know which of the cellphones they seized belonged to Mr. Gill, and they made only cursory inquiries and conducted virtually no investigations to gain such knowledge.
- [44] The judge considered that the police are not entitled, in executing a search warrant, to cast their net so widely. That is a sensible approach. The warrant was very specific in authorizing the police to seize "Samandeep Gill's cellular telephone" (Emphasis added). It must have been obvious to the police and to the justice who issued the warrant that there was a strong likelihood that other residents of the house would also have cellphones. The limitation of the warrant to Mr. Gill's cellphone was, therefore, significant. It was not open to the police to argue that the cellphones they seized were "mentioned in the warrant", because they took no steps to ascertain whether that was the case.
- [45] To justify the seizure of the cellphones, then, the police were required to rely on s. 489(1)(c) of the Criminal Code. They had to show that they believed that the seized items would afford evidence in respect of an offence, and that the belief was based on objectively reasonable grounds.

- [46] Those same criteria applied to the SVAT device, which clearly was not mentioned in the warrant.
- [47] The judge approached the issue by first asking whether the police had the belief that the seized items would afford evidence in respect of an offence. In asking that question, the judge concentrated on the subjective beliefs of the officer who acted in the capacity of "file coordinator". That officer had command responsibilities, and it was ultimately her that seized the items from the house.
- [48] The judge was not impressed with the evidence provided by the file coordinator. He did not accept her suggestion that she had "no way to know" who the phones belonged to, or who used what room. He found that proposition not to be credible. He also considered that the file coordinator was defensive in giving her evidence, and that aspects of her testimony were unreliable and not credible:
- [32] Though I do not attribute the 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".
- [34] 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.
- [49] The judge concluded that the file coordinator did not have the subjective belief necessary to satisfy s. 489(1)(c) of the Criminal Code:
- [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.

- [50] The judge found that, as the officer had no idea which cellphone or phones belonged to the accused, she could not subjectively believe that any particular phone would provide evidence in respect of the offence.
- [51] The judge's findings on subjective belief were based on his assessment of credibility and reliability and on findings of fact. As such, they are entitled to deference. I am not persuaded that this Court should interfere with them. It appears that, in respect of each cellphone seized, the police had no more than a mere suspicion that there was a possibility that it would afford evidence of an offence.
- [52] Section 489(1)(c) of the Criminal Code requires that the person making the seizure have a belief on reasonable grounds that it will afford evidence of an offence. In order to meet such a requirement, the Crown must establish both that the person had a subjective belief and that that belief was objectively reasonable: *R. v. Storrey*, [1990] 1 S.C.R. 241 at 250-251; *R. v. Henareh*, 2017 BCCA 7 at paras. 37-38.
- [53] In addition to his finding that the police did not have the requisite subjective belief to satisfy s. 489(1)(c), the judge concluded that there was also no objective basis for seizing the cellphones -- i.e., that there were no reasonable and probable grounds to believe that they would afford evidence of an offence.
- [54] While the question of whether the objective part of the test has been met includes issues of law, it requires an analysis of the totality of the circumstances (see *Henareh* at paras. 39-41). That means that findings of fact will also enter into the analysis.
- [55] On appeal, the Crown argued that the judge failed to consider the totality of the circumstances. The Crown specifically pointed to the following elements of the evidence:
- the "extremely messy" condition of the house;
 - the discovery of documents in the house indicating that Mr. Gill may have had more than one phone number;
 - the fact that there were more cellphones found in the home than the number of adults living there;
 - the fact that six of the cellphones lacked SIM cards;
 - the fact that almost all of the phones were located in rooms that also contained items linked to Mr. Gill; and
 - the existence of items in the house indicative of criminality.
- [56] I do not find this submission persuasive. Most of these pieces of evidence were referred to, at least in passing, in the judgment. While there were some that were not specifically discussed, there is no basis for concluding that the judge did not consider them. It is

apparent from his reasons that the judge understood the evidence was to be considered in its entirety, and his decision was given soon after the evidence was heard. It is well-established that a judge is not required to refer to every argument advanced by the parties, or to every piece of evidence heard.

- [57] In any event, the Crown's position on appeal ignores the effect of the judge's findings with respect to the file coordinator's state of knowledge when the cellphones were seized. At para. 47 of his reasons, the judge notes the file coordinator "explicitly stated in her testimony that she had no idea whether any of the individual cell phones belonged to the accused" (emphasis added). He found, as well, that the file coordinator misunderstood what she was authorized to seize. These were critical findings for purposes of the s. 8 analysis.
- [58] In the circumstances of this case, he considered that there was an insufficient basis to conclude that any one of the cellphones would afford evidence of an offence. I would not disturb that finding. While it may have been that, with only a few more inquiries or observations, the police could have obtained sufficient information to meet the objective test in respect of the iPhone, they did not do so. In determining the objective reasonableness of a belief, the proper focus is on what the police did, based on what they knew at the time of the seizure, and not on what information they could have acquired: *R. v. Glendinning*, 2019 BCCA 365 at para. 24.
- [59] In deferring to the judge's findings on reasonable grounds, I do not suggest that there is a general principle that a seizure of a group of items is inappropriate where the items cannot be readily differentiated and only one (or some) of the individual items are likely to yield evidence. A decision as to whether, in such a situation, the seizure of the group of items is reasonable will depend on the totality of the circumstances, as assessed by the judge: see, for example, *R. v. Robertson*, 2019 BCCA 116 at para. 23-29; *R. v. Sipes*, 2011 BCSC 1763 at paras. 300-307. The conclusions reached by the judge in this case were plainly shaped by the evidence on the voir dire and, importantly, his credibility findings.
- [60] With respect to the SVAT device seizure, the judge rejected the idea that the police had a subjective belief that the surveillance system would provide relevant evidence. He noted that the police did not know whether the system was operational, and that they did not articulate a basis for a belief that it would afford evidence.
- [61] On this appeal, the Crown accepts that the police lacked a subjective belief that the device would afford evidence of an offence. On that basis, it concedes that the seizure violated s. 8.
- [62] However, the Crown says this breach was of minimal impact because, objectively, there were reasonable grounds for the seizure. While nothing turns on the question for purposes of reviewing the determination of a breach, I am of the view that the objective standard was met in respect of the SVAT device. The positioning of the surveillance cameras and the fact that the SVAT device stored surveillance images for some length of time meant that there was more than "mere suspicion" that it would include images of the driver of the 4Runner. While there was a possibility that the device was not functional, there was no objective

reason to think that that was the case.

- [63] Because I would not interfere with the judge's findings that neither the subjective nor objective tests in s. 489(1)(c) of the Criminal Code were met for the seizure of the cellphones, I would not interfere with his determination that their seizure violated Mr. Gill's rights under s. 8 of the Charter. Similarly, the Crown's concession that the police lacked a subjective belief that the SVAT device would afford evidence of an offence, which concession appears to me to be well-founded, means that its seizure also violated s. 8 of the Charter.

Second Voir Dire Ruling (2021 BCSC 152) ("Over-holding Ruling")

- [64] The second voir dire ruling concerned the police's detention of the seized items beyond the period authorized under the Criminal Code.
- [65] The Crown accepted that the police retention of the cellphones and SVAT device beyond August 14, 2011 was contrary to s. 490 of the Criminal Code. The application in January 2018 to authorize continued retention of the cellphones did not make their detention for more than six years prior to that time lawful.
- [66] The Crown also accepted that the violation of s. 490 was deliberate. The evidence supporting that concession is overwhelming. Several years before the seizure in this case, IHIT officers had been directed by its senior management not to seek extensions of detention orders after the initial three-month authorization expired. They considered that seeking extensions would provide suspects with sensitive information as to the status of investigations. This concern subsisted until, several years later, the courts interpreted the Criminal Code provisions as allowing extension applications to be made without notice and in camera.
- [67] In 2007, two senior Crown counsel advised IHIT that it could face legal consequences for failures to abide by the requirements of s. 490 of the Criminal Code. In 2009, a third senior counsel reiterated that advice. Later on, an RCMP lawyer provided a similar warning. Nonetheless, IHIT continued to follow the practice of ignoring the legal requirement to seek an extension.
- [68] In 2014, IHIT finally changed its policy, but it did not apply for extensions of authority to retain seized items where the authority had already expired. As I have indicated, in this case, the RCMP did not apply for an extension until 2018.
- [69] The Crown's position was that the retention of the seized items between August 2011 and January 2018, while unauthorized, did not violate Mr. Gill's privacy interests, because the police did not conduct inspections of the phones or surveillance device during that period. It says that continuing to hold the items did not result in a "superadded intrusion". Further, Mr. Gill was aware that the cellphones were in the possession of the police and after the initial report of the seizure had been made, he could have made inquiries, and applied for the return of his items. Accordingly, the Crown contends that Mr. Gill's Charter rights were not violated by the continued detention of the seized items.

- [70] The judge rejected that argument in the second voir dire. He began by citing *R. v. Colarusso*, [1994] 1 S.C.R. 20 at 63 for the proposition that a seizure does not end with the taking of items, but rather continues for as long as the items remain in police detention.
- [71] While recognizing that merely holding onto cellphones and a surveillance device was not an intrusion of privacy of the same sort or degree as would have resulted from a search of their contents, the judge considered that privacy interests were still at stake, citing from *R. v. Reeves*, 2018 SCC 56:
- [33] Although a seizure of a computer may be less intrusive than a search of its contents, both engage important privacy interests when the purpose of the seizure is to gain access to the data on the computer. Privacy includes "control over, access to and use of information" (*R. v. Spencer*, 2014 SCC 43], at para. 40). Thus, the personal or confidential nature of the data that is preserved and potentially available to police through the seizure of the computer is relevant in determining whether the claimant has a reasonable expectation of privacy in it (*Marakah v. Marakah*, 2017 SCC 59], at para. 32).
- [72] He then referred to the decision of this Court in *R. v. Craig*, 2016 BCCA 154, holding that the Criminal Code regime for the handling of seized items after the original seizure engages s. 8 of the Charter:
- [181] The Charter protects against unreasonable search or seizure. In my view, a seizure does not end with the picking up of things. The requirement for a return to a justice is the ongoing judicial supervision of things seized--both under a warrant, pursuant to a warrantless search, and pursuant to a common law search: *Backhouse v. Backhouse* (2005), 194 C.C.C. (3d) 1 (Ont. C.A.)). This is the only public record of what was in fact seized, whether the items were named in the warrant, whether they were seized as found in plain view, and what was seized outside of a warrant. As noted, there can be a significant invasion of privacy after the picking up of the items--including DNA testing, forensic testing, copying and other examinations. Thus, the privacy interests are continuing.
- [182] I agree with the approach taken by the Ontario Court of Appeal in *Garcia-Machado v. Garcia-Machado*, 2015 ONCA 569] and *Butters v. Butters*, 2015 ONCA 783] that the failure to strictly comply with the statutory provisions of the Criminal Code will result in a Charter breach where the accused had an ongoing residual privacy interest and rendered the continuing detention unreasonable. I also agree that the circumstances are best left for an analysis under s. 24(2) of the Charter.
- [73] The judge considered, but rejected, the Crown's argument that Mr. Gill's privacy interests were protected because the police complied with the initial requirement of reporting the seizure to a justice and because they did not, without further authorization, search the devices. He found that such a parsing of the Criminal Code provisions would result in an overly narrow definition of a privacy interest.

- [74] I see no error in the trial judge's approach. Case law makes it clear that the retention of seized items, even without further examination of them, can constitute a violation of s. 8 of the Charter. It is true that the focus of Garcia-Machado was on the reporting requirements of the Criminal Code. As the appellant emphasizes, Garcia-Machado did not purport to determine whether a continuing seizure, by itself, impacted Charter rights:
- [55] The recording of the items seized, the right to notice and the right to apply for return of things seized confer important protections on people whose items the state holds in detention. Compliance with s. 489.1(1) is the gateway to all of these protections. I leave for another day whether any other breach of s. 489.1(1) or any breach of s. 490 - even if so minor or technical as to have no real impact on the judicial oversight contemplated by the sections -- would breach s. 8 of the Charter.
- [Emphasis added.]
- [75] In *R. v. Villaroman*, 2018 ABCA 220, the majority court suggested, in obiter dicta, that only certain features of the Criminal Code regime for seizures engaged Charter protection:
- [24] Not every failure to file a report to a justice (or the concomitant failure to obtain judicial authorization to detain seized property) will have a significant impact on an individual's privacy interests. The purpose of the provisions of sections 489.1 and 490 of the Criminal Code is to ensure that items detained by police officers are not held indefinitely without judicial oversight. In the case of the seizure of an electronic device such as a computer, an individual's privacy rights are not infringed by the continued detention of the property per se, but instead, by the search of the contents of the electronic device. While the detention of property may be an inconvenience, it is the informational privacy interests implicated by a search of a computer that are the most significant Charter concern.
- [76] In my view, what was said in this paragraph of Villaroman has been overtaken by the remarks that the judge quoted from para. 33 of Reeves. Privacy interests attaching to devices that hold data are not confined to an interest in ensuring that others do not examine the data. Rather, privacy interests extend to "control over, access to and use of information."
- [77] I acknowledge that the impact on Mr. Gill's privacy interests was mitigated considerably by police compliance with the Criminal Code's reporting requirement and by the fact that they did not access data during the period when the detention of the items was unauthorized. Even so, the retention of the items by the police placed serious constraints on Mr. Gill's control over and use of the data on the devices. Moreover, the failure to comply with the s. 490 extension requirements meant that from expiry of the original three-month period to the granting of an extension in 2018--a period of over six years--there was no ongoing judicial supervision of the seizure and continued detention. These were sufficiently serious incursions on Mr. Gill's residual privacy interests to constitute a violation of s. 8 of the Charter.

[78] I agree with Bennett J.A.'s observation at para. 182 of Craig that "the failure to comply with the statutory provisions of the Criminal Code will result in a Charter breach where the accused had an ongoing residual privacy interest [and] that the circumstances are best left for an analysis under s. 24(2) of the Charter."

[79] Accordingly, I would not interfere with the judge's decision on the second voir dire.

Third Voir Dire Ruling (2021 BCSC 377) (Exclusion of Evidence Ruling)

[80] Having found violations of s. 8 of the Charter in both the original seizure of the cellphones and SVAT device and in the unauthorized retention of them, the judge turned to the question of whether s. 24(2) of the Charter required him to exclude the evidence. Section 24(2) provides:

24(2) Where a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[81] The judge began his analysis by considering whether the infringements of the Charter were sufficiently related to the Crown "obtaining" evidence to meet the threshold requirements of s. 24. He concluded that the threshold was met, and no appeal is taken from that finding.

[82] He next addressed the meaning of the words "bring the administration of justice into disrepute." He quoted the following paragraphs from *R. v. Grant*, 2009 SCC 32, the case that established the current framework for analysis under s. 24(2):

[68] The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall reputation of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute.

[69] Section 24(2)'s focus is not only long-term, but prospective. The fact of the Charter breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the reputation of the justice system.

- [70] Finally, s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term reputé of the justice system.
- [83] Next, the judge enumerated the three factors that need to be considered in the Grant analysis: the seriousness of the Charter-infringing conduct; the impact of the breach on the accused's Charter-protected interests; and society's interest in an adjudication on the merits. He then engaged in separate detailed analyses of the three factors in relation to the over-seizure and over-holding violations.
- [84] The judge found that the over-seizure amounted to serious Charter-infringing conduct. Several aspects of the over-seizure caused him concern:
- the file coordinator did not seem to appreciate that a standard practice of seizing all cellphones found in a search was problematic;
 - the failure of the police to make any attempt to determine which cellphones belonged to Mr. Gill and which did not;
 - the seizure of the SVAT device without authority; and
 - the manner in which the file coordinator testified.
- [85] On the other hand, the judge considered that the effect of the Charter breaches on Mr. Gill's protected rights, while "substantive", was not serious. In making that assessment, he noted that the search warrant authorized the seizure of Mr. Gill's cellphone. As such, there had been judicial pre-authorization for an incursion into Mr. Gill's privacy, at least to a certain extent, and the seizure occurred within that overarching context.
- [86] The judge considered that, because the warrant used the word "telephone" rather than "telephones", it could not serve as a basis for the seizure of the two other cellphones. I have, in this judgment, expressed some doubt about that proposition. In any event, the judge does not appear to have considered the seizure of those two cellphones to have constituted a serious incursion against Mr. Gill's privacy interests.
- [87] Finally, the judge found that there was a strong societal interest in the adjudication of the charges on the merits. In doing so, he noted that the crimes alleged were very serious and that the evidence was both critical to proving the crimes and apparently reliable.
- [88] Considering the three Grant factors, the judge concluded that the over-seizure, had it occurred alone, would not have required the court to exclude the evidence.
- [89] The judge found that the over-holding was a more serious violation of the Charter. In doing so he emphasized that the over-holding was a flagrant disregard for Charter-protected rights, and that it represented a deliberate decision not to comply with the law.

- [90] With respect to the impact of the over-holding on Mr. Gill's Charter rights, the judge recognized that case law has established that individuals have a high interest in the informational privacy of devices such as cellphones, citing *R. v. Tessling*, 2004 SCC 67; *R. v. Spencer*, 2014 SCC 43; and *R. v. Marakah*, 2017 SCC 59. The judge recognized that while engaging in over-holding, the police were not actually accessing data:
- [129] Though detention of an electronic device does not impact privacy interests nearly as seriously as a search of its contents, I find that when evaluated in light of the nearly seven-year unlawful detention and the high expectation of privacy in devices such as cell phones, the impact of the over-holding on the accused's privacy interests was serious.
- [91] Applying *Reeves*, the judge noted that Mr. Gill had been deprived of control of his cellphones and the data that they contained for a period of over six years. The breach had a significant effect on Charter-protected rights:
- [132] Given that cell phones create, store, and share extremely personal information, loss of control over a cell phone and its contents seriously implicates the informational privacy of its owner. The importance of control over such devices is intuitive. Their contents fall squarely within the "biographical core" of information that "tends to reveal intimate details of the lifestyle and personal choices" that "individuals in a free and democratic society would wish to maintain and control from dissemination to the state". These are precisely the descriptors used to define the type of information that invites privacy protection under the Charter in *R v. Plant*, [1993] 3 S.C.R. 281 at 293 (endorsed by *Craig* at para. 133).
- [133] Thus, while a breach brought about by non-compliance with s. 490 is, generally, less significant relative to a search in breach of the Charter, its seriousness should not be minimized. The breach is substantive rather than merely technical.
- [92] While the impact of the over-holding of the SVAT device was of lesser concern, the judge still found it to be serious:
- [137] . Though the impact of the SVAT detention is less significant due to the relative sensitivity of its contents, it similarly compounded over seven years to the point where I cannot ignore it. As a result, I find that the time that elapsed between the expiration of the original detention period and the s. 490(9.1) application rendered the impact of the breach pursuant to the over-holding serious in spite of the fact that it initially had a lesser (though substantive) impact on the privacy interests of the accused.
- [93] The judge recognized that the public interest in having the charges adjudicated on the merits was the same in respect of the over-holding violations as in respect of the over-seizure ones.
- [94] Applying the three *Grant* considerations to the over-holding violation, the judge concluded that the evidence should be excluded:

- [140] I have found the Charter-infringing conduct related to the over-holding to be serious, and the impact of the breach on the accused's Charter-protected rights to be significant. I have also found that society has a significant interest in this case being heard on its merits. These three avenues of inquiry are not to be compartmentalized when considering the outcome under s. 24(2); rather, a broad, overall assessment of the analysis of the circumstances of the case is required: Reilly [R. v. Reilly, 2020 BCCA 369] at para. 115. Further, while not determinative, "[w]here the first and second inquiries, taken together, make a strong case for exclusion, the third inquiry will seldom if ever tip the balance in favour of admissibility": Le [R. v. Le 2019 SCC 34] at para. 142.
- [141] There is something particularly concerning about a police policy of deliberate non-compliance with mandated requirements due to the unilateral prioritization of their preferred investigative methods over following the law. In doing so, they undermined the supervisory role of the court in the state's detention of seized items. The significance of state authorities interfering with and displacing the responsibility of the courts cannot be overemphasized. The fact that the police in this case sought and received legal advice that explicitly deemed compliance mandatory makes these actions more egregious. While a decision to exclude the evidence might cause certain public outcry and clear disappointment to those most interested in the case being decided on its merits, I must consider the long-term public perception related to the perceived endorsement of unlawful police activities. To tacitly condone such egregious, institutional, systemic behaviour in disregard of legislative provisions and Charter interests by a premier homicide investigation unit would have serious implications for the rule of law that I cannot abide.
- [95] Given that he found the over-holding violation, by itself, required the evidence to be excluded, the judge acknowledged that the over-seizure violation did not need to be taken into account. Nonetheless, the judge found the two violations to be sufficiently connected that it would have been permissible to take them into account, together, in deciding whether the evidence should be excluded.
- [96] The parties do not differ on the standard of review that this Court must apply to a trial judge's decision in respect of s. 24(2) of the Charter. The standard is well-summarized in a number of cases, and several have been cited in argument. I will mention only two. In R. v. Pawar, 2020 BCCA 251, the Court said:
- [42] The standard of review to be applied to a determination under s. 24(2) that the admission or exclusion of unconstitutionally obtained evidence would bring the administration of justice into disrepute is well-settled. Where the proper factors have been considered and where no unreasonable findings have been made, the conclusion of a trial judge is owed considerable deference on appeal: Grant at para. 86; R. v. Beaulieu, 2010 SCC 7 at para. 5; R. v. Côté, 2011 SCC 46 at para. 44; R. v. Mian, 2014 SCC 54 at para. 88. In addition, the factual findings of the judge on which the determination is based must be respected absent palpable and overriding error: Grant at para. 129; Beaulieu at para. 5.

- [97] A similar summary was provided by the majority of this Court in *R. v. Reilly*, 2020 BCCA 369 (affirmed 2021 SCC 38):
- [62] A trial judge's s. 24(2) analysis is entitled to considerable deference on appeal.
- [63] In *R. v. Mian*, 2014 SCC 54 at para. 77, the Court, citing *R. v. Côté*, 2011 SCC 46 at para. 44, per Justice Cromwell, writing for the majority, recognized it was well-established that the determinations of trial judges as to what would bring the administration of justice into disrepute having regard to all the circumstances will be reviewed deferentially. Where a trial judge has considered the proper factors and has not made any unreasonable finding, their determination is owed considerable deference on appellate review.
- [64] In *R. v. McGuffie*, 2016 ONCA 365, Justice Doherty explained the standard of review in somewhat more detail:
- [64] The three inquiries identified in *Grant* require both fact-finding and the weighing of various, often competing interests. Appellate review of either task on a correctness standard is neither practical, nor beneficial to the overall administration of justice. A trial judge's decision to admit or exclude evidence under s. 24(2) is entitled to deference on appeal, absent an error in principle, palpable and overriding factual error, or an unreasonable determination: see *Grant*, at paras. 86, 127; *Côté*, at para. 44; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 82; *Jones [R. v. Jones]*, 2011 ONCA 632, at para. 79; *R. v. Ansari*, 2015 ONCA 575, at para. 72.
- [98] On this appeal, the Crown's arguments with respect to the s. 24(2) decision to exclude evidence are, for the most part, dependent on it having succeeded on at least some of its arguments concerning the first or second voir dres. As I have indicated, I am not persuaded that the judge made any reversible errors in those earlier rulings. Accordingly, I am of the view that the judge considered proper factors and made no unreasonable findings for purposes of his s. 24(2) analysis.
- [99] In saying this, I do not overlook the fact that, contrary to the judge's ruling, I have determined that there were objectively reasonable grounds to seize the SVAT device. As the Crown concedes, even with such grounds, the seizure still violated s. 8 because the police lacked the requisite subjective belief that the SVAT device would yield evidence of an offence. Even if the judge had recognized that there were objectively reasonable grounds to seize the SVAT, it could not realistically have affected his s. 24(2) analysis.
- [100] Given that conclusion, I need only discuss a single basis of appeal put forward by the Crown. The Crown accepts that the judge correctly instructed himself on the s. 24(2) framework. However, it argues that he over-stated the impact that the over-holding had on Mr. Gill's Charter-protected interests. It argues, in particular, that the judge exaggerated the privacy interests at stake, and gave too much weight to the duration of the over-holding.

- [101] Again, I note that the Crown's argument, as presented, was grounded on its position that the original seizure of the cellphones and SVAT device was lawful. The force of the argument is greatly attenuated given the Court's conclusion that the original seizures were unlawful.
- [102] In my opinion, the judge was careful in his evaluation of the privacy interests at stake in the overholding. In particular, he recognized that the overholding affected only Mr. Gill's right to control over his cellphone, not the state's access to the data on it.
- [103] The judge took a reasonable approach to the issue. Cellphones typically contain large stores of private information, and the ability to control and access that information is Charter-protected. The judge fully understood what was at stake in this case and made no reversible errors in his application of the law.
- [104] The Crown, here, concedes that the flagrant and apparently deliberate breach of the law by police officers was egregious. When that characterization is combined with a finding that the breach had a serious effect on Charter-protected rights, the case for excluding evidence is very strong, indeed.
- [105] As made clear by the Supreme Court of Canada in *R. v. Tim*, 2022 SCC 12 at para. 82, a wilful or reckless disregard of a Charter right falls at the "more serious end" of the culpability scale for Charter-infringing conduct. It was open to the trial judge to conclude that admitting the cellphones and SVAT device into evidence would bring the administration of justice into disrepute.
- [106] The Court must not, in these circumstances interfere with the judge's discretionary decision to exclude evidence, even in the face of extremely serious offences that had tragic human consequences.

Conclusion

[107] I would dismiss the appeal.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

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Prepared on 29 October 2026 · Esheria