

CANADA / JUDGMENT

R. v. Hernandez

2008 BCSC 1478

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 1478 R. v. Hernandez IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Hernandez, 2008 BCSC 1478 Date: 20080613 Docket: 23905 Registry: Vancouver Regina v. Jose Hernandez, Anh The Nguyen, Joshua Poncappo, Sam Tuan Vu & Van Van Vu Ban on Disclosure 486.5(1) C.C.C. Inherent Jurisdiction Pursuant to s. 486.5(1) of the Criminal Code, there is a ban on the publication in any document or the broadcast or transmission in any way of any information that could identify the witnesses, identified in these proceedings as "Witness X" and "Witness Y". They are to be referred to as Witness X and Witness Y in any publication. There is a statutory ban, as well as a ban pursuant to the inherent jurisdiction of the Court, on the publication in any document or broadcast or transmission in any way of any information that could identify the person referred to in these Reasons as "Mr. Z". He may be referred to as Mr. Z in any publication. Before: The Honourable Mr. Justice Silverman Oral Ruling on Vukelich Application June 13, 2008 Counsel for the Crown: K. Murphy, E. Duncan & S.M. Black Counsel for the Accused Hernandez L. Smith Counsel for the Accused Nguyen K. Bastow Counsel for the Accused Poncappo D. Kontou Counsel for the Accused Sam Vu C. Corriveau Counsel for the Accused Van Vu D. Karp Place of Trial: Vancouver, B.C.

- [1] THE COURT: This is my ruling with respect to what is commonly referred to as a Vukelich application relating to evidence the Crown seeks to lead concerning intercepted telephone conversations. The accused or some of them say a voir dire is necessary. The Crown does not seriously contest that. This ruling will determine what issues the voir dire will encompass. None of my comments suggest that I have made any findings of fact except to the extent necessary for determining whether or not a voir dire is or is not necessary.
- [2] First, I will note two aspects of potential evidence which are not necessary and need not be called or argued on this voir dire and they are, first, that there were exigent circumstances, when viewed objectively by reasonable people, which indicated that Mr. McMynn was in danger of imminent harm and that urgent steps were required to be taken to protect him. Related to that, that any evidence with respect to subsection (a) of 184.4 need not be called except to the extent that it bears on the issue of reasons police officers may have had for not naming various accused persons by name in the authorizations referred to as P-18 and P-19.

- [3] Now, I pause there just so it is clear for the record that one of the accused, at least, through counsel, intends to argue that a subsequent judicial authorization was ineffective in law because it did not name the accused and that, therefore, the non-judicial authorization acted upon, on exigent circumstances, must be taken to be the one that subsequent interceptions were made under. That is the context in which I note the exception that I did. It is not necessary to call any evidence at all about Mr. McMynn's circumstances. The exception only relates to why were names not in the subsequent authorization. So one might argue that that is really not a 184.4 issue at all.
- [4] Now, the second thing that need not be called on the voir dire, although the Crown may call it if they wish to, is evidence of voice identification. The Crown's view was that the law suggests that the accused must admit voice identification for the purposes of the voir dire only in order to obtain standing to make at least Charter arguments, and the defence is, for obvious reasons of potential self-incrimination, reluctant to do that.
- [5] I am in agreement with the general proposition that one cannot advance certain arguments, and particularly Charter arguments, unless one is able to assert that one has certain Charter rights which have been violated. However, in my view, it is not necessary to go so far as to require admissions from the defence. What is required from the defence if they are to have standing, and I am anticipating that they will be forthcoming with this, is their indication that the issue of voice identification will not be one that will be argued on the question of admissibility at the end of the voir dire. In other words, if otherwise admissible, voice identification will not make the difference and to that extent the Crown need not call it. Of course, if the evidence is ultimately admissible, then the Crown will face the usual burden of proof with respect to voice identification and may or may not obtain admissions with respect to that.
- [6] What the voir dire will cover is this, and evidence may be called. I will leave it to counsel to decide how much, and argument may be made.
- (1) Number one, the constitutionality of s. 184.4. I have indicated that I would hear Ms. Ainslie for about two and a half hours, and I will. If we are going to be any longer than that I would not, and I would limit this issue initially to submissions with respect to whether or not I was bound by Judge Davies decision in *R. v. Six Accused Persons*. I certainly do not want to revisit the entirety of the constitutional argument unless and until I am satisfied that I am not bound by that, but I will hear Ms. Ainslie, as I have indicated I would. I will also permit, and defence counsel have agreed, that the Crown can file legislative documentation relating to 184.4
- (2) Second, an issue on this voir dire on which I will hear evidence and argument is with respect to the effect and applicability of s. 184.4(c), and I think that is self-explanatory to everybody there.

- (3) Third, I will hear evidence in argument on the question of whether or not the authorizations referred to as P-18 and P-19 sufficiently, for the purposes of evidence, identify the accused persons and the consequences of the way in which they are identified.
- (4) Fourth, I will hear evidence and argument with respect to s. 24(2) of the Canada Evidence Act and all its aspects. This perhaps is putting the cart before the horse because if there is no breach, it is not necessary, but given the time constraints and the agreement of counsel and the fact that there will be some overlap of evidence with respect to that issue and the potential breach issues, we will hear it as one voir dire.
- [7] I emphasize that point, that all counsel have agreed that all of these issues can be heard and argued as one voir dire, although obviously they will have to be dealt with separately in subsequent argument and in my ultimate decision at the end of the voir dire. "A. Silverman J."

The Honourable Mr. Justice Silverman

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