

CANADA / JUDGMENT

R. v. Islam

2024 BCSC 1000

COURT

Supreme Court of British Columbia

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2024 BCSC 1000 R. v. Islam IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Islam, 2024 BCSC 1000 Date: 20240607 Docket: 33912 Registry: Vancouver Rex v. MD Rafiqul Islam, Charles Lawrence Flynn, Quintin Jerome Anthony and Jordan Gregory Trembley Before: The Honourable Justice MacNaughton Oral Reasons for Judgment (Voir Dire #2: June 9, 2021 Tracking Warrant) Counsel for the Crown: T. Lattimer A. Russell Counsel for MD Rafiqul Islam: M. James Place and Date of Hearing: Vancouver, B.C. May 15, 2024 Place and Date of Judgment: Vancouver, B.C. June 07, 2024 Table of Contents Introduction.. 3 Background to the Investigation.. 3 Applicable Legal Principles. 4 Facial Challenges. 4 Standard Applied when Issuing a Tracking Warrant 5 Analysis. 8 General Structure of the Tracking Warrant 8 Confidential Informant Information. 9 Police Records Inquiry. 10 Surveillance. 10 Application of the Standard in this Case. 12

Introduction

- [1] On June 9, 2021, Det. Cst. David Leslie-Greaves (the "Affiant") swore an affidavit in support of an application seeking a judicial authorization, pursuant to s. 492.1(1) of the Criminal Code, R.S.C. 1985, c. C-46 [Code], to track a 2016 Toyota Sienna (BC License Plate ND6048) (the "Tracking Warrant"). At the time, the Toyota Sienna operated as Vancouver Taxi V41 ("Taxi V41").
 - [2] Based on the Affiant's affidavit, later that day, Judicial Justice F.D. Hodge granted the Tracking Warrant for a period not exceeding 60 days.
 - [3] MD Rafiqul Islam, the driver of Taxi V41, challenges the facial validity of the Tracking Warrant on the basis that it breached his right to be free from unreasonable search under s. 8 of the Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11.
 - [4] The Crown responds that Mr. Islam cannot establish that there are any defects or insufficiencies in the supporting Information to Obtain (the "Tracking Warrant ITO").
- Background to the Investigation

- [5] The Tracking Warrant was obtained during a Vancouver Police Department ("VPD") drug squad investigation into alleged drug trafficking, known as Project Tache. Project Tache was initiated in late May 2021, based on information from a confidential informant that Taxi V41 was being used to transport and distribute bulk quantities of drugs to various locations in Vancouver.
- [6] The Tracking Warrant lists two named offences in relation to Taxi V41, the target vehicle:
- a) Possession of a controlled substance for the purposes of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act, S.C. 1996, c. 19 [CDSA]; and
 - b) Trafficking in a controlled substance, contrary to s. 5(1) of the CDSA.
- [7] In the early stages of Project Tache, and prior to obtaining the Tracking Warrant, the VPD conducted physical surveillance of the movements of Taxi V41. Police then obtained the Tracking Warrant to assist them in conducting surveillance more safely and effectively in Vancouver's downtown core.
- [8] During surveillance of Taxi V41 on June 1, 2021, the VPD made several observations of suspicious, short-duration meetings between the driver and passenger of Taxi V41, and others at various locations in downtown Vancouver.
- [9] The Tracking Warrant was granted on all of the evidence set out by the Affiant in the Tracking Warrant ITO, including: i) confidential informant information; ii) information about the driver, Mr. Islam, and Taxi V41 obtained through police and other police database checks; and iii) the June 1, 2021 surveillance observations. Applicable Legal Principles Facial Challenges
- [10] On a facial challenge to a warrant, the burden is on the applicant to show that the record before the issuing justice was insufficient to meet the Code's statutory preconditions.
- [11] The record on review consists of the issued warrant and the affidavit (or information to obtain) sworn in support of the application for the warrant. On a facial challenge, the record is not amplified and the court must decide the sufficiency of the authorization based solely on the information in the affidavit: *R. v. Araujo*, 2000 SCC 65 at para. 19 [Araujo]. A facial challenge accepts the accuracy of the facts set out in the affidavit, but alleges that the evidence, even if believed, does not support the issuance of the warrant.
- [12] The question the court must decide on a review is whether, on the basis of the content of the affidavit, the authorizing judge could have issued the warrant: *Araujo* at paras. 51, 54; *R. v. Vu*, 2013 SCC 60 at para. 16. The onus is on the applicant to demonstrate that the warrant could not have issued: *R. v. Wilson*, 2011 BCCA 252 at para. 63.

- [13] The tracking warrant authorization is presumed to be valid and Mr. Islam bears the burden of proving otherwise, on a balance of probabilities. The parties did not disagree about the general legal principles that apply to tracking warrants. Standard Applied when Issuing a Tracking Warrant
- [14] Section 492.1(1) of the Code permits a justice to issue a tracking warrant where satisfied, by information on oath, that there is a reasonable suspicion to believe that an offence has been or will be committed, and that the tracking of a vehicle will assist in the investigation of the offence. The section provides: Warrant for tracking device -- transactions and things 492.1(1) A justice or judge who is satisfied by information on oath that there are reasonable grounds to suspect that an offence has been or will be committed under this or any other Act of Parliament and that tracking the location of one or more transactions or the location or movement of a thing, including a vehicle, will assist in the investigation of the offence may issue a warrant authorizing a peace officer or a public officer to obtain that tracking data by means of a tracking device.
- (3) The warrant authorizes the peace officer or public officer, or a person acting under their direction, to install, activate, use, maintain, monitor and remove the tracking device, including covertly. [Emphasis added.]
- [15] In *R. v. Chehil*, 2013 SCC 49 paras. 26-28, the Supreme Court of Canada discussed the "reasonable suspicion to suspect" standard explaining that a reasonable suspicion means something more than a mere suspicion and something less than a belief on reasonable and probable grounds, the terms used with respect to certain other warrants that may be issued under the Code. "Reasonable suspicion" only requires reasonable possibility whereas 'reasonable and probable grounds' requires probability.
- [16] The reasonable suspicion standard addresses the possibility of uncovering criminality and not a probability of doing so: *Chehil* at para. 32.
- [17] Assessing whether the constellation of factors relied upon by the police meets the reasonable suspicion standard requires an assessment of all the circumstances through an inquiry that is fact-based, flexible, and grounded in common sense and practical everyday experience: *Chehil* at para. 29.
- [18] The Supreme Court of Canada provided further guidance in distinguishing the reasonable suspicion and reasonable grounds standards in *Mackenzie* at paras. 71-74:
- [71] Reasonable suspicion must be assessed against the totality of the circumstances. Characteristics that apply broadly to innocent people and "no-win" behaviour -- he looked at me, he did not look at me -- cannot on their own, support a finding of reasonable suspicion, although they may take on some value when they form part of a constellation of factors.

- [72] Exculpatory, common, neutral, or equivocal information should not be discarded when assessing a constellation of factors. However, the test for reasonable suspicion will not be stymied when the factors which give rise to it are supportive of an innocent explanation. We are looking here at possibilities, not probabilities. Are the facts objectively indicative of the possibility of criminal behaviour in light of the totality of the circumstances? If so, the objective component of the test will have been met. If not, the inquiry is at an end.
- [73] Assessing whether a particular constellation of facts gives rise to a reasonable suspicion must not devolve into a scientific or metaphysical exercise. Common sense, flexibility, and practical everyday experience are the bywords, and they are to be applied through the eyes of a reasonable person armed with the knowledge, training and experience of the investigating officer.
- [74] [T]here are several ways of describing what amounts to the same thing. Reasonable suspicion means "reasonable grounds to suspect" as distinguished from "reasonable grounds to believe" (Kang-Brown, at paras. 21 and 25, per Binnie J., and at para. 164, per Deschamps J.). To the extent one speaks of a "reasonable belief" in the context of reasonable suspicion, it is a reasonable belief that an individual might be connected to a particular offence, as opposed to a reasonable belief that an individual is connected to the offence. As Karakatsanis J. observes in Chehil, the bottom line is that while both concepts must be grounded in objective facts that stand up to independent scrutiny, "reasonable suspicion is a lower standard, as it engages the reasonable possibility, rather than probability, of crime" (para. 27). [Emphasis added.]
- [19] The assessment of sufficiency is not about what the police did not know or what they could have done by way of further investigation. Rather, the question is whether the information the police had was sufficient. This necessarily means that "factors that give rise to a reasonable suspicion may also support completely innocent explanations". This is acceptable, as the reasonable suspicion standard addresses "the possibility of uncovering criminality, and not a probability of doing so": Chehil at para. 32.
- [20] A police officer's training and experience can give significance to factors that are, on their face, apparently neutral: R. v. Mackenzie, 2013 SCC 50 at para. 62 [Mackenzie]. Police experience is applied to objectively discernible facts, subject to judicial review, differentiating this requirement from a "hunch", "intuition" or "mere suspicion" all of which are arguably lower standards than "reasonable suspicion": Chehil at para. 47.
- [21] The Supreme Court of Canada cautioned trial courts against "upping the ante for reasonable suspicion to the point that it virtually mirrors the test for reasonable and probable grounds": Mackenzie at para. 84.

- [22] The grounds for reasonable suspicion may include information from confidential informants. In such cases, an assessment of the informant's reliability is required. As Wilson J. discussed in *R. v. Debot*, [1989] 2 S.C.R. 1140 at 1168, 1989 CanLII 13, the Court should consider whether the informant information was compelling, credible, and corroborated, acknowledging that a weakness in one area may be compensated by strength in the others.
- [23] In summary, for the investigative tool of a tracking warrant to be issued, the constellation of factors need only establish the possibility that an offence has been committed and that the tracking device could reveal useful information in furtherance of an investigation into that offence.
- [24] In the circumstances of this case, I must determine whether there was a constellation of factors on which Judicial Justice Hodge could have been satisfied there was a possibility that Mr. Islam was involved in possessing drugs for the purpose of drug trafficking or drug trafficking, and that it was possible that useful evidence in that regard could be obtained through the use of a tracking device.

Analysis

- [25] For the reasons that follow, I conclude that the applicable standard was met in this case.
- [26] In this case, in the Tracking Warrant ITO, the Affiant provides three sources of information: 1) the confidential informant information; 2) the police records inquiry; and 3) the surveillance on June 1, 2021. After setting out the general structure of the Tracking Warrant ITO, I will consider each of the three sources of information in turn. General Structure of the Tracking Warrant
- [27] The general structure of the Tracking Warrant ITO is as follows:
- a) At paras. 1-5, the Affiant explains his nine-year background with the VPD and his involvement with the Drug Unit in the Organized Crime Section for about twelve months. He explains his training and extensive experience in over a hundred drug investigations, ranging in scale, complexity, and the substances involved. He also explains his knowledge of various drug trafficking techniques, including distribution patterns, packaging, and the use of vehicles and cell phones to traffic drugs.
 - b) At paras. 6-9, the Affiant explains the offences under investigation, overviews the investigation to that point, and sets out the purpose of the application and the authorizations he is seeking.
 - c) At paras. 10-18, the Affiant explains definitions and abbreviations used in the Tracking Warrant ITO and indicates that where he is giving his opinion, based on his experience as a police officer, his knowledge of the investigation, and his review of the investigative file materials and discussion with other investigators, he uses square brackets and italics.

- d) At para. 19, the Affiant explains that no prior authorizations had been sought in the Project Tache investigation. Confidential Informant Information
- [28] At paras. 20-24, the Affiant explains the confidential informant information he received from "Informant A" and Informant A's police handlers.
- [29] Although some of the content in this part of the Tracking Warrant ITO is redacted, it sets out information provided by Informant A about drug-trafficking activities in the past that had proven reliable. The information was used to obtain a search warrant and drugs were located. Some of Informant A's information was corroborated by their handlers.
- [30] Neither of Informant A's handlers determined that Informant A's information with respect to Project Tache was false or misleading. The Affiant explained that Informant A was believed to be reliable. Informant A volunteered the information, had not been given payment or a promise of favour for providing it in the Project Tache investigation; and was motivated by moral obligation and the belief that they were doing the right thing.
- [31] The Tracking Warrant ITO contains the following information provided by Informant A to the VPD:
- a. Sonny is a drug trafficker;
 - b. Sonny supplies drugs to the Downtown Eastside;
 - c. Sonny supplies drugs to traffickers in Vancouver, primarily in single room occupancy hotels (on the Downtown Eastside and in Downtown Vancouver);
 - d. Sonny supplies cocaine, heroin/fentanyl, crystal methamphetamine, and GHB;
 - e. Sonny uses Vancouver Taxi V41, to deliver drugs;
 - f. Taxi V41 is a newer-model dark orange/red minivan and is in good condition;
 - g. Taxi V41 is driven by a South Asian male with short dark hair and a thin moustache;
 - h. The driver drives Taxi V41 but is not involved in any exchanges;
 - i. Sonny uses workers to deliver drugs via Taxi V41, with usually 1 or 2 workers who sit in the back row;
 - j. There are several different workers who use Taxi V41 to deliver drugs; and
 - k. Traffickers contact the workers by phone to place orders for drugs. Police Records Inquiry

- [32] At paras. 25-26 of the Tracking Warrant ITO, the Affiant sets out the inquiries he made about Mr. Islam in the PRIME, CPIC, and ICBC databases regarding Mr. Islam's drivers license, home address, employment as a driver with Vancouver Taxi, clean criminal record, and a previous traffic ticket. He also explains the inquiries he made about Taxi V41 which was owned by Vancouver Taxi. This information corroborated some of the information given by the confidential informant about Taxi V41 and its driver. Surveillance
- [33] At para. 27 of the Tracking Warrant ITO, the Affiant explains the use of covert surveillance to gather information in relation to the offences being investigated and summarizes the surveillance on June 1, 2021, of which he was a part. At para 28, the Affiant details the surveillance of Taxi V41 and an unknown male assigned the designation UM1, now known to be Mr. Islam, between 12:10 p.m. and 10:30 p.m. He describes driving patterns that he said were designed to evade surveillance, including a common manoeuvre referred to as "squaring" or circling the block to expose or detect surveillance. Mr. Islam was also observed driving through two solid red lights (driving north on Granville St. through Nelson St. and then turning left from Granville St. onto Smithe St.). The Affiant described this type of driving as being a "high risk to public safety" and complicating police surveillance "as officers are required to drive more aggressively to maintain surveillance on a target". The Affiant also said that it is common for persons who are wary of being under surveillance to drive through red lights to defeat the surveillance.
- [34] Mr. Islam submits that "squaring" may be evidence of an attempt to determine if a driver is being observed by the police when it involves an ordinary vehicle but, as it relates to a taxi driver, it may relate to searching for a fare. Further, he submits that the fact that the taxi then parked for eight minutes, diminishes the likelihood that squaring occurred. He describes the Affiant's comments as conclusory and misleading.
- [35] The Affiant describes what he believed to be several "meets" of short duration, consistent with drug trafficking. He also describes some regular taxi activity.
- [36] In the Crown's submissions, the observations made of Taxi V41 and an unknown male, UM5, were summarized in a chart as follows: UM5 into Taxi V41 (approx.) Para. UM5 out of Taxi V41 (approx.) Para. Observations (of UM5 and Taxi V41) Approx. times Approx. times 2:31 p.m. 28.16 UM5 exits taxi entered a Tim Horton's and met with UM1. UM5 did not return to Taxi V41 at this time. 3:24 p.m. 28.20 UM5 entered the rear of Taxi V41, which then drove from the 400-block of Drake Street to 540 E. Hastings Street. UM6 was observed leaving a residence, walk quickly to the driver side of Taxi 41 before returning to the residence (at approximately 3:38 p.m.; see para. 28.22). 3:48 p.m. 28.23 UM5 exited Taxi V41 and entered 1283 Howe Street. Taxi V41 parked nearby. 4:23 p.m. 28.24 UM5 entered Taxi V41, which was parked in the same location. Taxi V41 proceeded to drive away, and continuity was broken for approximately four minutes (no view of inside the vehicle). 4:39 p.m. 28.26 UM5 exited Taxi V41 and entered 1283 Howe Street. Taxi V41 parked nearby. 5:01 p.m. 28.28 UM5 entered Taxi V41, which was parked in the same location. Taxi V41 drove away. UM7 entered the taxi cab at approx. 5:09 p.m. (para. 28.29) and exited at approx. 5:12 p.m. (para. 28.30).

UM5 was still onboard Taxi V41 at approx. 5:23 p.m. (para. 28.31) and at 5:59 p.m. (para. 28.33). 6:06 p.m. 28.34 UM5 exited Taxi V41 and entered 1283 Howe Street. Taxi V41 parked nearby. UM5 next observed in Taxi V41 at approx. 6:37 p.m. (para. 28.35), now in the 100-block of E. Hastings Street. 6:53 p.m. 28.37 UM5 observed outside Taxi V41 meeting with UF1. UF1 subsequently left UM5 and went into a separate vehicle. 7:02 p.m. 28.39 UM5 returned to Taxi V41 and got in after another individual (UM8) exited. Taxi V41 then drove away. 7:16 p.m. 28.40 UM5 exited Taxi V41 and walked toward the rear of 1283 Howe Street. 8:18 p.m. 28.42 UM5 returned to Taxi V41, which was parked nearby and got into the rear passenger side. At approx. 8:29 p.m. another individual (UM7) entered the rear of Taxi V41. The vehicle drove around the block before letting UM7 out of the taxi (para. 28.44). 8:40 p.m. 28.46 UM5 exited 933 Hornby Street and into the rear driver side of Taxi V41. 9:07 p.m. 28.48 28.49 UM5 exited Taxi V41 and entered 1283 Howe Street.

- [37] At para. 29, the Affiant explains his reasons for believing that UM1 is Mr. Islam and at para. 30, relying on his experience as an officer, he sets out the behaviour of Taxi V41 that he believes is indicative of drug trafficking.
- [38] At para. 32, the Affiant sets out his justification for the Tracking Warrant for Taxi V41 and at paras. 34-41, his justification for authorization to enter on to private property, for a general production order, non-disclosure order, and a sealing order. Application of the Standard in this Case
- [39] I am satisfied that the reasonable suspicion standard is met in this case and that the issuing justice could have issued the Tracking Warrant based on the Tracking Warrant ITO. There was a possibility that an offence had been or was about to be committed.
- [40] The Affiant was an experienced VPD officer currently assigned to the Drug Unit of the Organized Crime Section. He had been involved in more than a hundred drug investigations, in various capacities, from street level drug transactions, "dial-a-dope" investigations, and kilogram level drug traffickers. The drug investigations involved a number of illicit substances. He sets out his experience in para. 3 of the ITO.
- [41] In para. 4 of the ITO, he sets out some general information about various methods of drug trafficking and the activities drug traffickers engage in.
- [42] The information provided to the VPD by Informant A described how an individual, known as "Sonny" was using a taxi driven by a South Asian man with short dark hair and a thin moustache, to deliver drugs. The taxi was identified as Taxi V41 and it was described as a newer model, dark orange/red in colour minivan, in good condition. The informant described the interior seating in Taxi V41. The informant explained that the driver's only involvement was driving the taxi that was being used by various workers to deliver drugs.
- [43] The information was credible and compelling about a drug trafficking operation using a taxi, the areas to which drugs were supplied, the nature of the drugs, and the number of workers using the taxi delivering drug orders placed by telephone. The VPD corroborated

some of Informant A's information. The surveillance observations of Taxi V41 on June 1, 2021, and the activities of its associated individuals, were consistent with drug trafficking. The description of the taxi and the driver were corroborated by the surveillance. I am satisfied that each of the factors outlined in Debot were met in this case.

- [44] Based on the June 1, 2021 surveillance, the Affiant, an experienced drug investigation officer, described driving behaviour that he explained was consistent with trying to avoid surveillance and five short-duration meets that he believed were consistent with drug trafficking. In the context of the overall investigation, the meetings observed by the VPD support a reasonable suspicion that a crime had been committed. The driving behaviour also supports that reasonable suspicion.
- [45] The Affiant set out about ten hours of surveillance of Taxi V41, during which the VPD identified the driver as UM1 (the Applicant), another primary passenger (UM5), and several other individuals (identified using the identifiers UM# or UF#). UM5 was observed either meeting with UM1, or as the rear passenger of Taxi V41, on eight separate occasions during the surveillance. As set out above, the VPD observed what the Affiant believed to be five short duration meets involving UM5 as the rear passenger of Taxi V41 and other individuals.
- [46] In the Tracking Warrant ITO, the Affiant fairly distinguishes between what could be seen as normal cab operations and what he believed was suspicious behaviour.
- [47] Counsel for Mr. Islam argued that there might be another explanation for an individual hiring a taxi, over the course of many hours, engaging in short duration meetings, and going into and out of the taxi at downtown Vancouver addresses. He suggested that the occupant could have been running errands or picking up items from Facebook Marketplace vendors. As explained in Chehil at paras. 33-34, the police cannot disregard exculpatory, neutral, or equivocal information when assessing the constellation of factors giving rise to a reasonable suspicion. However, the police are not under a duty to rule out possible innocent explanations for observed behaviour during an investigation as the reasonable suspicion standard addresses the possibility of uncovering criminality, not the probability of doing so.
- [48] The surveillance relied on by the Affiant was only on one day; however, it occurred over ten hours and UM5 was observed engaging with Taxi V41 and UM1, its driver, for about seven hours. In this case, the Affiant demonstrated in the Tracking Warrant ITO that it was possible that knowing the location of Taxi V41 could assist the VPD in investigating drug trafficking activities associated with it.
- [49] I am also satisfied that the Tracking Warrant ITO provided reasonable grounds to believe that the installation of an electronic tracking device on Taxi V41 would assist in the investigation. The surveillance observations included behaviour consistent with drug trafficking including short duration meetings inside Taxi V41, out of the view of surveillance, and a single passenger in the taxi for each meeting, coupled with evasive driving techniques and the taxi returning to a single location between meetings.

- [50] Relying on his experience, the Affiant set out his belief that installing a tracking device would assist in ongoing physical surveillance of Taxi V41, allowing police to remain covert, locate the taxi if visual continuity was lost, and determine other locations related to the offences being investigated.
- [51] The constellation of factors described above could have given rise to a reasonable suspicion that an offence had been or would be committed.
- [52] I dismiss Mr. Islam's s. 8 Charter challenge to the issuance of the June 9, 2021 Tracking Warrant. "MacNaughton J."

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