

CANADA / JUDGMENT

R. v. Islam

2024 BCSC 235

COURT

Supreme Court of British Columbia

DECIDED

9 February 2024

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2024 BCSC 235 R. v. Islam IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Islam, 2024 BCSC 235 Date: 20240209 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 Application to Cross-examine Affiants Counsel for the Crown: A. Russell T. Lattimer Counsel for Quintin Jerome Anthony: K. Westlake, K.C. W. Jessop Counsel for Charles Lawrence Flynn: P.M. Ferguson S. Purton Counsel for Jordan Gregory Trembley: C. Muldoon Place and Date of Trial/Hearing: Vancouver, B.C. January 12, 2024 Place and Date of Judgment: Vancouver, B.C. February 9, 2024 Table of Contents Introduction.. 3 Background of the Charges. 3 Judicial Authorizations and Informations to Obtain ("ITOs") 4 The Applications. 6 Legal Framework for Reviewing the Issuance of Warrants. 8 Cross-Examination of the Affiant 11 Analysis: Leave to Cross-Examine. 12

Introduction

- [1] The applicants, Quintin Anthony, Jordan Trembley, and Charles Flynn, are charged with various offences under the Controlled Drugs and Substances Act, S.C. 1996, c. 19. Mr. Trembley is also charged with possession of a firearm under the Criminal Code, R.S.C. 1985, c. C-46. The trial is currently set to begin on October 15, 2024.
- [2] The applicants seek to exclude evidence seized during the course of the police investigation on the basis that it was obtained through alleged breaches of their respective rights to be free from unreasonable search and seizure, pursuant to 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 [Charter]. Specifically, the applicants challenge the sufficiency of a number of the judicial authorizations that were issued. A number of voir dieres to determine the validity of the judicial authorizations and the admissibility of the evidence are scheduled in the coming months.

- [3] These reasons concern applications brought by the applicants for leave to cross-examine the affiants of two Informations to Obtain ("ITOs"), which were filed in support of two Production Orders, that are to be challenged at a voir dire currently scheduled for June 2024. I heard submissions on the applications at a hearing on January 12, 2024. Background of the Charges
- [4] The charged offences arise from a Vancouver Police Department ("VPD") investigation known as "Project Tache" which was initiated in May 2021. Project Tache was based on confidential informant information received by the VPD, that Vancouver Taxi V41 (the "Taxi") was being used for drug trafficking purposes. As part of the investigation, the Taxi was the subject of police surveillance.
- [5] Police identified MD Rafiqul Islam as the driver of the Taxi. As a result of surveillance and other investigative techniques, police identified what they believed to be two drug stash sites: 1526-933 Hornby Street/938 Smithe Street (the "Hornby/Smithe Street Residence") and 3501-1283 Howe Street (the "Howe Street Residence"), collectively the "Residences".
- [6] On June 24, 2021, the VPD executed search warrants at the Residences and seized:
- a) Approximately 12kg of fentanyl, 10kg of methamphetamine, and 4kg of cocaine from the Hornby/Smithe Street Residence;
 - b) Approximately 600g of fentanyl, 800g of cocaine, and a firearm from the Howe Street Residence; and
 - c) 200g of cocaine from the Taxi driven by Mr. Islam and in which Mr. Flynn was the passenger.
- Judicial Authorizations and Informations to Obtain ("ITOs")
- [7] Between June 9, 2021 and August 6, 2021, VPD investigators filed six ITOs in support of 18 judicial authorizations as set out in the following chart (the "Chart"):
- | Authorization | Date | Affiant |
|---|-----------------------|--------------------------|
| 1 Tracking Warrant - Taxi V41 | June 9, 2021 | Det. Cst. Leslie-Greaves |
| 2 Production Order - Mr. Islam's ICBC photo | June 9, 2021 | Det. Cst. Leslie-Greaves |
| 3 Production Order - CCTV and fob records for the Hornby/Smithe Street Residence | June 1, 8 and 9, 2021 | Det. Cst. Yuen |
| 4 Production Order - CCTV and fob records for the Howe Street Residence | June 1, 8 and 9, 2021 | Det. Cst. Yuen |
| 5 General Warrant - covert entry and fob access to the Hornby/Smithe Street Residence | June 19, 2021 | Det. Cst. Leslie-Greaves |
| 6 General Warrant - covert entry and fob access to the Howe Street Residence | June 19, 2021 | Det. Cst. Leslie-Greaves |
| 7 Search Warrant - the Hornby/Smithe Street Residence | June 23, 2021 | Det. Cst. Leslie-Greaves |
| 8 Search Warrant - the Howe Street Residence | June 22, 2021 | Det. Cst. Leslie-Greaves |
| 9 Production Order - CCTV & fob records for the Hornby/Smithe Street Residence | from June 1-24, 2021 | Det. Cst. Leslie-Greaves |
| 10 Production Order - CCTV and fob records for the Howe Street Residence | from June 1-24, 2021 | Det. Cst. Leslie-Greaves |
| 11 Search Warrant - Taxi V41 | July 6, 2021 | Det. Cst. Leslie-Greaves |
| 12 Search Warrant - Mr. Islam's phone | July 6, 2021 | Det. Cst. Leslie-Greaves |
| 13 | | |

Search Warrant - Mr. Flynn's phones July 6, 2021 Det. Cst. Leslie-Greaves 14 Production Order - in-taxi camera footage from Taxi V41 July 6, 2021 Det. Cst. Leslie-Greaves 15 Production Order - ICBC photo for Mr. Trembley August 6, 2021 Det. Cst. Leslie-Greaves 16 Production Order - ICBC photo for Mr. Anthony August 6, 2021 Det. Cst. Leslie-Greaves 17 Impression Warrant - Mr. Trembley August 6, 2021 Det. Cst. Leslie-Greaves 18 Impression Warrant - Mr. Flynn August 6, 2021 Det. Cst. Leslie-Greaves

- [8] According to the Crown's submissions, the information obtained as a result of the execution of earlier judicial authorizations, was often included in subsequent ITOs filed in support of later judicial authorizations. The Applications
- [9] The applicants seek to cross-examine the affiants of two ITOs at the voir dire to determine the lawfulness of the Production Orders for the Residences. The ITOs at issue are:
1. The ITO sworn by Det. Cst. Leslie-Greaves on June 9, 2021, in support of the Taxi Tracking Warrant and the Production Order for Mr. Islam's ICBC photo, being judicial authorizations 3 and 4 in the Chart (the "June 9 ITO"); and
 2. The ITO sworn by Det. Cst. Yuen in support of the Production Orders with respect to the CCTV and fob records for the Residences for June 1, 8 and 9, 2021, being judicial authorizations 3 and 4 in the Chart (the "June 17 ITO"). The June 17 ITO incorporates by reference, affirms as true, and relies upon the content of the June 9 ITO.
- [10] The June 17, 2021 Production Order for the Residences relies on three separate evidentiary bases to establish the reasonable grounds for the authorizations: (1) confidential informant information; (2) surveillance observations; and (3) information gathered from the Tracking Warrant with respect to the Taxi. In the June 17 ITO, Det. Cst. Yuen relies on the surveillance to corroborate the confidential informant information and gives his opinions with respect to those observations and the inferences that may be drawn from them.
- [11] The main thrust of the applicants' position in the application is that the June 17 ITO invited inferences that would not have been supported had certain facts been properly disclosed to the authorizing judge. They seek leave to cross-examine the affiants on certain observations that the applicants say are erroneous and/or misleading as well as on the material facts that they allege were strategically and purposefully omitted.
- [12] While all three applicants seek leave to cross-examine the affiants, the nature of what they seek to cross-examine them on differs.
- [13] Mr. Anthony and Mr. Trembley seek to cross-examine the affiants in relation to the Production Orders for the Residences, specifically on assertions made in the ITOs relating to the surveillance operations of the Taxi. They submit the affiants failed to make full and frank disclosure of material surveillance observations, were strategic in their omissions of relevant information, and expressed opinions based on misstated or overstated facts.

- [14] Mr. Flynn seeks to cross-examine the affiants on the omissions of surveillance observations and statements of opinion. He also seeks to cross-examine Det. Cst. Yuen specifically on the identification of one of the targets in the June 17 ITO, whom Mr. Flynn says was misidentified.
- [15] In submissions, and depending on the outcome of Det. Cst. Yuen's cross-examination, the applicants indicated that it might not be necessary to cross-examine Det. Cst. Leslie-Greaves.
- [16] The Crown opposes the applications for leave to cross-examine on the basis that the applicants failed to establish that the proposed cross-examination will tend to undermine the statutory preconditions for the respective judicial authorizations. Legal Framework for Reviewing the Issuance of Warrants
- [17] In the broader context of the applicants' s. 8 Charter voir dres, the issue I will ultimately have to decide is whether there is some basis on which the judicially authorized production orders and warrants could have been issued.
- [18] In *R. v. Dadmand*, 2016 BCSC 720, Justice Pearlman provided a helpful summary of the law applicable to a review of the issuance of search warrants:
- [25] The police, in seeking a warrant on an ex parte basis, have an obligation to make full and frank disclosure of the material facts: *R. v. Morelli*, [2010] 1 S.C.R. 253 at para. 40.
- [26] In order to provide a foundation for the exercise of the authority of the Justice of the Peace under s. 487(1) of the Criminal Code, the ITO must set out sworn evidence sufficient to establish reasonable grounds for believing that (1) an offence has been committed, (2) the things to be searched for will afford evidence of the offence, and (3) the things will be found at a specified place: *R. v. Morris* (1998), 134 C.C.C. (3d) 539 at 549 (NSCA).
- [27] In *R. v. Liu*, 2014 BCCA 166, the Court summarized the law applicable to a review of the issuance of a search warrant at para. 39. I would summarize the main points from this jurisprudence in the following way: * The trial judge's role in reviewing the validity of a search warrant is to consider whether the material filed in support of the warrant, as amplified on review, could support the issuance of the warrant. * The trial judge should examine the information in its totality, not on a piece meal basis, in a "practical, non-technical, and common sense basis". * The question is not whether the reviewing judge would have granted the order, but whether there was an objective basis on which the issuing justice could have done so. * The appropriate standard is one of reasonable probability rather than proof beyond a reasonable doubt or prima facie case. The phrase reasonable belief also approximates the requisite standard. * Reasonable grounds may be said to exist at the point at which credibly-based probability replaces suspicion.
- [28] Regarding amplification, on the voir dire, an accused may lead evidence supporting the challenge to the ITO. However the Crown is restricted to amplification aimed at the correction of minor or technical errors made in good faith and derived from information

available to the police at the time the warrant issued: *R. v. Scott*, 2012 BCCA 99 at para. 41. The Crown is not entitled to lead amplification evidence that would provide retroactive authorization by circumventing the requirement to obtain approval for the warrant prior to the search: *R. v. Araujo*, 2000 SCC 65 at paras. 54-59.

- [29] The task of the reviewing judge is to examine the record before the authorizing justice, including any exclusions and additions arising from proper amplification on review, and to decide whether on a practical, non-technical, and common sense basis the totality of the circumstances demonstrate reasonable grounds for the belief the accused was committing the stated offences and could support the issuance of a warrant: *R. v. Voong*, 2013 BCCA 527 at para. 22, citing *Scott* at para. 42.
- [19] To summarize, deciding whether the standard of reasonable grounds - the point at which credibly-based probability replaces suspicion - is met, requires a practical, non-technical, and common-sense assessment of the totality of the circumstances: *R. v. Vu*, 2011 BCCA 536 at para. 39, *aff'd* on this point 2013 SCC 60.
- [20] As explained in *R. v. Frederickson*, 2018 BCCA 2, a challenge to a judicial authorization can be undertaken on a facial or a sub-facial basis:
- [28] The sufficiency of the grounds for the issuance of a search warrant may be attacked in two ways: (1) a challenge to the facial validity of the affidavit; and (2) a sub-facial challenge to the reliability of the content of the affidavit. Whether the attack is facial, sub-facial or both, the role of the reviewing judge remains the same: *R. v. Araujo*, 2000 SCC 65; *R. v. McKinnon*, 2013 BCSC 2212, at para. 11.
- [21] In this case, the challenge is sub-facial.
- [22] The parties agree that in reviewing the validity of a judicial authorization, the trial judge's role is to consider whether the material filed in support of a warrant, as amplified on review, could support its issuance. The reviewing judge should not set aside the warrant unless, on the whole of the material presented, there is no continuing basis to support it: *Frederickson* at para. 27, citing *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at 1452, 1990 CanLII 52; and *R. v. Wilson*, 2011 BCCA 252 at para. 37.
- [23] The application process for judicial authorizations is *ex parte* and, as a result, it imposes duties on the authorizing justice and the affiant seeking the authorization. In *R. v. Araujo*, 2000 SCC 65, the Supreme Court of Canada noted the responsibility of the affiant to provide full and frank disclosure in light of the *ex parte* nature of the application process. In the context of a wiretap authorization, the Court said:
- [47] A corollary to the requirement of an affidavit being full and frank is that it should never attempt to trick its readers. At best, the use of boiler-plate language adds extra verbiage and seldom anything of meaning; at worst, it has the potential to trick the reader into thinking that the affidavit means something that it does not. Although the use of boiler-plate language will not automatically prevent a judge from issuing an authorization (there is, after all, no

formal legal requirement to avoid it), judges should deplore it. There is nothing wrong - and much right - with an affidavit that sets out the facts truthfully, fully, and plainly. Counsel and police officers submitting materials to obtain wiretapping authorizations should not allow themselves to be led into the temptation of misleading the authorizing judge, either by the language used or strategic omissions.

- [24] In *R. v. Booth*, 2019 ONCA 970, Justice Paciocco considered the scope of information that should be included in an ITO to meet the requirement of full and frank disclosure:
- [54] [I]t is imperative that issuing judges or justices have an accurate understanding of the material, known facts available to the affiant officer. If the ITO contains erroneous, incomplete, or dishonest information relating to known information, an issuing judge or justice could be misled, and provide an authorization that should not have been provided. To ensure accuracy, anyone seeking an ex parte authorization, such as a search warrant, is required to make full and frank disclosure of material facts: *R. v. Araujo*, 2000 sec 65, [2000] 2 S.C.R. 992, at para. 46. This is because an ex parte warrant application is not adversarial. As a corollary of the privilege of being the only party permitted to present evidence in an ex parte application, a search warrant affiant bears the burden of presenting the facts accurately and fairly, from the perspectives of both sides.
- [55] Therefore, a search warrant ITO should never try to trick its readers, or offer misleadingly incomplete recitations of known facts, and the affiant officer must not pick and choose among the relevant facts in order to achieve a desired outcome: *Araujo*, at para. 47; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 58. Nor should the affiant officer invite inferences that would not be drawn or a conclusion that would not be reached if the omitted facts were disclosed: *Morelli*, at para. 58.
- [56] What, then, is the frame of material information that should be included to make full and frank disclosure? To answer that question, consider what is required to issue a reasonable and probable grounds search warrant. For such a search warrant to issue, the grounds for the warrant must be adjudged not only to be probable, but reasonable to rely upon. The ITO affidavit has to disclose what Dickson J. described in *Hunter et al. v. Southam Inc.* as a credibly-based probability [that] replaces suspicion: 1984 Canlll 33 (SCC), (1984) 2 S.C.R. 145, at p. 167; . As a result, the frame of material information required to achieve full and frank disclosure includes all material information that: (a) could undercut the probability that the alleged offence has been committed; (b) could undercut the probability that there is evidence to be found at the place of the search; and (c) that challenges the reliability and credibility of the information the affiant officer relies upon to establish grounds for the warrant.
- [25] The court's review of the impugned judicial authorization starts with the presumption of validity. The applicant bears the onus of demonstrating invalidity: *R. v. Sadikov*, 2014 ONCA 72 at paras. 35, 83.

- [26] On their own, inaccuracies or omissions in an ITO will not provide a sufficient basis for a finding of bad faith or intent to mislead an issuing justice, or serve as a basis to quash a judicial authorization. However, non-disclosure or misleading information in an ITO, together with new evidence, are all relevant when reviewing the validity of a judicial authorization. However, they are neither a prerequisite to, nor dispositive of, the review: Sadikov at para. 87, citing Garofoli at 1452. Cross-Examination of the Affiant
- [27] The reliability of the content of an ITO on a sub-facial challenge may be challenged through cross-examination of the affiant; however, an applicant alleging s. 8 Charter violations is not entitled, as of right, to cross-examine the affiant of a judicial authorization. Leave must be granted to do so: Garofoli, at para. 112; R. v. Pires; R. v. Lising, 2005 SCC 66 at para. 3.
- [28] A sub-facial challenge can still be made if leave to cross-examine is not granted: Frederickson at para. 29.
- [29] Leave should only be granted where the applicant shows a reasonable likelihood that cross-examination will elicit testimony of probative value to the issue for consideration by the reviewing judge. In Garofoli, Justice Sopinka expressed the well-settled test at p. 1465: The granting of leave must be left to the exercise of the discretion of the trial judge. Leave should be granted when the trial judge is satisfied that cross-examination is necessary to enable the accused to make full answer and defence. A basis must be shown by the accused for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization, as for example the existence of reasonable and probable grounds.
- [30] The standard that must be met was explained in Pires/Lising, 2005 SCC 66:
- [40] the Garofoli leave requirement is simply a means of weeding out unnecessary proceedings on the basis that they are unlikely to assist in the determination of the relevant issues. The reason that the test will generally leave just a narrow window for cross-examination is not because the test is onerous -- it is because there is just a narrow basis upon which an authorization can be set aside. Hence, in determining whether cross-examination should be permitted, counsel and the reviewing judge must remain strictly focussed on the question to be determined on a Garofoli review -- whether there is a basis upon which the authorizing judge could grant the order. If the proposed cross-examination is not likely to assist in the determination of this question, it should not be permitted. However, if the proposed cross-examination falls within the narrow confines of this review, it is not necessary for the defence to go further and demonstrate that cross-examination will be successful in discrediting one or more of the statutory preconditions for the authorization. Such a strict standard was rejected in Garofoli. A reasonable likelihood that it will assist the court to determine a material issue is all that must be shown.

- [31] Although the applicants in this case urged me to apply the less stringent standard adopted by the Supreme Court of Canada in *R. v. Haevischer*, 2023 SCC 11, in my view *Haevischer*, did not change the *Pires/Lising* standard except in the context of summary dismissal motions: see *Haevischer* at para. 80. Thus, the applicants in this case must show a basis on which I could conclude that the cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization.
- [32] The ultimate reliability of the information in the ITO is not the issue on a motion to cross-examine the affiant. The applicants are not required to show that the cross-examination will succeed in demonstrating the unreliability of the affiant's information: *Garofoli*, at pp. 1463-1465, as cited in *R. v. Shivrattan*, 2017 ONCA 23 at para. 49. Analysis: Leave to Cross-Examine
- [33] In deciding whether to grant leave, I focused my analysis on whether the proposed cross-examination would assist in answering the ultimate question to be determined in a *Garofoli* review - whether there is a basis on which the authorizing judge could have granted the order: *Pires/Lising* at para. 40.
- [34] The applicants are not required to establish, on the application to cross-examine, that the information in the ITOs is, in fact, unreliable, misleading, or otherwise improper. They need only demonstrate that there is a reasonable likelihood that the proposed cross examination will assist in determining whether that is so. The threshold is not particularly onerous. As such, I am only concerned with whether there is a reasonable likelihood that the proposed cross-examination would assist in determining whether the grounds existed for the issuance of the Production Orders.
- [35] Having considered the applicants arguments, I am satisfied that the applicants have demonstrated that there is a reasonable likelihood that the cross-examination would elicit testimony tending to discredit the existence of one or more of the preconditions to the authorization. The areas on which the applicants seek to cross-examine could potentially undermine the factual basis supporting the issuance of the authorization.
- [36] I note that while *Det. Csts. Leslie-Greaves and Yuen*, are not held to a standard of perfection, they must consider their duty to make full and frank disclosure in the *ex parte* process of obtaining a judicial authorization. They must take care to avoid inaccuracies, exaggerations, or omissions that result in an affidavit or affidavits that are likely to mislead the authorizing judge: *R. v. Araujo*, 2000 SCC 65 at paras. 46-47.
- [37] In this case, surveillance of the Taxi was conducted on June 1, 8, 9, and 10, 2021. The surveillance on those dates is the foundation for the June 17 ITO. The Taxi's movements, the behaviour of its occupants, and the Taxi's and the occupant's attendance at the Residences form the basis for the affiant's opinion that a pattern emerged from the surveillance, consistent with the alleged offences, and that the Production Orders would provide evidence of the alleged offences.

- [38] The applicants identified some instances where the ITO may have fallen short of full and frank disclosure of material facts relating to the surveillance of the Taxi. They also seek leave to cross-examine the affiants on material facts that they allege were strategically and purposefully omitted, thereby failing in their duties of full, fair, and frank disclosure.
- [39] Further, the applicants allege that the June 17 ITO omitted material facts that are inconsistent with the opinions set out by the affiant. They seek leave to cross-examine on certain observations made by the affiants of the June surveillance dates that they say are erroneous and/or misleading. By way of example, counsel for Mr. Anthony submitted that there is evidence that contradicts the opinion made in the ITO by Det. Cst. Yuen that the Taxi was a dedicated taxi to the drug trafficking enterprise that was not, and should have been, included in the June 17 ITO. He submits that evidence that the taxi was observed taking routine fares should have been put before the authorizing justice.
- [40] I find that to the extent that other surveillance observations of the Taxi may tend to diminish the conclusion that a pattern emerged that it was being used in furtherance of alleged drug transactions, there is scope for cross-examination.
- [41] I understand that the ITO asked the issuing justice to draw certain inferences based on the surveillance observations. These inferences are relevant to the statutory grounds for issuing the Production Orders. As such, leave to cross-examine on this issue is granted.
- [42] The applicants do not seek to cross-examine on any confidential informant information.
- [43] The cross-examination is to be limited to the opinions formed by the affiants, the basis for those opinions, and the inferences they asked the issuing justice to draw, based on their surveillance observations. Mr. Flynn is also entitled to cross-examine Det. Cst. Yuen on the identification of one of the targets of the investigation, filed in support of the June 17, 2021 Production Orders.
- [44] In my view, in light of the short number of days on which the surveillance occurred, it is reasonable to limit the length of the cross-examination to four hours for all counsel and for both affiants, to be adjusted if necessary. "MacNaughton J."

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Prepared on 28 October 2026 · Esheria