

CANADA / JUDGMENT

R. v. Kang

2020 BCSC 1433

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1433 R. v. Kang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kang,

2020 BCSC 1433

Date: 20200807

Docket: 27786-5, 27786-7, 27786-29, 27786-33, 27786-52, 27786-53

Registry: Vancouver

Regina

v.

Sameet Kang, Gary Kang, Manveer Braich, Kristoffer Ghuman, Jitesh Vagh

RESTRICTION ON PUBLICATION: Ban on Publication 648(1) C.C.C.

Before: The Honourable Justice Winteringham

Oral Reasons for Judgment re Application for leave to cross-examine Affiant, Constable Nielsen

In Chambers

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Place and Date of Hearing:

Vancouver, B.C.

August 6 & 7, 2020

Place and Date of Judgment:

Vancouver, B.C.

August 7, 2020

- [1] THE COURT: This is an application by Mr. Braich and Mr. Vagh for leave to cross-examine Constable Nielsen, the affiant of an Information to Obtain (ITO) dated May 23, 2017. At the outset of this application, I was advised that the Crown contested Mr. Ghuman and Mr. Gary Kang's standing on this application. I have not been asked to determine that standing issue, so I will deal solely with the application from Mr. Braich and Mr. Vagh.
- [2] I received oral submissions from counsel yesterday and today, and I am providing my decision this afternoon to enable counsel to prepare for the next steps of this voir dire. I will provide the reasons for my decision in writing in the coming weeks.
- [3] Very briefly, the legal framework is not in dispute. Rather, the parties disagree as to the application of the well-known principles in an application for leave to cross-examine an affiant on a challenge to a judicial authorization.
- [4] Mr. Braich, with carriage of this application, set out the specific paragraphs of the ITO where he seeks to cross-examine Cst. Nielsen. The Crown, in response, contends that leave should not be granted to cross-examine on any of the proposed areas because the paragraphs, as drafted and when the ITO is read as a whole, are not misleading, nor do they give rise to a finding that Cst. Nielsen failed in his duty to provide full, fair, and frank disclosure. Where errors exist, the Crown submits, they are of a minor or technical nature and are properly corrected on amplification only.

- [5] The legal framework is this: An applicant challenging the validity of an authorization is not entitled to cross-examine the affiant as a right. Rather, leave to cross-examine should only be granted where the applicant shows a reasonable likelihood that cross-examination of the affiant will elicit testimony of probative value to the issue for consideration by the reviewing judge.
- [6] The standard that must be met was set out in *R. v. Pires*; *R. v. Lising*, [2005] 3 S.C.R. 343 at para. 40:

As discussed earlier, 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.

- [7] In other words, leave should not be granted where the accused has failed to demonstrate that there is a reasonable likelihood that cross-examination will assist the court to determine a material issue.
- [8] In deciding this application, I have considered *R. v. Garofoli*, [1990] 2 S.C.R. 1421, *Pires*/ *Lising*, *R. v. Homeniuk*, 2019 BCSC 282 and *R. v. Dadmand*, 2016 BCSC 720 as well as the other authorities referred to by counsel during their submissions. I have also considered Justice Paciocco's decision in *R. v. Booth*, 2019 ONCA 970, and have considered the following paragraphs:
- [54] Obviously, it 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 SCC 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 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at p. 167; see also R. v. Floyd, 2012 ONCJ 417, 263 C.R.R. (2d) 122, at para. 9. 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.

...

[71] The Crown's position before the reviewing judge during the s. 8 Charter voir dire was that the ITO disclosed this omitted fact four pages later. This is not sufficient to comply with the obligation to make full and frank disclosure, for several reasons:

- i. First, the watch information, even if clarified, remained irrelevant and prejudicial. Absent evidence tying the watch to the robbery, it should not have been included and there could be no legitimate purpose for including a large photograph of the watch in the ITO.
- ii. Second, the information disclosed four pages later could itself mislead the issuing justice into thinking that the watch could be Mr. Alqebali's. It reported that "ALQEBALI could not identify the watch as his." Yet, a fair reading of Mr. Alqebali's comment, "No not this one", when asked if he recognized the watch, was that he was making it known that the watch did not belong to him.
- iii. Moreover, the manner of presenting the information that was disclosed was unfair. The comment highlighting the importance of the watches is isolated from the qualifying information, which appears four pages later tagged onto the end of a paragraph about Mr. Alqebali's descriptions of the robbers. The Morelli majority, at para. 56, raised a similar concern about ordering information in an ITO in a way that could mislead the issuing justice. In that case, the description of a webcam trained at a child's play area was "juxtaposed immediately alongside" descriptions of suspicious child pornography hyperlinks. This painted a more villainous picture than what would have emerged had the affiant officer disclosed all the material information. The fact that the affiant officer disclosed later in the ITO that the webcam was plugged into a VCR and not the computer did not remove the problem.

- [9] I have determined that Mr. Braich has demonstrated a basis "for the view that the cross-examination will elicit testimony tending to discredit the existence of one or more of the preconditions to the authorization". I make this determination for some but not all of the proposed areas of cross-examination.
- [10] Using the words of Justice Devlin from Homeniuk, at para. 14, the court is granting leave because I am satisfied that Mr. Braich has shown a reasonable likelihood that cross-examination will elicit testimony of probative value to the issue for consideration by the reviewing judge, and there Devlin J. cites Pires/Lising at para. 3.
- [11] In addition, appreciating that the threshold is not particularly onerous, the analysis must be strictly focused on the question to be determined in a Garofoli review. Namely, whether there continues to be a basis on which the authorizing judge could have granted the order: para. 40 of Pires/Lising.
- [12] Referring to Justice Sopinka's decision in Garofoli, in my view, Mr. Braich has shown a basis for the cross-examination here, because I am satisfied that cross-examination is necessary to enable him to make full answer and defence and because the areas where Mr. Braich seeks cross-examination could, not will, undermine the factual basis supporting the issuance of the authorization.
- [13] I am going to turn to the notice of application seeking leave and will address each of the paragraphs therein. I will set out my decision with respect to the paragraphs where I am granting leave and the paragraphs where I am not:
- a) Paragraphs 34.3, 47, 75.1.5-75.1.8, 75.6.8-75.6.9, 79-79.8, 88, 89-89.6 and 99.2 leave to cross-examine is granted;
 - b) Paragraphs 52, 65-66 and 94, leave to cross-examine is denied; and
 - c) Paragraph 75.2.6, leave is cross-examine is granted to the extent that it connects back to paragraph 47, where I have granted leave to cross-examine.
- [14] During the hearing, counsel raised two additional areas of cross-examination not particularized in the notice of application for leave. I am adjourning that aspect of this application.
- [15] With respect to concerns about prolixity, I am placing what I view to be a reasonable limit on the length of the cross-examination and I am limiting the cross-examination to three hours. Of course, there is some flexibility in any time limit, but, based on the submissions I received about the proposed areas of cross-examination, it is my view that three hours is sufficient.
- [16] That is my decision with respect to the areas of cross-examination where I am granting leave.

"Winteringham J."

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