

CANADA / JUDGMENT

R. v. Kang

2020 BCSC 1557

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Supreme Court of British Columbia

DECIDED

23 October 2020

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2020 BCSC 1557 R. v. Kang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Kang,

2020 BCSC 1557

Date: 20201023

Docket: 27786-52, 27786-53

Registry: Vancouver

Regina

v.

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

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

Before: The Honourable Justice Winteringham

Ruling on Charter Application - Voir dire #2 - Application for leave to cross-examine Affiant,
Constable Nielsen

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Place and Date of Hearing:

Vancouver, B.C.

August 6-7, 2020

Place and Date of Judgment with reasons to follow:

Vancouver, B.C.

August 7, 2020

Date of Written Reasons:

October 23, 2020

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I. OVERVIEW

- [1] Manveer Braich and Jitesh Vagh allege their s. 8 Charter rights were infringed because of orders issued in reliance on an Information to Obtain (ITO) affirmed on May 23, 2017. The voir dire to challenge the May 23, 2017 orders commenced with an application by Mr. Braich and Mr. Vagh to cross-examine the affiant, Cst. Matthew Nielsen.

- [2] On this application, the Court received submissions from counsel on August 6 and 7, 2020. I delivered an oral ruling on August 7, 2020 where leave to cross-examine, with time and subject-matter limits, was granted. I advised counsel on that date that I would provide more fulsome reasons for my decision. These are those reasons.
- [3] For context, the Crown takes the position that Mr. Braich has standing to challenge: (1) a warrant for a tracking device for a telephone associated to him; and (2) a transmission data recorder warrant for a telephone associated to him. Regarding Mr. Vagh, the Crown takes the position that he has standing to challenge the production order for electronic key fob records and building security camera footage for 1221 Bidwell, Vancouver. When the application was heard, Mr. Vagh and Mr. Braich had not asserted standing.

II. BACKGROUND

A. Circumstances of the early investigation

- [4] In spring 2017, the Vancouver Police Department (VPD) began investigating a number of rival criminal groups operating in the Lower Mainland. Task Force Tourniquet, a proactive task force including members from the VPD and other police agencies in the Lower Mainland, was the policing response to the conflict. Task Force Tourniquet was later broken down into investigations focusing on particular groups. Project Territory was one of the break out investigations and tasked with investigating the alleged drug trafficking activities of the Kang group and the Latimer group.[1]
- [5] At the end of April 2017, the police received information from a confidential informer suggesting that Mr. Braich was a drug courier for the Kang group. The police conducted surveillance of Mr. Braich from May 2 - May 12, 2017. They observed Mr. Braich go to the Alexandra at 1221 Bidwell Street, Vancouver, a multi-residential building ("Bidwell"). The police believed members of the Kang group were using Bidwell as a stash site. Investigators went to Bidwell and obtained, without judicial authorization, CCTV footage and fob access records showing Mr. Braich's attendance at Bidwell on May 4, 2017.
- [6] On May 23, 2017, Cst. Nielsen affirmed the ITO in support of a number of orders including:
- a) Production order pursuant to s. 487.014 of the Criminal Code for electronic key fob records for 907-1221 Bidwell Street from April 1 -May 23, 2017 and CCTV footage from May 1 - May 23, 2017;
 - b) Transmission data recorder warrant pursuant to s. 492.2 of the Criminal Code for phone number 778-896-4259, associated to Mr. Braich, valid from May 23 - July 21, 2017; and
 - c) Warrant authorizing the police to install and monitor a tracking device on telephone number 789-896-4259 pursuant to s. 492.1(2) of the Criminal Code, valid from May 23 - July 21, 2017.

- [7] Mr. Vagh was seen at Bidwell on May 18, 2017 and his image was captured by CCTV footage. He challenges the search wherein his image was seized.

B. Notices of Application

- [8] On September 18, 2019, Mr. Braich filed Application #33, challenging the May 23, 2017 production order for fob records and CCTV footage, and Application #29 challenging the May 23, 2017 phone tracking and transmission data warrants.
- [9] On August 19, 2019, Mr. Vagh filed Application #7, challenging the VPD's obtaining of the May 18, 2017 key fob records and building security camera footage from Bidwell. An amended version of this application was filed on July 28, 2020.
- [10] As part of their s. 8 Charter challenge to the May 23, 2017 authorizations, Mr. Braich and Mr. Vagh filed Notices of Application (#52 and #53) seeking leave to cross-examine Cst. Nielsen.

C. Position of the Parties

- [11] Mr. Braich, with carriage of this aspect of the application, set out the specific paragraphs of the ITO where he seeks to cross-examine Cst. Nielsen. For each paragraph, Mr. Braich particularized the basis for which leave is sought. He submits the application should be granted because the affiant:
- a) Failed to make full, frank and fair disclosure;
 - b) Presented information in a manner that was misleading; and
 - c) Failed to disclose relevant information and that such omissions were material.
- [12] 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.

III. LEGAL FRAMEWORK - LEAVE TO CROSS-EXAMINE

- [13] 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 s. 8 Charter challenge to a judicial authorization.
- [14] A claimant alleging s. 8 Charter violations is not entitled as of right to cross-examine the affiant. The claimant must show a basis that the cross-examination will elicit testimony tending to discredit the existence of one of the preconditions to the authorization. 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 and 83.

- [15] In *R. v. Dadmand*, 2016 BCSC 720, Justice Pearlman provided a helpful summary of the law applicable to a review of the issuance of a search warrant at paras. 25-29:
- [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.
- [16] In *R. v. Booth*, 2019 ONCA 970, Justice Paciocco provided this useful overview of the authorities setting out the principles engaged when considering the "frame of material information that should be included to make full and frank disclosure" at paras. 54-56:
- [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.
- [17] Booth then provides guidance to a reviewing judge when considering allegations of failures to make full and frank disclosure

[18] I turn to the jurisprudence governing an application for leave to cross-examine the affiant.

[19] An applicant challenging the validity of an authorization is not entitled to cross-examine the affiant as a right. Rather, leave 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. In *R. v. Garofoli*, [1990] 2 S.C.R. 1421, Justice Sopinka expressed the now well known test this way at 1465:

. . . Leave must be obtained to cross-examine. 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.

[20] It is clear that the reason for the leave requirement is to prevent proceedings from prolixity. To be sure, requiring leave helps to weed out that which is ultimately irrelevant to the challenge to the judicial authorization. The standard that must be met was set out in *R. v. Pires*; *R. v. Lising*, 2005 SCC 66 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.

[21] 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.

IV. ANALYSIS - LEAVE TO CROSS-EXAMINE

- [22] I determined that the applicants had demonstrated a basis "for the view that the cross-examination [would] elicit testimony tending to discredit the existence of one or more of the preconditions to the authorization". I made this determination for some but not all of the proposed areas of cross-examination.
- [23] Using the words of Justice Devlin from *R. v. Homeniuk*, 2019 BCSC 0282 at para. 14, I granted leave because I was satisfied the applicants showed a reasonable likelihood that cross-examination would elicit testimony of probative value to the issue for consideration by the reviewing judge.
- [24] Appreciating that the threshold is not particularly onerous, in granting leave I was conscious that 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: *Pires/Lising* at para. 40.
- [25] Following Garofoli, I was satisfied that the applicants had established cross-examination was necessary to enable them to make full answer and defence. The areas where the applicants sought cross examination could potentially undermine the factual basis supporting the issuance of the authorization.
- [26] On their own, inaccuracies in an ITO will not provide a sufficient basis for a finding of bad faith or an intent to mislead, or serve as a basis to quash a judicial authorization. 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.
- [27] I have also considered that Cst. Nielsen, when drafting a lengthy ITO, is not held to a standard of perfection. However, he must bear in mind the duty to make full and frank disclosure in an ex parte proceeding such as this. In the end, he must take the care necessary to avoid inaccuracies or exaggerations that are likely to mislead the authorizing judge: *R. v. Araujo*, 2000 SCC 65 at paras. 46-47.
- [28] I pause to note that I have made certain determinations taking into account the threshold required for the applicants to be granted leave to cross-examine the affiant. I accept that the parties will tender a more fulsome evidentiary record at the voir dire. At this stage, counsel proceeded primarily on the basis of submissions asking the court to draw certain inferences from the material tendered. My comments are relevant only to the issue before me in determining whether leave should be granted and not on the merits of the s. 8 Charter challenge. In other words, I touch on the merits only insofar as is necessary to determine whether the applicants have met their burden.

- [29] Turning to the particulars set out in the Notice of Applications, I set out below the basis for my decision with respect to the paragraphs where I granted leave and the paragraphs where I did not:
- a) Leave to cross-examine granted for paragraphs 34.3, 47, 75.1.5-75.1.8, 75.6.8-75.6.9, 79-79.8, 88-89.6 and 99.2;
 - b) Leave to cross-examine granted for paragraph 75.2.6 to the extent it connected back to paragraph 47; and
 - c) Leave to cross-examine denied for paragraphs 52, 65-66 and 94.
- [30] The applicants have identified some instances where the ITO seemed to fall short of full and frank disclosure of material facts relating to the reasonable grounds requirement. Specifically, for Mr. Braich, at para. 34.3 of the ITO, Cst. Nielsen writes about a meeting of the Kang group the day after the murder of Navdip Sanghera. In this paragraph, there is a suggestion that Mr. Braich was involved in the meeting and this part of the ITO is drafted in such a way that this inference could be drawn. Leave to cross-examine regarding the facts relating to this paragraph is granted on the basis that Mr. Braich's involvement in or knowledge of the meeting is relevant to the statutory grounds for issuing the order as it draws a link between Mr. Braich and the Kang group and the grounds to believe that Mr. Braich is a drug courier for the Kang group.
- [31] A second instance relevant to the discussion of full, fair and frank disclosure arises out of para. 75.6.8. I granted leave to cross-examine because the paragraph as drafted suggests corroboration of information given by the confidential informer about Mr. Braich. For this application, I accepted the submission that certain facts about Mr. Braich were omitted and those facts could weaken the assertion that the informer's information had been corroborated.
- [32] A third instance relevant to the discussion of full, fair and frank disclosure arises out of paras. 47 and 75.2.6 as those paragraphs relate to rental car information. I granted leave to cross-examine because the paragraphs as drafted could suggest the police obtained certain information from surveillance when the source may have been otherwise.
- [33] I was also satisfied that the applicants established a reasonable likelihood that cross-examination on the paragraphs linking Mr. Braich and "super" will assist the Court on the issue of whether there were reasonable and probable grounds for authorizing the warrants. The link between Mr. Braich and "super" first occurred during a motor vehicle stop on May 20, 2016 where the police seized a number of cell phones. When the cell phones were later analyzed, the police retrieved a text message, "I gotta go grab a reload from super while working." In the ITO, Cst. Nielsen states that heroin and cocaine were recovered and writes that the driver of the stopped vehicle, Dilraj Gill, has "documented PRIME files associating him to Randeep Kang, Sameet Kang and Gary Kang." I was satisfied that the ITO appeared to omit some facts relevant to the assessment of the link between Mr. Braich and "super."

- [34] I therefore granted leave to cross-examine Cst. Nielsen about paras. 75.1.1-75.1.6, 75.1.8 and 75.6.9.
- [35] Similarly, I was satisfied the applicants established a reasonable likelihood that cross-examination on paras. 79-79.8 will assist the Court on the issue of whether there were reasonable and probable grounds for authorizing the warrants. These paragraphs concern Cst. Nielsen's review of CCTV footage from Bidwell. An inference could be drawn from the paragraphs as drafted that he reviewed much more footage than was possible based on what was in police possession at the time the ITO was drafted. As such, I accepted that the paragraphs are potentially misleading.
- [36] I also accepted the applicants' assertion that para. 88 is potentially misleading because the way it was drafted suggests Mr. Braich was engaged in (exclusively) suspicious driving behaviour connected to activities one would expect from a drug trafficker. The surveillance report from which this paragraph is drawn-up also notes significant time that Mr. Braich spent driving to locations where he is engaged in benign activities. This omission could weaken the inference that Mr. Braich was involved in the drug trade and could weaken the suggestion that the confidential informer's information was corroborated.
- [37] Paragraphs 89-89.6 and 99.2 may also suffer from similar flaws where Cst. Nielsen asserts that Mr. Braich was engaging in unusual driving behavior for, he suggests, a malevolent purpose; that is, in a deliberate attempt to try and expose possible surveillance.
- [38] I did not grant leave to cross-examine on paras. 52, 65-66 and 94. I was satisfied based on the submissions of the Crown that any discrepancies were minor in nature and would not undermine the preconditions for the issuance of the orders.
- [39] With respect to concerns about prolixity, I placed what I viewed to be a reasonable limit on the length of the cross-examination of three hours, to be adjusted if necessary.

"Winteringham J."

- [1] Three separate indictments charging 12 individuals were preferred in Project Territory: (1) the Kang Indictment charging Sameet Kang, Gary Kang, Manveer Braich, Kristoffer Ghuman and Jitesh Vagh; (2) the Second Kang Indictment charging Sameet and Gary Kang's parents with the facilitation of a criminal organization; and (3) the Latimer Indictment charging Kyle Latimer, Criag Latimer, Jacob Pereira, Anduele Pikientio, and Csongor Szucs with criminal organization, drug-trafficking and firearms offences.

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Prepared on 29 October 2026 · Esheria