

CANADA / JUDGMENT

R. v. Khan

2013 BCSC 387

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 387 R. v. Khan IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Khan, 2013 BCSC 387 Date: 20130307 Docket: X70004 Registry: New Westminster Between: Regina v. Amjad Khan and Naim Saghir BAN ON PUBLICATION PURSUANT TO S. 517(1) AND 539(1) OF CRIMINAL CODE Before: The Honourable Mr. Justice Josephson Application by Crown re: Informer Privilege Counsel for Crown: D. Ballyk S. Sidhu Counsel for Accused Naim Saghir: S. Buck Counsel for Accused Amjad Khan R. Claus Place and Date of Hearing: New Westminster, B.C. February 26, 2013 Place and Date of Judgment: New Westminster, B.C. March 7, 2013 I. Introduction

- [1] The Crown seeks a declaration that all information provided to the police by a Crown witness (referred to throughout these reasons as "the Source") on matters unrelated to the present case is privileged. Mr. Khan seeks to question the witness and his police handler, Detective Bentley, regarding these unrelated disclosures, saying that this evidence might uncover reports by the witness found to be unreliable by police, thus reflecting adversely on the credibility of the witness. This witness is a Vetrovec witness in these proceedings.
- [2] Detective Bentley is a member of the Integrated Gang Task Force. He approached the witness while the witness was incarcerated on September 21, 2005. Disclosure material reveals that the witness provided information about a crime that was expected to occur. The witness was released back into the community days after the September 21 visit. The Detective left a message for the witness on November 16 and received a call back from the witness the following day. They met on November 17 when (then) Csts. Bentley and Uppal arrived in front of the Source's house. During the 40 minute to one hour meeting in the unmarked police car the witness provided information that Mr. Khan had offered to pay him to commit a homicide at the residence of the victim. He pointed out that residence and then pointed out the residence of Mr. Khan. The victim was killed in the residence identified by the witness three days later. There is no privilege claimed for information relevant to the alleged offence on the Indictment before me. The affidavit of Staff Sergeant Mullen indicates that the Source signed a letter of limited waiver to this effect on February 21, 2013. However, it is apparent from the prior proceedings in this matter that the Source has been willing to waive any privilege he enjoyed with respect to the indictment before the court.

- [3] The Crown led no evidence from Detective Bentley about any promises of confidentiality made by him or any other peace officer to the witness. The witness did provide information to the Detective about other persons involved in criminal activity in matters unrelated to the investigation of this alleged offence. It is that information for which the Crown seeks a declaration of privilege. II. The positions of the parties
- [4] The Crown submits that informer privilege arose when the Source was approached by members of the Intel Probe team in September 2005. They say that there is evidence that the Source gave information to the police because he believed it would not be disclosed. In the Crown's view, disclosure of this information could raise serious concerns for the witness' safety or that of his family. They submit that the witness' contradictory evidence in the previous voir dire in this trial can be attributed to the witness having been taken by surprise by the line of questioning and his having not received legal advice as to his status on this issue.
- [5] In support of the argument that informer privilege arose, Crown relies on case law that sets out that the promise of confidentiality need not be expressly made by the police or expressly accepted by the informant. Instead, they submit that an implicit understanding of confidentiality arose, and they need not demonstrate that Cst. Bentley expressly assured the Source that they would maintain his confidentiality in exchange for the information he provided. Crown also points to evidence that following the initial meeting with the Source, the police applied for and received a source coding number for him. Crown further argues that the Source has been treated like a confidential source since that time, save for the information related to the murder of Ms. Rossette, which they say both the Source and the Crown have waived privilege over.
- [6] Crown asserts privilege with respect to any information unrelated to the Rossette murder (the "unrelated information") and submits that any previous disclosure by the Crown was inadvertent and therefore a breach of the Source's confidentiality. In such instances, the Crown states that the court must take steps to rectify the breach and reinstate the privilege. Alternatively, the Crown says that even if the prior disclosure was intentional, the Crown lacked the authority to disclose such information absent the informed consent of the Source.
- [7] The Crown points to case law that holds that informer privilege is held jointly by the informant and the Crown, and neither may unilaterally waive the privilege, expressly or by implication, without the consent of the other. They submit that there has been no waiver of privilege regarding the unrelated information, and that the privilege is absolute and not subject to any balancing of competing interests. They submit that the innocence at stake exception is not triggered in these circumstances.
- [8] Mr. Buck, counsel for Mr. Saghir, focussed his submissions on the issue of whether privilege was ever established, that is, whether an expectation of confidentiality arose, either expressly or implicitly, as per the "first stage" inquiry outlined in *R v. Basi*, [2009] 3 S.C.R. 389

at paras. 38-39 [Basi]. Defence points to the Crown's burden to establish the privilege on the balance of probabilities and argues that the recent waiver signed by the witness is evidence that the claim of privilege is an after-the-fact supposition and should be viewed as such. He submits that the affidavit by Staff Sgt. Mullen is inadequate to establish that privilege arose with respect to the unrelated information. Defence submits that due to the almost absolute nature of the privilege, the court should be rigorous to ensure that the Crown has satisfied its burden to establish that the source was a confidential informant.

- [9] Furthermore, I understand defence counsel's characterization of the previous disclosure by former Crown counsel as deliberate and intended and therefore evidencing that privilege was not claimed because it did not exist. Mr. Buck argues that it is implausible that the Crown disclosed this information inadvertently, and that it can be inferred that the disclosure resulted from a conscious decision to disclose.
- [10] In a similar vein, Mr. Claus pointed to the various statements that the Source has testified to in these proceedings and in one unrelated proceeding to show that he was not promised confidentiality, had no expectation of such, and that he has testified as to his informant role on previous occasions. The defence say that the lack of evidence establishing the quid pro quo outlined in *R v. Leipert*, [1997] 1 S.C.R. 281 [Leipert] must be assessed when determining whether the Crown has met their burden to establish whether privilege attaches to the information the Source provided to the police in September 2005 and thereafter.
- [11] Mr. Claus submits that the absence of an express promise of confidentiality coupled with the Source's evidence on the voir dire shows that the Source did not have a reasonable expectation that he would be treated any differently than anyone coming forward to the police during the course of a regular police investigation. In support of this contention, Mr. Claus points to disclosure outlining that the Source was informed of the difference between being an agent and being an informer, and as I understand his argument, the Source's apparent willingness to become an agent is indicative of his role as a non-confidential informant.
- [12] The Defence accepts the Crown submissions on the scope of the informant privilege once it has been established. Their interest in disclosure is not to compromise the safety of the witness, but rather, to further challenge his credibility by questioning him as to the accuracy or reliability of other information he may have given to the police on unrelated matters; the argument being that if he was untruthful or unreliable on previous occasions, the inference can be drawn that information provided in relation to this matter is also unreliable. III. The Law
- [13] The law has been accurately outlined in the Crown's submissions and I will only repeat the most pertinent portions here. The question is whether the evidence as a whole establishes on balance that the witness was a confidential informant as opposed to a non-confidential informer, or a witness merely providing information relating to criminal activities or investigations in circumstances in which no expectation of confidentiality arises.

- [14] Informer privilege may arise expressly or implicitly. It was described at paras. 9 - 10 of Leipert as follows: 9 A court considering this issue must begin from the proposition that informer privilege is an ancient and hallowed protection which plays a vital role in law enforcement. It is premised on the duty of all citizens to aid in enforcing the law. The discharge of this duty carries with it the risk of retribution from those involved in crime. The rule of informer privilege was developed to protect citizens who assist in law enforcement and to encourage others to do the same. ... 10 The rule is of fundamental importance to the workings of a criminal justice system. As described in *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at p. 105: The rule gives a peace officer the power to promise his informers secrecy expressly or by implication, with a guarantee sanctioned by the law that this promise will be kept even in court, and to receive in exchange for this promise information without which it would be extremely difficult for him to carry out his duties and ensure that the criminal law is obeyed.
- [15] More recently, in *R. v. Barros*, 2011 SCC 51 Binnie J. explained at paras. 31- 32:
- [31] In a clear case, confidentiality is explicitly sought by the informer and agreed to by the police. As noted in *Basi* at para 36: The privilege arises where a police officer, in the course of an investigation, guarantees protection and confidentiality to a prospective informer in exchange for useful information that would otherwise be difficult or impossible to obtain. *Bisaillon*, however, added that the promise need not be express. It may be implicit in the circumstances: The rule gives a peace officer the power to promise his informants secrecy expressly or by implication, with a guarantee sanctioned by the law that this promise will be kept even in court, and to receive in exchange for this promise information without which it would be extremely difficult for him to carry out his duties and ensure that the criminal law is obeyed. [Emphasis added; p. 105]
- [32] A claim to informer status is always open to challenge by the defence. The Crown is better able to meet that challenge if it can point to clear evidence of informer status being conferred explicitly rather than after-the-fact supposition. Keeping in mind the informer's privilege was created and is enforced as a matter of public interest rather than contract, it might be argued that in a situation of serious potential danger, the informer privilege (or other public interest privilege) might apply even in the absence of contract-type elements of offer and acceptance...
- [16] The promise of confidentiality may be implicit in the circumstances examined as a whole. The test is set out in the recent Supreme Court of Canada case *R. v. Named Person B*, 2013 SCC 9, [2013] S.C.J. No. 9, where at para. 18, it states as follows: The legal question is whether, objectively, an implicit promise of confidentiality can be inferred from the circumstances. In other words, would the police conduct have led a person in the shoes of the potential informer to believe, on reasonable grounds, that his or her identity would be protected? Related to this, is there evidence from which it can reasonably be inferred that the potential informer believed that informer status was being or had been bestowed on him or her? An implicit promise of informer privilege may arise even if the police did not intend to confer that status or consider the person an informer, so long as the police conduct in all

the circumstances could have created reasonable expectations of confidentiality. [Emphasis added.]

- [17] In *R. v. Sundstrom*, 2012 BCCA 385, the Court of Appeal concluded that even where the informant was the wife of the accused, the understanding of confidentiality could be inferred from the evidence.
- [18] The law is clear, however, that not everyone who provides information to the police becomes a confidential informant: *R. v. Barros*, at para. 31. When the claim is challenged by the defence, the party seeking to demonstrate the existence of privilege must establish on a balance of probabilities that the source is a confidential informant. If privilege is established, the judge must give it full effect: *Basi*, at para. 39.
- [19] The parties appear to be in agreement as to the scope of the privilege once it attaches: see *Leipert* at para. 18; *Named Person v. Vancouver Sun*, 2007 SCC 43 at paras. 21-26.
- [20] Related to the issue of waiver, inadvertent disclosure of privileged information by one party does not amount to a valid waiver. In *R. v. X*, 2012 BCSC 325, [2012] B.C.J. No. 441, at para. 158, it was held: Waiver must therefore be clear, fully informed (both as to the right to refuse to waive the privilege and knowledge of the consequences), as well as unequivocal.
- [21] Even misguided deliberate disclosure does not meet this test. As well, since informer privilege belongs to both the Crown and the witness, both must have waived the privilege: *Leipert* at para. 15; *Basi* at para. 40. As was held in *R. v. Nicholson*, 2001 BCSC 752 [2012] B.C.J. No. 441 at para. 15 and 16:
- [15] I would add that courts ought not to find that either the Crown or the informer may unwittingly waive the privilege which, after all, is a protection provided for the public benefit, not just for the benefit of the particular informer.
- [16] Accordingly, any further disclosure or cross-examination on the matters inadvertently disclosed would be improper without the specific consent of the witness and, as well, could potentially further undermine his security and act as a disincentive for other citizens to come forward to report crime. IV. Analysis
- [22] In this case, far from waiving the privilege, both the Crown and the Source have asserted it with respect to information not relevant to this alleged offence.
- [23] The evidence before me shows that the witness disclosed information to the Integrated Gang Task Force on matters unrelated to this alleged offence. The risk to the witness if this information is disclosed is real and potentially significant. As noted in *Leipert* the courts are ill-suited to determine whether disclosure of information given to the police might be sufficient to reveal the identity of the informer: para. 28. Even if the Source's identity has been revealed, the privilege remains intact regarding the information which may connect him to having provided specific information to the police on other matters.

- [24] There are a number of factors which I have considered in determining whether the Crown has met its burden in establishing that informer privilege exists with respect to information that the Source provided to two members of the BC Integrated Gang Task Force (BCIGTF) Intel Probe Unit. In this case, the circumstances under which the initial meeting between the officers and the Source arose, the evidence as to context of their meetings, the nature of the information provided by the Source to the officers as of their first meeting on September 21, 2005, the positions that the members held within the police force, and the evidence as to the way that the Source was later handled by those officers are factors which I consider relevant to the determination of whether it can reasonably be inferred that the potential informer believed that informer status was being or had been bestowed on him.
- [25] There was a dearth of evidence led by the Crown on this hearing from the individuals who ought to have been in the best position to address the issue. Neither Detective Bentley nor Sergeant Uppal gave direct evidence by way of affidavit, or by any other means. However, rather than engaging in speculation as to why Bentley and Uppal were not called to give evidence on behalf of the Crown, I will instead focus the inquiry on whether, given the evidence that is available, the Crown has established on a balance of probabilities that the Source is protected by informer privilege with respect to any information he may have provided to the police that falls outside the ambit of the prosecution of the individuals accused in this case.
- [26] The Crown submitted a sealed package containing an affidavit from Staff Sgt. Mullen of the New Westminster Police Department. It included, as Ex. B, police documents related to officers Bentley and Uppal's dealings with source "23". Staff Sgt. Mullen was involved in the IHIT investigation of the murder of Ms. Rossette and provided affidavit evidence as to the Source's informant role. A summary version of this affidavit was provided to defence counsel.
- [27] I feel it is necessary to address the Source's evidence which gave rise to this very application. During a voir dire earlier in this trial on January 30, 2013 the Source provided answers to questions posed to him on cross-examination by Mr. Buck which can only be described as contradictory and, as admitted by the Crown, are "confusing". The following excerpt from that cross-examination by Mr. Buck is useful in highlighting the confusion: Mr. Buck: In keeping with your understanding that you were an informant, you understood that you were a confidential informant? Answer: Um, no. He didn't say nothing about that. Mr. Buck: Did you not have any kind of previous arrangement with Detective Bentley that your identity would be kept secret? Answer: Um, it can be, unless I, you know, end up testifying for something. Mr. Buck: Right, he told you that? Answer: Yes. Mr. Buck: Did he tell you that? Answer: Well, if it gets to court or something like that, yes. Mr. Buck: Did he tell you that? Answer: It was one of them, I'm not too sure. Mr. Buck: Pardon? Answer: It was one of them. Mr. Buck: The police told you that, not some general knowledge [inaudible].. Answer: No the police told me that. Mr. Buck: The police told you that if you get to court your identity may be revealed? Answer: Yes. Mr. Buck: Did they tell you otherwise that your identity would be

kept secret? Answer: Yes. Mr. Buck: So when you gave this information to Detective Bentley about the murder plot you understood that your identity would be kept secret? Answer: No. Mr. Buck: Did you understand that you might be a witness? Answer: Yes. ... Mr. Buck: Did he tell you that once you become a witness your identity is revealed? Answer: Yes. Mr. Buck: Did you agree to that? Answer: Yes. ... Mr. Buck: On the first occasion that you spoke in person to Detective Bentley you agreed that your identity could be revealed, is that correct? Answer: The first time, uh, yes, I think we did. Mr. Buck: Let's be clear, the occasion that I am questioning you about is when Detective Bentley came by your house with, with Sergeant Uppal and you sat in the back seat of the vehicle and you told Detective Bentley about the alleged murder plot. On that occasion? Answer: Yes. Mr. Buck: On that occasion, did Detective Bentley tell you that you may be a witness in the case? Answer: Yes. Mr. Buck: And that if you are your identity may be revealed? Answer: Yes. Mr. Buck: And did you agree to that? Answer: Yes. Mr. Buck: Did you consider yourself not to be a confidential informant anymore in regard to this matter? Answer: Yes. Mr. Buck: When you first told Detective Bentley about this alleged murder plot did you consider yourself to be a confidential informant? Answer: No. Mr. Buck: Did you consider that when you were telling Detective Bentley about this alleged murder plot that he would not reveal your identity? Answer: No. Mr. Buck: You didn't think about that? Answer: No I didn't. Mr. Buck: You had no previous understanding with the police officer that you were a confidential informant? Do you know what I mean by that? Answer: No, I was uh, I told Bentley I am willing to testify against them Mr. Buck: At that time? Answer: Yes Mr. Buck: Right. But before that, before you had that exchange with him, did you consider yourself to be a confidential informant? Answer: Uh, maybe, can be. Mr. Buck: Pardon? Answer: Well, he said that if things go to court, then I would have to testify. Mr. Buck: But before that? Answer: Before that, before that he said the same thing. ... Mr. Buck: Same thing as what? Answer: What I said right now. ... Answer: If I give him information, on what's happening out there, um, that if things go to court, that I may have to testify and I agreed to that. Mr. Buck: When did he tell you that? At the jail? Answer: Yes. Mr. Buck: He explained to you the notion of potentially being a witness in a case? Answer: Yes, I think it was at jail or at my house, I'm not too sure where. Mr. Buck: Was it ever explained to you the concept of confidential informant? Was that ever explained to you? Answer: Yes, it was. Mr. Buck: What did you understand that to mean? Answer: Well, he won't say anything about me to anyone. Mr. Buck: Right. Answer: Yes. Mr. Buck: He would keep your name, your identity secret? Answer: Yes. Mr. Buck: Between him and you? Answer: Yes, unless things go to court. Mr. Buck: Right. So you understood that? Answer: Yes. Mr. Buck: And you understood that that was the case when you first spoke to Detective Bentley outside your house? Answer: Yes. Mr. Buck: You understood when you first spoke to Bentley, Detective Bentley about the alleged murder plot that you were a confidential informant, correct? Answer: About the murder? Yes, well, yes, I knew it was going to court anyways. Mr. Buck: You don't control whether it goes to court right? Answer: No I don't. Mr. Buck: No, when you first disclosed this alleged murder plot to Detective Bentley, you considered yourself to be a confidential informant, right? Answer: Yes, yes. Mr. Buck: Right, and in your mind that meant, that meant that the only Bentley and you knew you had passed

this information to him. Right? Answer: Yes. ...

- [28] It was these answers, which Mr. Buck submits caught him by surprise, and which raise the issue as to whether the Source ever believed his identity and the information he provided to the police would be kept confidential absent an express waiver.
- [29] I agree with Crown that the answers provided by the Source indicate some confusion on his part. However, the Source has exercised his privilege in prior proceedings on this matter. For example, on September 13, 2007 during the preliminary inquiry, the Source was asked how many people he had informed about. In response, the Source responded that it was "none of your business" [page 31, line 39 of preliminary inquiry September 13, 2007]. Upon further questioning, he admitted it was more than one, but when asked if it was more than 10, he replied that he didn't want to answer the question.
- [30] I do not consider the Source's inability to recall the details of his conversations with Officers Bentley and Uppal in the fall of 2005 as determinative of the Crown's current claim to informer privilege.
- [31] In light of all of the evidence before me I am satisfied on a balance of probabilities that there was, at minimum, a tacit understanding by the Source that he reasonably believed that if he provided information to the police it would be kept confidential. While it may be the case that the police expressly assured the Source's confidentiality on September 21, 2005, I need not be satisfied that they did so.
- [32] In coming to the conclusion that an understanding of confidentiality can be inferred on the evidence I have considered the Source's voir dire evidence, the sensitive nature of the information provided by the Source on September 21, 2005, the circumstances under which (then Constables) Bentley and Uppal came into contact with the Source, that is, while he was incarcerated at Matsqui Institution. Further, it is not insignificant that Bentley and Uppal approached him as members of the Intel Probe team of the BCIGTF during a period in which the Source had been re-incarcerated based, in part, on reports that he feared for his safety following his initial release in August 2005. I also consider it relevant that Cst. Bentley referred to the Source by the moniker "23" as of their very first interaction and that all of the subsequent police disclosure, inadvertent or not, refers to the Source by either "23" or some other anonymous source identifier. Had it not been for the Source's participation in this criminal investigation and his agreement to waive his privilege in respect of this investigation and prosecution, I am satisfied that his identity as an informer in relation to unrelated matters would not have been disclosed.
- [33] I cannot accept defence counsel's argument that the recent limited waiver letter signed by the Source respecting information related to the Rossette murder is a clear indication that an understanding of confidentiality with respect to other matters did not arise.

- [34] Having concluded that the informer privilege exists, I am bound to give it full effect. The innocence at stake exception to the privilege rule does not apply. There is simply no evidentiary basis to support this exception in the circumstances of this case, as required by *Named Person v. Vancouver Sun*, [2007] S.C.J. No. 43, para. 27.
- [35] The question of waiver was not seriously pursued by defence counsel, but I will mention for the sake of completeness that I am not satisfied that waiver has been established on the evidence. Specifically, I am not satisfied that the Source has ever given informed consent to waive his informer privilege with respect to information unrelated to the indictment before this court. "Josephson J."

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