

CANADA / JUDGMENT

R. v. Lau

2003 BCCA 337

COURT

British Columbia Court of Appeal

DECIDED

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2003BCCA0337

Court of Appeal for British Columbia

Citation:

R. v. Lau,

2003 BCCA 337

Date: 20030605

Docket: CA028769

Between:

Regina

Respondent

And

Chi Fung Lau

Appellant

Before:

The Honourable Madam Justice Ryan

The Honourable Mr. Justice Mackenzie

The Honourable Mr. Justice Thackray

J.D. Jevning and J.W. Sherren

Counsel for the Appellant

V. Hartney

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

October 28, 2002

Place and Date of Judgment:

Vancouver, British Columbia

June 5, 2003

Written Reasons by:

The Honourable Madam Justice Ryan

Concurred in by:

The Honourable Mr. Justice Mackenzie

The Honourable Mr. Justice Thackray

Reasons for Judgment of the Honourable Madam Justice Ryan:

Introduction

- [1] The appellant, Chi Fung Lau, appeals his May 22, 2001 convictions in Supreme Court of one count of production of cannabis and one count of possession of cannabis for the purpose of trafficking contrary to ss. 7(1) and 5(2) of the Controlled Drugs and Substances Act.
- [2] The offences occurred in a house rented by the appellant and involved a three-room, two-stage marijuana production operation consisting of some 252 marijuana plants.
- [3] The evidence of the grow operation was obtained by the Vancouver police during a search of the appellant's house on the basis of a valid warrant to search. The warrant was obtained the day of the search pursuant to s. 11 of the Controlled Drugs and Substances Act. The police officers conducting the search did not "knock and announce" their presence. To gain entry to the house they used a battering ram to knock down the front door. For reasons which I will discuss later, the trial judge found that the use of the battering ram made the manner of the search unreasonable and held it to be a violation of the appellant's rights under s. 8 of the Canadian Charter of Rights and Freedoms. The trial judge declined, however, to exclude the evidence under s. 24(2) of the Charter. The appellant says that the trial judge erred in failing to exclude the evidence.

Factual Background

- [4] The facts leading up to the search of Mr. Lau's home are relevant to the question whether the fruits of that search ought to have been excluded from evidence by the trial judge.

- [5] On September 3, 1998 Detective Brown of the Vancouver Police Department received a Crime Stoppers tip that there was a possible "grow" at 6629 Fremlin Street. The tip said that two Asian males, in their 30's, were involved; that there was a smell of marijuana emanating from the house from time to time; that there were two vehicles associated with the house; and that the venetian blinds were closed around the house.
- [6] Detective Brown made a number of visits to the area after receiving this tip. He noted that all of the windows, with the exception of one small window, were covered up with venetian or vertical blinds. The blinds on the small window were raised about a foot and a half. The officer observed condensation on the bottom half of one of the windows. He also detected the odour of growing or bulk marijuana on one or two occasions.
- [7] On December 10, 1998 Detective Brown obtained the warrant to search the house for evidence of a Controlled Drugs and Substances Act offence from a justice of the peace pursuant to s. 11 of that Act. It is common ground that the officer had reasonable and probable grounds to obtain the warrant and that the warrant itself was valid.
- [8] Prior to the execution of the warrant Detective Brown held a briefing with respect to the anticipated search. While he could not remember the specifics, the officer said that generally he would have discussed where they would meet before entry, who would breach the door, who would identify the activity as a police search and who would be in radio contact with the officer stationed at the rear of the home.
- [9] When asked if there was a discussion about weapons or drugs in the house in question Detective Brown said that he did not "believe that they had that information." Detective Brown was then asked why the decision was made to use a battering ram. He replied:

A We were forcing the front door like that because we wanted to have some element of surprise. The thinking was weapons, and we didn't have any information there was weapons, but we didn't have any information that there wasn't any weapons. And by having that element of surprise, we hoped to gain quick control over anybody that may be in there and which would be safer for us and the person or persons that we found in there.

[Prosecutor]

Q Is there some reason why the element of surprise to gain control over anybody in the house is important in executing these warrants?

A Yes, just they don't have time to make a decision as to, you know, if there are weapons in there, perhaps they may go for the weapons or -- it was just basically so we could get in there fast and basically catch them by surprise, to gain control.

- [10] The officer was asked what his experience was with respect to the presence of weapons where there is a grow operation. He answered:

From time-to-time we've gone into grow operations where we've found loaded handguns, loaded rifles, shotguns, machetes, bats just inside the door. And there's been vicious dogs and -- but I can't give an exact -- I can't give an exact number but frequently. Or I wouldn't say frequently but often enough that it's a concern. I was at -- my last grow operation there was a person murdered at it.

- [11] The officer was asked the number of times that weapons or other items such as bats had been seized at marijuana operations. Detective Brown answered that it would probably be less than 10 percent, but that the police did not often seize such things as bats and machetes. The question with respect to how often such items were present at grow operations was not pursued with Detective Brown.
- [12] On cross-examination Detective Brown was asked whether he had ever engaged the services of the Emergency Response Team when executing a search warrant of a suspected grow operation. Detective Brown replied that he had done so when he had information that there were weapons on the premises. He agreed that he did not know if there were weapons present in the appellant's house.
- [13] Detective Brown agreed on cross-examination that it was the general practice of the police at the time that this warrant was executed not to knock and announce but to ram the door down so that they could obtain the element of surprise. He said that if the police had specific information that there were children or elderly people in the house that they would knock to gain entrance. He agreed that there was no concern in the case at bar that the evidence would be destroyed.
- [14] In this case the police entered the home with a battering ram and guns drawn around 6:00 p.m. on December 10, 1998. They found the appellant seated in his living room watching television.
- [15] Sergeant Cope, who was assigned to the Vancouver Drug Squad at the time of this investigation, was called by the Crown to discuss the reasons behind the police practice of using a battering ram to obtain entry to a residence that was the subject of a Controlled Drugs and Substances Act search warrant. Sergeant Cope reiterated that the use of the ram was primarily to secure the safety of the police and anyone inside the residence. He testified that "most of the time when we enter these places and there's somebody there, there is a weapon." He said that this was not the case when the place was held vacant. He said:

Well, generally, I think that warrant execution's one of the most dangerous things a policeman can do. You enter a person's premises, they're in a state of confusion, weapons are available, they're committing criminal activities; there's a whole -- there's a whole range of things that can go wrong.

- [16] Sergeant Cope said that this was the case even where the police have no specific information that there is a weapon present on the property. He said he based this conclusion on his experience that most premises have weapons when people are occupying the residence.

- [17] After the execution of the search warrant in question, but before the trial of the charges in this case took place, two decisions in the trial court served to alter police policy in the execution of Controlled Drugs and Substances Act search warrants. In *R. v. McAllister*, [2000] B.C.J. No. 963, 2000 BCSC 223, Mr. Justice Wong concluded that without evidence of exigent circumstances relating to the specific premises the police were not entitled to execute a Controlled Drugs and Substances Act search warrant without first knocking and announcing their presence. Mr. Justice Williamson reached the same conclusion in *R. v. Vadon*, [2000] B.C.J. No. 2081.
- [18] The trial judge in the case at bar determined that he was bound by the *McAllister* decision. He held that the manner of entry in the case at bar, the failure to knock and announce, made the subsequent search unreasonable.
- [19] In determining whether to exclude the evidence under s. 24(2) the trial judge said this (at paras. 15-19):

In *McAllister*, Mr. Justice Wong discussed the leading authorities in which the difficult task of balancing privacy rights and public interest concerns are discussed. Although he ultimately concluded that the information provided in support of the search warrant application was sufficient, as do I in the present case, he held that the search was unlawful since the investigating officers "were acting only from very general information pertaining to grow operations".

However, citing *R. v. Stillman* [1997] 1 S.C.R. 607, and *R. v. Jacoy* [1988] 2 S.C.R. 548, Mr. Justice Wong emphasized two things. First, the policy of unannounced entries had not yet been ruled unlawful and there was, therefore, no evidence of bad faith. Second, the police were motivated by concerns for the protection of evidence and for their own safety. In any event, had they announced their entry the grow operation would still have been found.

The testimony of Detective Brown and Sergeant Cope, veteran police officers, suggests that the execution of search warrants is one of the most dangerous of activities for police officers. Sergeant Cope was not asked about the incidence of weapons found in "grow" operation searches, but claimed that baseball bats, machetes, martial arts devices etc. are found in the majority of searches - and, guns "occasionally".

As mentioned, Detective Brown was specific about the numbers of guns found in such entries when he testified in the *McAllister* case. In my view, it would be absurd to hold that police officers must annually monitor the numbers of suspects keeping weapons at grow operations before they can justify a policy formulated to meet genuine concerns about protecting the lives and safety of both searchers and home occupants. Second guessing police officers in the conduct of these inherently dangerous operations is inappropriate.

The warrant to search Chi Fung Lau's home was lawfully obtained. The unannounced battering down of the door was an inherently unreasonable beginning to the ensuing search, but having regard to the purpose for which the police chose not to announce their presence before breaching the door, admitting the evidence discovered during the search will not bring the administration of justice into disrepute. The application to exclude the evidence obtained in the search is dismissed.

[20] While the trial judge in this case did not specifically state that the police officers were acting in good faith, he found that the police decision to batter down the door was based on a police policy formulated with a view to protecting the lives and safety of both searchers and home occupants. I take it from this that the trial judge found that the police officers were in fact acting in good faith.

The Position of Counsel on the Appeal

[21] Counsel for the appellant submitted that the trial judge was right to follow the McAllister case in finding that the search was unreasonable. He conceded that the evidence obtained in the search was non-conscriptive in character and would not affect the fairness of the trial. In accordance with *R. v. Stillman*, [1997] 1 S.C.R. 607, 113 C.C.C. (3d) 321, counsel submitted that it was therefore incumbent on the trial judge to consider the seriousness of the breach and whether the admission of the evidence could bring the administration of justice into disrepute. Counsel's argument centered on the question of good faith on the part of the police. He submitted that the trial judge erred in finding that the police acted in good faith in the circumstances of this case. Counsel for the appellant submitted that the case relied upon by the trial judge in McAllister, i.e. *Eccles v. Bourque*, [1975] 2 S.C.R. 739, 19 C.C.C. (2d) 129, which stands for the proposition that the police must knock and announce before they enter a private residence, had been in existence for many years. More importantly, counsel submitted, the Supreme Court of Canada in *Genest v. The Queen*, [1989] 1 S.C.R. 59, 45 C.C.C. (3d) 385, established that the police must knock and announce their presence when executing a drug search warrant. Thus, he argued, the police could not rely in good faith upon an entry policy which did not take these cases into account.

[22] Counsel put it this way in his factum, "Police misapprehension of the scope of their authority cannot found the basis for a finding of good faith where they ought to have known well-established common law limitations on their power to search."

[23] Counsel for the respondent did not take issue with the correctness of the McAllister case. Rather, she submitted that the trial judge did not err in refusing to exclude the evidence. Counsel for the respondent submitted that the police acted in good faith by relying on the policy in place with respect to the execution of Controlled Drugs and Substances Act search warrants prior to the McAllister decision. Until that time, she said, case law and experience supported the policy.

[24] The respondent referred the court to *R. v. Gimson* (1990), 54 C.C.C. (3d) 232, 77 C.R. (3d) 307, where the Ontario Court of Appeal held that the provisions of the Narcotic Control Act created a comprehensive set of special search powers which replaced common law rules; in particular, the requirement of announcement before entry. Under the Narcotic Control Act, s. 14 provided:

14. For the purpose of exercising authority pursuant to any of sections 10 to 13, a peace officer may, with such assistance as that officer deems necessary, break open any door, window, lock, fastener, floor, wall, ceiling, compartment, plumbing fixture, box, container or any other thing.

[Emphasis added.]

[25] The court in *Gimson* held that the powers were not unrestricted, however, and that in some circumstances announcement may be required to comply with s. 8 of the Charter (pp. 243-244).

[26] *Gimson* was appealed to the Supreme Court of Canada. In brief reasons ([1991] 3 S.C.R. 692; 69 C.C.C. (3d) 552) Iacobucci J. held that the case was not a proper one to determine whether there was a blanket authorization under the Narcotic Control Act to enter without prior announcement. He found that there were exigent circumstances in that case which entitled the police to enter the premises by way of unannounced forced entry in any event.

[27] The respondent submitted that it was therefore not settled law that the execution of a drug search warrant required that the police knock and announce before entering a residence. She argued that it cannot be said that the police failed to comply with settled law in designing the policy that they did.

Discussion

Exigent Circumstances

[28] Whether the Narcotic Control Act did or did not grant the power to those executing a search warrant to make an unannounced forced entry is not the issue in the case at bar. The warrant involved in this case was obtained under the Controlled Drugs and Substances Act, which, by its enactment on May 14, 1997, repealed the Narcotic Control Act.

[29] The Controlled Drugs and Substances Act does not contain a provision similar to s. 14 of the Narcotic Control Act. The new Act makes it clear that the police may use force in executing a warrant only where exigent circumstances are present. Section 12 provides:

12. For the purpose of exercising any of the powers described in section 11, a peace officer may
 - (a) enlist such assistance as the officer deems necessary; and
 - (b) use as much force as is necessary in the circumstances.

[Emphasis added.]

[30] This section permits the police to enter a home with a certain degree of force, without announcing their presence, if the circumstances make it necessary for them to do so.

[31] In *McAllister*, *supra*, Mr. Justice Wong said this about exigent circumstances at paras. 84-5:

Likewise, there will exist exigent circumstances where there will be a need for officers to act and enter without giving prior notice. These will include fear of safety for persons within the premises, and concern for the destruction of evidence, as well as, at times, concern for the officer's own safety. In this case no evidence was provided that the officers had knowledge particular to the situation, but were acting only from very general information pertaining to grow operations.

I therefore must conclude the manner of the search was unreasonable.

[32] By this I do not understand Mr. Justice Wong to mean that general knowledge pertaining to grow operations is not relevant to a determination of the danger involved in a particular grow operation. I believe he meant that there was nothing in the general knowledge acquired by the police that could have led them to the belief that there was a significant possibility that if they knocked before entering the residence in that case violence or loss of evidence would have been the result.

[33] In the earlier decision of *Genest v. the Queen*, *supra*, Dickson C.J.C. did not discount past experience as a basis for the use of force. He said, at pp. 408-9:

I agree with LeBel J.A. that fears for the safety of the searchers and the possibility of violence are reasons for the use of force in the execution of a search warrant, but no attempt was made by the police at trial to lay the factual foundation to support this approach.

I would not wish to be taken to say that the Crown must prove a tendency to violence beyond a reasonable doubt, nor that the Crown cannot refer to past conduct as influencing their decision as to the amount of force thought necessary to carry out a search. The assessment of the amount of force, like motives for the search in the first place, need not be proven on the same standard of guilt as when proving the elements of an offence. The Crown must, however, lay the evidentiary framework to support the conclusion that there were grounds to be concerned about the possibility of violence.

[Emphasis added.]

[34] It should be noted that in this passage Dickson C.J.C. was relying on past experience at the same residence which was the target of an earlier search. Whether it is experience at the same premises, or experience acquired by searches of a number of different residences, the reasoning process is the same. The question is whether an inference can be drawn from the circumstances that there is a significant likelihood of danger if the police announce their presence. As Mr. Justice Wong said, however, it is not enough to rely on general experience alone. The general experience must be weighed with the situation prevailing at the time of

the search. In the case at bar there was no evidence from the police that they had made any inquiries about the premises they searched which led them to believe that there could have been danger if they had announced their presence.

- [35] While the trial judge did not refer to s. 12 of the Act in his reasons for judgment, he did look for the presence of exigent circumstances which would militate for the use of force in executing the search warrant. While the trial judge accepted Sergeant Cope's statement that weapons are found "most of the time" when searches are made of grow operations where people are present, and that the officers relied on a police policy concerned about safety, the trial judge did not find that the evidence was sufficient to provide a basis for a finding that the force used was necessary. That conclusion has not been challenged on this appeal. Having found that the search was unreasonable the trial judge moved on to consider whether the evidence should be excluded under s. 24(2) of the Charter.

Good faith

- [36] Good faith is an important factor in determining whether a Charter breach is so serious that the evidence obtained thereby should be excluded. In *R. v. Caslake*, [1998] 1 S.C.R. 51, 121 C.C.C. (3d) 97, Lamer C.J.C. said at para. 34:

The next category is seriousness of the breach. When considering this issue, the court looks at some or all of the following factors: the obtrusiveness of the search, the individual's expectation of privacy in the area searched, the existence of reasonable and probable grounds, and the good faith of the police.

- [37] In the case at bar the method of entry was obtrusive. The individual's expectation of privacy in the area was high. The grounds for the search were reasonable. The important question for the trial judge in this case was whether the police officers were acting in good faith.
- [38] I am of the view that once the trial judge concluded that there were no exigent circumstances, it was not open to him to find good faith on the part of the police.
- [39] It is important to acknowledge that the motivation behind the police policy in this case is not open to debate. That it is necessary to ensure the safety of the police and of the occupants of a home when the police undertake operations to enforce the laws of this country is beyond question. But good motives do not permit the police to formulate policies which are contrary to legislative requirements. The difficulty in this case is that s. 12 of the Controlled Drugs and Substances Act does not permit the formulation of a blanket policy for searches under s. 11 of the Act. By s. 12 Parliament has required that the use of force be as is necessary in the circumstances. Therefore, each case must be considered independently. The officers in this case did not advert to this requirement. Rather, they based their decision to enter the premises in the manner that they did on a policy which, contrary to the Act, requires surprise entries with respect to every marijuana grow operation (unless the police know children or old people are present) without regard to the circumstances which prevail in the situation at hand. Good faith cannot be founded on a policy which is made contrary to the

dictates of the legislation.

[40] In my view the trial judge erred in finding good faith.

[41] It was common ground that if the breach in the case at bar could be considered to be deliberate or flagrant, the Charter violation would be serious enough to warrant exclusion of the evidence under s. 24(2) of the Charter. Counsel for the Crown in this case submitted that the actions of the police in this case could not be described as "flagrant, or a deliberate disregard of an accused's rights" since the police did not deliberately, or knowingly violate the rights of the appellant. I agree with counsel that the police officers did not set out to violate the rights of the appellant in this case. However, the breach must nonetheless be characterized as a flagrant or blatant. The violation occurred because the actions of the police were based on a policy which was contrary to existing legislation. The Narcotic Control Act which, by s. 14, might have permitted the search, had been repealed. The Controlled Drugs and Substances Act with its new provisions, especially s. 12, had been in existence for over a year. There was no evidence in this case that the police officers had misunderstood the provisions of s. 12. There was no evidence that they considered it at all. For that reason the breach must be considered flagrant and the evidence excluded.

[42] Without the evidence obtained in the search, the Crown had no case against the appellant. In the result, I would allow the appeal, set aside the conviction and enter an acquittal.

"The Honourable Madam Justice Ryan"

I Agree:

"The Honourable Mr. Justice Mackenzie"

I Agree:

"The Honourable Mr. Justice Thackray"

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