

CANADA / JUDGMENT

R. v. Mason

2021 BCSC 2691

COURT

Supreme Court of British Columbia

DECIDED

9 June 2021

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Mason,

2021 BCSC 2691

Date: 20210609

Docket: 180287-2

180287-3

Registry: Victoria

Regina

v.

Jonathan Christopher Lee Mason

Before: The Honourable Mr. Justice G.R.J. Gaul

Oral Ruling on Voir Dire 1 - Part 2:

Section 24(2) Charter Remedy

Counsel for the Crown:

M. Halston

Counsel for the Accused:

J. Dosanjh

Place and Date of Trial/Hearing:

Victoria, B.C.

June 8 & 9, 2021

Place and Date of Judgment:

Victoria, B.C.

June 9, 2021

- [1] THE COURT: The accused, Mr. Mason, is charged with having unlawfully possessed methamphetamine and fentanyl for the purposes of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act.
- [2] In the first part of this voir dire, I found the accused's rights protected by s. 9 of the Charter were breached when, on 20 June 2020, the police arrested him without having reasonable and probable grounds to do so. I also found that the accused's s. 8 Charter rights were breached when the arresting officer searched him and his belongings incidental to the unjustified arrest.
- [3] As I noted in my reasons this morning on part 1 of the voir dire, when Constable Eddy searched the accused incidental to the arrest, the officer discovered in the clothes that the accused was wearing as well as the backpack and small pouch that he was wearing the following items:
- a) approximately 83 grams of methamphetamine;
 - b) 14 grams of fentanyl wrapped in a plastic bag;
 - c) a small amount of fentanyl in a small plastic container with a green lid;
 - d) a small amount of methamphetamine in a small plastic container with a red lid;
 - e) a small dime bag containing .6 of a gram of fentanyl;
 - f) \$435 in cash;
 - g) a glass pipe of the type used to smoke methamphetamine;
 - h) two small electronic scales; and
 - i) 42 dime baggies.
- [4] There were also other items that were seized including a can of Capsaicin bear repellent and an extendable baton similar to one police officers use in the course of their duties.
- [5] The question before me is whether pursuant to s. 24(2) of the Charter, the evidence the police seized during their search incidental to the arrest of the accused ought to be excluded from the accused's trial because of the Charter violations that I found.

The Law

[6] The enforcement of the rights and freedom guaranteed by the Charter and the potential consequences flowing from breaches of any of those rights are governed by s. 24 of the Charter. That section provides:

24(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[7] In order for me to grant the relief the accused seeks, I must be satisfied on a balance of probabilities that the admission of the evidence obtained in violation of his rights would bring the administration of justice into disrepute.

[8] The jurisprudence is replete with cases that have examined the purpose and principles of s. 24(2) of the Charter. The seminal case continues to be the Supreme Court of Canada's decision in *R. v. Grant*, [2009] 2 S.C.R. 353. Writing for the majority, Chief Justice McLachlin and Justice Charron explained:

[68] The phrase "bring the administration of justice into disrepute" must be understood in the long-term sense of maintaining the integrity of, and public confidence in, the justice system. Exclusion of evidence resulting in an acquittal may provoke immediate criticism. But s. 24(2) does not focus on immediate reaction to the individual case. Rather, it looks to whether the overall repute of the justice system, viewed in the long term, will be adversely affected by admission of the evidence. The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the Charter, would conclude that the admission of the evidence would bring the administration of justice into disrepute.

[69] Section 24(2)'s focus is not only long-term, but prospective. The fact of the Charter breach means damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage to the repute of the justice system.

[70] Finally, s. 24(2)'s focus is societal. Section 24(2) is not aimed at punishing the police or providing compensation to the accused, but rather at systemic concerns. The s. 24(2) focus is on the broad impact of admission of the evidence on the long-term repute of the justice system.

[71] A review of the authorities suggests that whether the admission of evidence obtained in breach of the Charter would bring the administration of justice into disrepute engages three avenues of inquiry, each rooted in the public interests engaged by s. 24(2), viewed in a long-term, forward-looking and societal perspective. When faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the Charter-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on the Charter-protected interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits. The court's role on a s. 24(2) application is to balance the assessments under each of these lines of inquiry to determine whether, considering all the circumstances, admission of the evidence would bring the administration of justice into disrepute. These concerns, while not precisely tracking the categories of considerations set out in *Collins*, capture the factors relevant to the s. 24(2) determination as enunciated in *Collins* and subsequent jurisprudence.

Discussion

[9] I will now address the three factors referenced in *Grant*.

Seriousness of the Charter-infringing conduct

[10] While I do not find Constable Eddy was acting with *mala fides* when he arrested the accused, I am not convinced his actions reflect an entirely appropriate approach either. In my opinion, the speed with which he made his decision to arrest the accused, that is, about five seconds, and the lack of any apparent objective analysis on his part as to whether he had reasonable and probable grounds to make the arrest, amount to a troubling disregard for the foundational rights that are enshrined in the Charter.

[11] In *R. v. Pope*, 2015 BCSC 2391, Madam Justice Gray excluded material and inculpatory evidence that police had obtained during the course of a drug investigation. In addressing the nature of the impugned police conduct, Justice Gray observed:

[114] Here, the Charter-infringing state conduct was serious. The police conduct was not malicious, flagrant, egregious, or otherwise in bad faith, but it reflected a failure to carefully consider Ms. Pope's rights before making a warrant-less arrest. An arrest is a serious step and a violation of liberty. The conduct of the police in arresting without objectively adequate grounds arose from a failure to take a cautious approach.

[12] These comments are apposite to the case before me. In my view, Constable Eddy's decision to arrest and search the accused based upon tenuous grounds that were reached in a rushed manner without much forethought or consideration, amounts to the Charter-infringing state conduct that Justice Gray in *Pope* refused to condone.

[13] In my opinion, this factor militates in favour of exclusion.

Impact on the Charter-protected interests of the accused

- [14] Immediately upon his arrival at the scene, that is, within five seconds of seeing the iPad that had the white substance on it, Constable Eddy told the accused he was detained and not free to leave. In my view, the restriction on the accused's liberty was arbitrary and unjustified and amounted to a serious infringement on the accused's right protected by s. 9 of the Charter.
- [15] Moreover, while the Crown quite properly points to the fact that the accused was released from police custody once he had been processed, there is no evidence before me suggesting how long that might have taken. In other words, there is no evidence of how long the accused was actually in police custody. What is known is that he was in their custody at the scene and this included a search of the clothes he was wearing and a backpack and small satchel that he had with him. He was then transported to the Victoria Police Department. How long he was there and held there is unknown. He was held there long enough for the police to process him. That is all I know.
- [16] In my view, the s. 9 breach is a serious one. With respect, I do not agree with the Crown's submission that it falls towards the lower end of the spectrum. On the contrary, I find it falls on the higher end of the scale.
- [17] The same applies to the search that was conducted incidental to the arrest. Individuals are still entitled to a degree of personal privacy when they are being dealt with by the police in a public location, as in this case. The Crown says the search of the accused was a brief one and did not involve anything that could be described as causing the accused any discomfort or humiliation. While I agree with the latter portion of that statement, I again repeat that there is no indication of how long the accused was in police custody and this includes how long he was subjected to the search of his person and the items that he had with him in public. In my view, the breach of the accused's s. 8 Charter rights, like the breach of his s. 9 rights, falls more towards the higher end of the seriousness spectrum.
- [18] Consequently, I find this second branch of the Grant factors favours the accused's position.

Society's interest in the adjudication on the merits

- [19] In Grant, the court explained this third and final branch of the s. 24(2) test as follows:
- [79] Society generally expects that a criminal allegation will be adjudicated on its merits. Accordingly, the third line of inquiry relevant to the s. 24(2) analysis asks whether the truth-seeking function of the criminal trial process would be better served by admission of the evidence, or by its exclusion. This inquiry reflects society's "collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law" Thus the Court suggested in Collins that a judge on a s. 24(2) application should consider not only the negative impact of admission of the evidence on the repute of the administration of justice, but the impact of failing to admit the evidence.

- [80] The concern for truth-seeking is only one of the considerations under a s. 24(2) application. The view that reliable evidence is admissible regardless of how it was obtained is inconsistent with the Charter's affirmation of rights. More specifically, it is inconsistent with the wording of s. 24(2), which mandates a broad inquiry into all the circumstances, not just the reliability of the evidence.
- [20] In *R. v. McGuffie*, 2016 ONCA, Mr. Justice Doherty examined the relationship between the three branches of the Grant test and concluded:
- [62] The first two inquiries work in tandem in the sense that both pull toward exclusion of the evidence. The more serious the state-infringing conduct and the greater the impact on the Charter-protected interests, the stronger the pull for exclusion. The strength of the claim for exclusion under s. 24(2) equals the sum of the first two inquiries identified in *Grant*. The third inquiry, society's interests in an adjudication on the merits, pulls in the opposite direction toward the inclusion of evidence. That pull is particularly strong where the evidence is reliable and critical to the Crown's case
- [63] In practical terms, the third inquiry becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of the evidence. If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility. Similarly, if both of the first two inquiries provide weaker support for exclusion of the evidence, the third inquiry will almost certainly confirm the admissibility of the evidence
- [21] I have applied that framework to my analysis in this case.
- [22] There is no question in my mind that the charges against the accused are serious. The jurisprudence is overflowing with judicial comment about the horrific and devastating effects illegal drugs, especially fentanyl, are having on our community. They are a scourge of our community and must be addressed with a firm but fair hand.
- [23] The community has a high interest in having the charges against Mr. Mason adjudicated on the strengths of the evidence. That evidence is very reliable. It is also critical to the Crown's case against Mr. Mason. However, it is also important that this third factor from *Grant* not be used to trump all other considerations. Society wants and needs the court to ensure that the rights and freedoms guaranteed by the Charter are respected and enforced. These legal principles are very well founded in the jurisprudence, including *R. v. Paterson*, [2017] 1 S.C.R. 202.
- [24] In my view, the present case is one where, even though the charges are serious and the evidence against the accused is strong, the breaches committed by the police are of such a grave nature and the impact on the accused's Charter-protected rights are sufficiently serious that the scale Justice Doherty refers to in *McGuffie* tips conclusively in favour of excluding the evidence in question.

Conclusion

- [25] I acknowledge that society has a genuine interest in having cases such as this one adjudicated on its merits. The substances that were found on Mr. Mason and in his backpack, in amounts that arguably suggest that they were for more than just personal consumption, especially the fentanyl, are killing individuals in our community at a horrific rate.
- [26] I also recognize that, in obtaining the Charter relief that Mr. Mason seeks, he being a person who at law is presumed innocent, but against whom there appears to be a significant amount of incriminating evidence, will likely not be tried and held to account for the serious offences he is alleged to have committed. However, as the case authorities including the Supreme Court of Canada in *Grant* have pointed out, a court must be vigilant that the rights protected by the Charter are not diluted in individual cases because of the seriousness of the charges and a need to have them prosecuted. The rights of the person charged with a very serious criminal offence such as what is before me are just as important and must be recognized and protected with equal attention and vigour as those of the person charged with a less serious offence.
- [27] For all the foregoing reasons, I find the Charter breaches committed by the police in this case were serious and warrant the exclusion of the evidence in question. Admitting the evidence at the accused's trial would, in my respectful view, bring the administration of justice into disrepute.
- [28] The evidence resulting from the search incidental to the accused's arrest is therefore ruled inadmissible at Mr. Mason's trial.
- [29] I thank counsel for their helpful submissions.

"G.R.J. Gaul J."

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