

CANADA / JUDGMENT

R. v. Mojtahedpour

2003 BCCA 22

COURT

British Columbia Court of Appeal

DECIDED

15 January 2003

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2003BCCA0022

Citation:

R. v. Mojtahedpour

Date: 20030115

2003 BCCA 22

Docket:

CA028554

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

REGINA

RESPONDENT

AND:

KAMRAN MOJTAHEDPOUR

APPELLANT

Before:

The Honourable Chief Justice Finch

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Hall

W. Ehrcke, Q.C.

Counsel for the Appellant

G. DelBigio

Counsel for the Respondent

Place and Date of Hearing:

Vancouver, British Columbia

3 October 2002

Place and Date of Judgment:

Vancouver, British Columbia

15 January 2003

Written Reasons by:

The Honourable Mr. Justice Hall

Concurred in by:

The Honourable Chief Justice Finch

Concurring Reasons by:

The Honourable Madam Justice Newbury (Page 16, para. 26)

Reasons for Judgment of the Honourable Mr. Justice Hall:

- [1] On April 9, 2001, this appellant was convicted by a Supreme Court judge on two counts of wilfully attempting to obstruct, pervert or defeat the course of justice. The obstruction alleged was making false statements to a police officer in the course of an investigation. On April 30, 2001, he was sentenced to a nine month conditional sentence.
- [2] The issue in the case is about the admissibility of intercepted private communications between the appellant and his parents, which communications occurred around 6:30 a.m. on September 15, 1997, at an interview room in the North Vancouver R.C.M.P. detachment. The appellant argues that the conversation ought to be held to have not been lawfully intercepted and seeks to have it excluded as evidence at trial. The Crown argues that there were no unlawful features in the interception but that in any event, the intercepted conversation ought to be found admissible pursuant to s. 24(2) of the Charter of Rights and Freedoms.
- [3] The background to the case is as follows. A fatal shooting occurred in a movie theatre in North Vancouver on February 2, 1997. The police suspected that the perpetrator of the crime to be a person named Caster. Caster was a friend or acquaintance of the appellant. The police interviewed the appellant on March 2, 1997, concerning the whereabouts of himself and Caster at the time of the homicide. As is now apparent, the appellant then lied to the police in claiming that he was at another location with Caster at the time of the homicide. That false statement was the subject of Count 1, the first charge on which the appellant was

convicted. The police continued to work on the case. By September 13, 1997, they had amassed enough evidence to arrest Caster and charge him with the murder. I gather that the success of the investigation against Caster resulted from evidence developed in an undercover operation. By September 13, the police had also concluded that the narrative of events given by the appellant to support an alibi for Caster was false.

- [4] After arresting Caster and an alleged accomplice in September, the police decided to re-interview the appellant. One of the officers suggested that their purpose for doing so was as follows:
- we sought the truth to advance the investigation and that included establishing that Mojtahedpour was giving us a false alibi - primarily, - we wanted the truth and we didn't believe his story and we wanted him as a witness against Caster and any investigation of obstruction was secondary.
- [5] In furtherance of their investigation, police officers attended, in Coquitlam, at the residence of the appellant, where he resided with his parents, around 10 o'clock on the evening of September 14, 1997.
- [6] The trial judge found their object was to determine what the appellant truly knew about the events of February 28 and whether they would be able to use him as a witness against Caster. The officers who went to the house had no particular instructions as to what do if the appellant refused to come with them. Their object was to persuade him to come with them on a voluntary basis. They asked him to do so in the presence of his parents. One of the officers admitted in his evidence that if the appellant had then refused, he would probably have arrested him. It appeared they had been instructed that if the appellant refused to go with them, they were to simply leave. In any event, that circumstance did not arise since the appellant agreed to accompany them to police headquarters at North Vancouver.
- [7] The residence in Coquitlam was about an hour's drive away from the North Vancouver detachment. The police transported the appellant back to the North Vancouver Detachment, arriving there in the late evening. The parents of the appellant also drove to the detachment at this time but not long after the commencement of the interview between the police and the appellant and at the suggestion of the appellant, his parents were advised to return home. There then followed a lengthy interrogation of the appellant by various police officers. The appellant continued to resist the suggestion that he knew more about the homicide than he was telling them. He again reiterated that he and Caster had been elsewhere at the time of the shooting. That, of course, was false and this formed the basis for the second charge of which he was convicted.
- [8] In the course of their investigation of the homicide in late July of 1997, the police had obtained from a judge an authorization to intercept the private communication of amongst others persons the appellant and his parents. The authorization permitted interception at various locations including the home of the Mojtahedpour family. The appellant and his parents were named parties in the authorization to intercept private communications. The

authorization was recited to be in force between July 27, 1997 and September 21, 1997, a period not exceeding 60 days, to conform with the provisions of s. 186(4)(e) of the Criminal Code.

- [9] Around 6 a.m. on the morning of September 15, the parents of the appellant were contacted at their home by the police. It was suggested to them that they ought then to attend police headquarters in North Vancouver as their son might have something to say to them. The appellant was concurrently advised that his parents were coming to the detachment and that he would be given an opportunity to speak to them in a room at the detachment. One of the officers said to the appellant at this time:

Your parents are downstairs and we have a room sort of set aside where you can talk to them and sort of explain, you know, your position on things. I know they're pretty anxious about what's going on. Why don't you come on downstairs. You guys can sit in comfort.

- [10] The appellant was taken from the area where he had been interviewed to a room in another part of the building. He and his parents were placed in that interview room. I gather the room is normally used as a victim assistance interview room. On this occasion, the police had, prior to having the appellant and his parents enter the room, set matters up technically so that any conversation between the appellant and his parents could be intercepted and tape recorded. As the police hoped, the appellant acknowledged in conversation with the parents that he had been with Caster at the scene of the homicide and had given misinformation on the subject to police investigators. The resultant tape recording was translated and transcribed. Thus, he acknowledged in the intercepted communications that he had lied to the police, the *actus reus* of the offences with which he was charged and ultimately convicted. The evidence from the intercepted conversation provided the basis for the convictions.
- [11] At the trial proceedings, counsel for the Crown conceded that the appellant had been detained by the police overnight at the detachment. There was at times some imprecision in the evidence as to his exact custodial status but I believe that concession to be governing. The police, in a general way, had given the appellant a s. 10 Charter warning, which warning the judge found sufficient. It was argued at trial that the prolonged police interrogation of September 14-15 was violative of the rights of the appellant and that the conversation should be excluded on that ground. The judge did not accede to that submission and neither would I. I cannot conclude that there was any breach of any Charter rights of this appellant in the conduct of the police in their dealings with the appellant.
- [12] The main focus of the appeal and the principal point argued before us was the question as to whether or not the conversation of September 15 between the appellant and his parents had been lawfully intercepted. As I noted, *supra*, the authorization, by its terms, permitted interception of the private communications of the appellant and other persons including his parents at various specific locations, in or near certain described motor vehicles. It also permitted the interception of communications:

at any other place or premises, either mobile or stationary, in the Province of British Columbia or elsewhere in Canada, resorted to or used by the persons referred to in paragraph 3,...

[13] The appellant argues that because the appellant and his parents were "brought to" the room where the conversation was intercepted in the police station, the interception was not made pursuant to the requirements of the authorization. The authorization, by its terms, provided that interceptions could be made at a place "resorted to" or "used by" those named in the authorization. It was submitted that what was done by the police to obtain evidence of the conversation was not within the parameters provided for in the authorization. Therefore, it is submitted, this interception was not lawfully made and the evidence ought to have been excluded by the learned trial judge.

[14] Concerning the admissibility of what was said by the appellant to his parents in the interview room, the learned trial judge ruled as follows:

In terms of the Victims Assistance Room, I conclude nothing done by the police compelled him to speak with his parents and thus while his own untrammelled tongue was his undoing it did not come as a consequence of any inappropriate conduct on the part of the police. All they did was to give him the false sense of security that he could speak with his parents out of the presence of police officers. The interception as I have concluded was itself lawful and thus they were entitled to record the conversation. I accordingly find no basis to consider s. 24(2) of the Charter.

[my emphasis]

[15] The trial judge, having found admissible the evidence that incontestably proved the case against the appellant, he was found guilty as charged.

[16] The narrow question to be decided on this appeal is whether or not the conclusion of the trial judge that the interception was lawfully made should be sustained. The appellant submits that if we conclude that the interception was not lawfully made, the matter should be dealt with by way of a new trial where a judge can pass on the question of the admissibility of the evidence under s. 24(2) of the Charter. The Crown, as I noted, submits that there was nothing unlawful in the circumstances of interception and further that even if it should be found that the interception was not lawfully made, this Court should hold the evidence to be properly admissible under s. 24(2) of the Charter.

[17] The words employed by the trial judge in his ruling, "his own untrammelled tongue was his undoing" would appear to be taken from an earlier judgment of this Court, *R. v. Roberts* (1997), B.C.J. No. 765. That was a homicide case where police officers posing as criminals befriended the appellant and persuaded him to give them detailed information about how he had killed his wife and children. He was subsequently convicted of the murders and appealed. This Court dismissed his appeal. At issue in that case was the admissibility of what he had said to the undercover officers. In the course of the judgment, I said this:

...The words of Scollin J. of the Manitoba Queens Bench in *R. v. Skinner* (1992), 17 C.R. (4th) 265 at p. 275, trenchantly express what I think could fairly be said about this appellant and about the conduct of the police in this case:

The difference between the unpalatable and the inedible is generally a matter of personal taste. Absent "dirty tricks", the courts should not set themselves up as the arbiters of good taste or of the preferred methods of investigation. It is unrealistic to demand chivalry from those who must investigate what are often heinous offences against blameless victims. The law should not appear to materialize as a revolutionary rabbit from a judicial magician's hat. Both the common law and the Charter justly preserve the accused from coercion and endow him with specific rights which he may exercise at the time of his arrest and while he is in custody; but the courts should not be so indulgent as to preserve the accused from himself and his own untrammelled tongue, and should require realistic justification for suppressing facts from the jury which go to weight rather than to admissibility.

In the case at bar, the police put on a good show, the appellant fell for it and "his own untrammelled tongue" did him in. The reasonable well-informed member of the community would be not at all shocked by this police conduct but would, I believe, unhesitatingly endorse it. There is here no abuse of process nor any breach of the Section 7 rights of the appellant.

[18] The present case is, of course, very different and distinguishable from the situation being considered in *Roberts*. In that sort of case, the police "put on a show" for a suspect and hope to get him to admit to persons posing as criminals details about the crime they are investigating. The suspect in those cases has no belief that he or she is speaking to police officers.

[19] In my opinion, the authorization in the instant case was facially valid. There was no over breadth as was found to be the situation in some of the earlier authorities that were cited to us, such as *R. v. Grabowski*, [1985] 2 S.C.R. 434. I agree with and adopt what was said about the meaning of "resorts to" as connoting "go" in the case of *R. v. LeClerc* (1985), 20 C.C.C. (3d) 173 (B.C.C.A.).

[20] I am in general agreement with the comments of the trial judge concerning the term "used by". The trial judge said:

The term "to use" means to cause to act or serve for a purpose, to bring into service and to avail oneself.

[21] However, those considerations do not quite characterize what happened in this case. In *R. v. Hillier* (1997), N.J. No. 125, O'Regan J. had before him a case where an electronic device had been placed in a police holding cell. The operative clause in the authorization to intercept private communications was as follows:

The communication of the persons referred to in paragraph C may be intercepted at:

"(iv) and any place or premises either stationary or mobile, including any motor vehicles resorted to or used by any of the persons referred to in Paragraph C."

[22] He went on to say:

A common sense interpretation of a clause which says

"resorted to" or "used by" would not include a jail cell where the accused is placed. To say that those suspected of involvement in drug conspiracy would "resort to" a jail cell for their activities does not have an air of reality. Counsel for the applicants relies on the interpretation of Sopinka, J. in Thompson (1990), 59 C.C.C. (3d) 225 (S.C.C.) at p. 296:

"In my view, the proper interpretation of the "resort to" clause is that the police can only intercept communications of the target at a place to which, based on evidence, they believe on reasonable and probable grounds the target has resorted or will resort. To this extent there is prior authorization. Before dealing with whether the Hunter v. Southam requirement of prior authorization is met, I canvass the issue of what evidence is required to prove "resorting to. ...

Of course, this does not end the inquiry in the case at bar. One must then ask whether there is other evidence that the target person "resorted to" a particular location. The level of evidence required, in my view, is that which would lead the police to believe on reasonable and probable grounds that a person will resort to a particular location. ..."

My interpretation of the comments of Sopinka J. in Thompson is that there must clearly be reasonable and probable grounds to believe that an individual has resorted to or will resort to a particular location. There is definitely nothing in the evidence before me to suggest that the applicants had planned to resort to the R.C.M.P. cells. There is, however, ample evidence to show that the police had every intention to bring them to the police cells while searching the residence with the added hope that the private communications being intercepted would lead to admissible evidence. In my opinion, there is a great difference when one considers the words "resorting to" as opposed to "brought to".

I find that the "resort to" clause is not sufficient to allow the interception in the cells. Whether or not the authorization to intercept at the jail would have been granted if expressly requested is a question for another day.

[23] The judge in that case did not at any length consider what might be encompassed by the term "used by". It is possible to argue that "used by" is a term of wider import and that it could encompass what occurred at police headquarters on September 15. However, in the particular circumstances of this case, I am not persuaded that this authorization should be interpreted to cover what occurred here. I do not read the authorization that was granted here in July as envisaging these rather unusual factual circumstances. I consider the interception made here was beyond the parameters of the authorization. The appellant, who was acknowledged to be detained, was placed in the room to talk to the parents. I think it would be a linguistic stretch to say that in these circumstances, the site of the interception

was a place being "resorted to" or "used by" the targets of the authorization.

- [24] Because I reach that conclusion, I consider the conversation between the appellant and his parents was not lawfully intercepted. That leaves for consideration the s. 24(2) issue. The trial judge, of course, was never required to consider that issue because of his conclusion that the interception had been lawfully made. Thus, the issue remains unresolved at the trial court level.
- [25] A trial court is usually considered to be somewhat more favourably situated to consider such a matter. A trial judge will be more conversant with the circumstances of the case and is well placed to assess such a question. Considerations such as investigative conduct, the seriousness of the charge and the like fall to be considered on the issue of admissibility. There are, of course, cases where such an issue can properly be considered on appeal but I am not persuaded that we should decide that issue in this case. I would not accede to the suggestion of the Crown respondent that we should decide this issue. I would therefore order a new trial in this case.

"The Honourable Mr. Justice Hall"

I AGREE:

"The Honourable Chief Justice Finch"

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [26] I agree with my colleague Mr. Justice Hall that the conversation between the appellant and his parents was not lawfully intercepted and that a new trial should be ordered. However, I reach the first conclusion for somewhat different reasons than he. I will state them very briefly.
- [27] First, it is important to distinguish between the question of the validity of the authorization and the ambit or meaning of the words used in the authorization, assuming it is valid. My colleague focuses on the second question. He concludes that it would be stretching the phrase "used by" too far to say that in the circumstances of this case, the site of the interception fell within the terms of the authorization.
- [28] Approaching this question solely on the basis of the wording used, I am not persuaded this is correct. In my view, the word "use" has a very wide meaning in its ordinary and natural sense. In ordinary parlance, it is common to refer to "using" a room in which to talk or meet. It would not have been unusual in the case at bar, for example, for the appellant and his parents to ask if they could "use" a room in which to speak privately, nor for the police to suggest that the appellant and his parents were welcome to "use" the room for that purpose.
- [29] That does not, in my view, decide the question of principle that arises under s. 8 of the Canadian Charter of Rights and Freedoms. Section 8 as it relates to wiretap authorizations was discussed at length by Sopinka J. for the majority in *R. v. Thompson* [1990] 2 S.C.R. 1111, 59 C.C.C. (3d) 225. In that case, two "resort to" clauses were at issue in three very similar

authorizations. Paragraph (c) of each authorization named various persons whose private communications could be intercepted at particular locations "or elsewhere in the Province of British Columbia resorted to by the [named persons]." The authorizations also stated:

- (d) The persons whose identities are not known as of the date hereof whose private communications may be intercepted and the places at which private communications may be intercepted are:
 - (i) those persons who resort to or use the premises described in sub-paragraph (c) hereof, or
 - (ii) those persons who are in communication with the persons described in sub-paragraph (c) hereof apparently with respect to an offence mentioned in paragraph (a) hereof;

which private communications may be intercepted at any of the premises hereinbefore described and any place or premises in the Province of British Columbia resorted to or used by the persons described in sub-paragraph (c) hereof. [at 257; emphasis added.]

[30] In discussing the appellant's attack in *Thompson* on the clauses in question, Sopinka J. for the majority noted that unlike the authorization in *Grabowski v. The Queen* (1985) 22 C.C.C. (3d) 449 (S.C.C.), the authorizations at issue did not "permit the interception of communications of anyone anywhere within the Province. It is limited in location to places resorted to by certain named individuals." (at 265) Thus the authorizations were found to be in compliance with the requirements of (then) s. 178.16 of the Criminal Code. Further, he said:

A basket clause which would permit interception of any persons unknown to the police at the time of the application for the authorization and which would permit the police to intercept such communications at any place provided that there are reasonable and probable grounds to believe that the interception may assist in the investigation has been held to be invalid. The basis for that decision is that such a clause vests in the police the discretion to intercept the private communications of any or all persons if there are reasonable or probable grounds to believe that the interceptions would assist in the investigations, which is the function given by statute to the issuing judge Neither paras. (c) nor (d) of the authorizations in this case is in that category. Each contains limitations. Paragraph (c) is limited to named persons. Paragraph (d) is limited to persons who resort to or use named premises or communicate with named persons. As to place, each is limited to places resorted to by five named individuals. It cannot therefore be said to delegate to the police the determination as to whether the interceptions would assist in the investigation. [at 265-6]

[31] Sopinka J. then turned to the so-called "minimization" argument under s. 8 of the Charter. He concluded that the "resort to" clause per se did not offend the requirement of prior judicial authorization referred to in *Hunter v. Southam Inc.* [1984] 2 S.C.R. 145, or constitute a delegation of the function of authorization from a judge to the officers conducting the surveillance. However, he continued:

... the proper interpretation of the "resort to" clause is that the police can only intercept communications of the target at a place to which, based on evidence, they believe on reasonable and probable grounds the target has resorted or will resort. To this extent there is prior authorization. [at 269; emphasis added.]

After considering the meaning of the phrase "resort to" (which he seemed at some points to equate with "use"), Sopinka J. agreed with the Ontario Court of Appeal in *R. v. Niles* (1978) 40 C.C.C. (2d) 512, that the identification of the targeted person's voice could not alone be sufficient to constitute evidence of this kind. To hold otherwise, he said, would encourage the police to monitor communications indiscriminately, "with the foreknowledge that any relevant communications that happen to turn up would be found, in a sense retroactively, to have been justified." He continued:

Of course, this does not end the inquiry in the case at bar. One must then ask whether there is other evidence that the target person "resorted to" a particular location. The level of evidence required, in my view, is that which would lead the police to believe on reasonable and probable grounds that a person will resort to a particular location. The Crown submits, and I agree, that "resorting to" can be established through a previously lawfully authorized interception. For instance, if a target says that he or she is going to use a particular telephone, this would provide reasonable and probable grounds to believe that a person "resorted to" a particular location. The evidence need not in my opinion take a particular form, e.g. visual surveillance, so long as it is probative of the fact in issue. In the absence of evidence to the contrary, the trial judge would be justified in concluding that the authorization had been complied with. [at 270; emphasis added.]

[32] In the result, the majority of the Court in *Thompson* held that to the extent that authorizations had been used by the police to monitor pay phones not specifically described in the authorization and without supporting evidence that created reasonable grounds for believing such phones would be used by the targeted persons, the officers had engaged in an unreasonable search contrary to s. 8 of the Charter. At 280, Sopinka J. then summarized two of his conclusions as follows:

- (i) Interceptions authorized by para.(c) are lawful, provided that the police acted upon sufficient evidence that a person "resorted to" a place. Interceptions at places for which such evidence is absent are unlawful.
- (ii) Interceptions obtained at public pay telephones in the absence of reasonable and probable grounds for believing that the telephone was in use by a target at the time the listening device was activated were obtained contrary to s. 8 of the Charter. . . .

Thus, the interceptions characterized as unlawful in (i) are subject to the absolute exclusionary rule of s. 178.16(1), and are therefore inadmissible. Interceptions characterized as unreasonable in (ii) . . . are not properly characterized as unlawful. [Emphasis added.]

- [33] Although I must say I find it difficult to reconcile these conclusions exactly with the other passages quoted above and in particular I find the tenses of the verbs underlined in the quoted passages to be confusing, I take the judgment as a whole to mean that: (i) the use of a "basket clause" such as that in issue here is not per se unlawful in the sense that such clauses do not comply with the requirements of what is now Part VI of the Code; but that (ii) in order not to infringe the requirement of reasonableness under s. 8 of the Charter, at the time the police activate the authorized listening device they must have evidence that provides reasonable and probable grounds to believe that the facility (in this case, the room) will be used or is being used by one or more of the targeted persons. (Sopinka J. used the words "was in use" and "resorted to" in the passage quoted immediately above, but the earlier portions of his reasons suggest that evidence that the telephone (or in this case, the room) will be used at a future time would also meet the requirements of s. 8.) The evidence must be independent of the fact that, by the time of trial, the person or persons did in fact resort to or use the facility in question.
- [34] It is difficult to apply these principles to the case at bar. It is clear the meeting room was "used by" the appellant and his parents, and that at the time the listening device was activated, the police knew the appellant and his parents would be "using" the room. But in this instance, they knew because it was they who directed the appellant and his parents to do so. Had it not been for this suggestion, the appellant and his parents would not have done so. There could have been no reasonable and probable grounds for believing they would do so except for the police officer's own suggestion. The facts go beyond the 'retroactive validation' found objectionable in Niles, supra, to prospective manipulation. In my opinion, these circumstances do not constitute the kind of "evidence" the Court had in mind in Thompson, notwithstanding that one might say the bare requirements of para. (ii) quoted above from the Court's judgment were met. If the Crown were permitted to use this evidence, it would be open to the police to manoeuvre suspects into places or facilities for the express purpose of intercepting statements, without any evidence justifying an expectation that the target would otherwise have used or resorted to the location or facility. On my reading of Thompson, the Supreme Court would regard this result as an unreasonable delegation of authority to law enforcement officers and an unacceptable violation of privacy. Accordingly, I find that the appellant's rights under s. 8 of the Charter were breached in this case.
- [35] I agree with Hall J.A. that the question of whether the admission of the evidence thus obtained would bring the administration of justice into disrepute is properly the province of a trial judge and I therefore join with him in concluding that a new trial should be ordered.

"The Honourable Madam Justice Newbury"

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