

CANADA / JUDGMENT

R. v. Russell

2012 BCSC 1454

COURT

Supreme Court of British Columbia

DECIDED

28 September 2012

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2012 BCSC 1454 R. v. Russell IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Russell, 2012 BCSC 1454 Date: 20120928 Docket: 25023 Registry: Vancouver Regina v. Daniel Ronald Russell, Yong Sung John Lee, Dilun Heng Barzan Tilli-Choli, Karwan Ahmet Saed, Ion Kroitoru also known as John William Croitoru Before: The Honourable Madam Justice Dillon Ban on publication pursuant to s. 648(1) of the Criminal Code until jury renders verdict Oral Ruling Re: Admissibility of Crown Documents on Voir Dire No. 2 Counsel for the Crown: G.D. McKinnon Q.C., H.J.R. Reiner Q.C., R.G. Keefer, A.M. Mandell, P.F. Sebellin, L. Hemming, M. Barrenger, S. McCallum, R.L. Storey Counsel for Daniel Russell: R.A. Cairns Q.C., L.R. Fleming, B.D. Vaze Counsel for Yong Lee: B. Craig, J. Esson, V.M. Williams Counsel for Dilun Heng: B.V. Bagnall, J.D. Jevning Counsel for Barzan Tilli-Choli: L. Smith, M. Daneliuk, C. Strong Counsel for Karwan Saed: J.W. Hogan, J.D. Banks, K. Bradley Counsel for Ion Kroitoru: J.B. Turner, D. Gaffar, J. Rutherford Place and Dates of Hearing: Vancouver, B.C. September 27, 2012 Place and Date of Ruling: Vancouver, B.C. September 28, 2012

- [1] In anticipation and then following from the ruling of this Court that the applicant, Daniel Russell, could introduce into evidence on this voir dire disclosure documentation from the police investigation file involving authorization P3/2008 to establish that Russell was known to police and should have been included in the authorization to intercept private communications (2012 BCSC 1438), the Crown seeks to introduce into evidence a book of materials described as "Re: Russell as a known" which contains hundreds of pages of documents from the police investigatory file including transcripts of interviews, fax correspondence from other police agencies, police briefing minutes from meetings, production orders, and investigating officer notes. Crown asserted that the materials are required as relevant evidence to "provide a full picture" to the court of the police investigation and to show where Russell's name does not appear in the police files or court orders, so to buttress the apparent conclusion from the affidavit in support of the authorization that Russell was not a known person at the time of the authorization within the meaning of that term as set out in R. v. Chesson, [1988] 2 S.C.R. 148, 43 C.C.C. (3d) 353.

- [2] To put the Crown request in the perspective as presented to the court, the Crown stated that it wanted to "give a broader context" to the material contained in the affidavit in support of the authorization so that this reviewing judge could have a "full perspective on what the police knew or thought about Russell". Crown sought to elaborate beyond what is contained in the affidavit to show the state of the investigation and knowledge with respect to Russell in the same manner and with the same latitude as afforded to the applicant accused. Crown asserted that it was entitled to introduce evidence that showed the "true state of affairs" separate from what is contained or not in the affidavit. The Crown argued that the affidavit contains no direct evidence on whether Russell was a known so the Crown should be entitled to now put this evidence before the court. The Crown seeks though use of these documents to rebut the inference that may arise from the defence disclosure documents that Russell should have been named as a known person in authorization P3.
- [3] It should be pointed out that the Crown does not say that there is any erroneous information contained in the affidavit. Nor is it suggested that there was a misstatement or minor error. The limited scope of amplification discussed in *R. v. Araujo*, [2000] 2 S.C.R. 992 at paras. 54-59, 149 C.C.C. (3d) 449 (Araujo), whereby erroneous information contained in an affidavit through simple error on the part of an affiant may be corrected through amplification to reflect the totality of the circumstances, does not apply here.
- [4] Amplification cannot be used by the Crown to circumvent a prior authorization requirement (Araujo at para. 59; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253 at para. 42 (Morelli)). In this case, the requirement is set out in s. 185(e) Criminal Code, R.S.C. 1985, c. C-46: the affiant must provide the names of all persons, if known, the interception of whose private communications there are reasonable grounds to believe may assist the investigation of the offence. If a person is not known in this sense, then there is no requirement to disclose his name in the affidavit in support of the authorization. Failure to disclose a known person may, however, constitute material non-disclosure. The burden of proving this allegation lies upon the applicant, Russell.
- [5] The focus is on the information available to the police at the time of the application (Morelli at para. 43). The affiant must avoid incomplete recitation of known facts so not to invite an inference that would not be drawn or a conclusion that would not be reached if the omitted facts were disclosed (Morelli at para. 58).
- [6] Outside of errors or misstatements, the scope of amplification afforded the Crown on review is limited. The Crown may not amplify the affidavit or bolster it to show that the investigative facts are different than set out in the affidavit (*R. v. Wilson*, 2011 BCCA 252, 272 C.C.C. (3d) 269 at para. 67 (Wilson)). It is the defence who may rely upon information outside the affidavit in a review (*R. v. Sanghera*, 2012 BCSC 1197 at para. 29, [2012] B.C.J. No. 1728).
- [7] However, once evidence is led on an issue, there is a scope for the Crown to supplement or qualify analogous to the limited re-examination allowed following cross-examination of the affiant (Wilson at para. 67). However, this scope must remain within the mandate in Morelli

at para. 42 that amplification should not serve as a means to circumvent the prior authorization process by permitting police to adduce additional evidence to retroactively authorize interception of private communications (R. v. Radjenovic, 2010 BCSC 1750 at para. 93, [2010] B.C.J. No. 2889 (Radjenovic)). Just as substantive deficiencies cannot be rectified through the amplification process, so too cannot the affidavit be bolstered by way of explanation or supplementation (Radjenovic at paras. 93-95). There has been no case cited to me where the Crown has led evidence except through re-examination of the affiant. However, I am prepared to allow some limited scope for the Crown to lead rebuttal evidence pertinent to the documents admitted into evidence for the defence. This includes admission of documents to supplement defence disclosure documents that are incomplete or ambiguous. Crown materials at tabs 2 and 3 appear to fall within this category.

- [8] The Crown seeks to admit other documents to show where Russell's name does not appear as a target. There is nothing specific to be gained by such documents as the court can well infer that there must be many documents in the course of this investigation that do not reveal information about Russell. In my view, the Crown cannot tender these documents to show the full state of the investigation as it pertains to Russell as the affidavit speaks for itself on this point.
- [9] The Crown has withdrawn tab 1 of the materials that contains an affidavit sworn in support of an authorization subsequent to P3. "Dillon J."

The Honourable Madam Justice Dillon

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