

CANADA / JUDGMENT

R. v. Sasano

2022 BCSC 715

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Supreme Court of British Columbia

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2022 BCSC 715 R. v. Sasano

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sasano,

2022 BCSC 715

Date: 20220429

Docket: 70994

Registry: Chilliwack

Regina

v.

Jeff Luke Rigear, Roy Makoto Sasano, Nicholas Steven George Schafer and Amy Elysia Soranno

Before: The Honourable Mr. Justice Verhoeven

Oral Reasons for Judgment re Application of Nicholas Schafer to Exclude Camera Videos (Voir Dire 7)

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Place and Date of Voir Dire:

New Westminster, B.C.

April 7, 2022

Place and Date of Judgment:

New Westminster, B.C.

April 29, 2022

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I. Introduction

- [1] The accused, Nicholas Schafer, applies for an order pursuant to s. 24(2) of the Charter for exclusion of evidence, consisting of a number of videos stored on SD cards taken by Abbotsford police from two cameras in his possession on April 28, 2019.
- [2] Mr. Schafer is an accused in all seven counts set out in the indictment.
- [3] Mr. Schafer advances two arguments in support of his contention that the evidence should be excluded: (1) he was not provided with reasonable access to counsel, contrary to s. 10(b) of the Charter, either before or contemporaneously with the seizure of the cameras by the police; and (2) the search warrant of May 23, 2019 that allowed the police to review the material found on the SD cards (the videos) should not have been issued.

II. Background

- [4] This ruling is one of a series of rulings on various applications heard on voir dire pre-trial. Relevant background facts are set out in the other reasons for judgment on the other applications.

- [5] Mr. Schafer did not provide an affidavit in support of the application, or testify on the voir dire.
- [6] For purposes of this application, Mr. Schafer and the Crown have agreed on certain facts, as follows:
1. On April 28, 2019, Nicholas Schafer was detained among a number of individuals engaged in a protest at the Excelsior hog facility in Abbotsford, BC.
 2. At some point the protesters inside the barn were arrested by police and told that once they were identified they would be free to leave with no charges at that time (though charges could later follow).
 3. At 1131 on April 28, 2019, Cst. Hagen of the Abbotsford Police Department (APD) provided a secondary Charter warning to Nicholas Schafer and put the question to him as to whether he wished to speak with a lawyer. Mr. Schafer responded with "Maybe in a bit".
 4. Following Mr. Schafer's answer to whether he wished to speak to a lawyer, neither Cst. Hagen nor any other officer made any further inquiries as to whether Mr. Schafer wished to speak to a lawyer, nor did Cst. Hagen or any other officer make any efforts or take any steps to facilitate Mr. Schafer's access to counsel.
 5. At approximately 1135 am, shortly after Mr. Schafer had been asked by Cst. Hagen as to whether he wished to speak to a lawyer, Cst. Conway of the APD seized a Canon EOS camera and Lumix GH5 camera (collectively, "the cameras") from Mr. Schafer incidental to arrest. Officers did not otherwise engage in a search of Mr. Schafer's person or clothing.
 6. Shortly thereafter, Cst. Chahal of the APD seized 3 SD cards from the cameras. The cameras were returned to Mr. Schafer, without the SD cards, before he left the scene of the protest. The police retained the SD cards.
 7. Outside of his general detention along with other protesters, Mr. Schafer was not taken into custody, booked, or taken into APD cells on the date of April 28, 2019.
 8. Nothing was seized from the other protestors by the police on April 28, 2019, except for a cell phone from Amy [Soranno].
 9. On or about May 22, 2019, a warrant was sought by Cst. Reddemann of the APD to be able to search the contents of the SD cards. The presiding Judicial Justice of the Peace (JJP) declined to issue the warrant, in part because the date range of the data to be searched for was not adequately explained as necessary, and because the items to be seized on the warrant sought was too broad and not reflective of the date range explained in the ITO.

10. On or about May 23, 2019, Cst. Reddemann again sought a warrant towards searching the contents of the SD cards, purportedly with a new Information to Obtain (ITO) that corrected the errors of the earlier one that had been utilized. A warrant to search the SD cards was issued to conduct such searches on May 23rd and May 24th, 2019, for any digital photographs or video associated to or depicting offences alleged to have occurred on April 28, 2019. A copy of the search warrant is attached to these admissions as exhibit "A".
11. On May 23rd, 2019, Special Cst. Ward received the search warrant and began the digital forensic extraction of the SD cards at 16:11 hours. Special Cst. Ward did not record and does not recall if he used any date filters when he did so. Special Cst. Ward provided the data extracted [from] the SD cards to Cst. Reddemann on May 30, 2019, and on May 31, 2019, Cst. Reddemann reviewed the data from the SD cards.
- [7] Staff Sgt. Murray testified that the protesters inside the barn (including Mr. Schafer) were arrested at 10:26 a.m.
- [8] Mr. Schafer does not challenge the legality of the search and seizure of the SD cards, incidental to his arrest, for investigative purposes.
- [9] The videos in evidence on the voir dire that the Crown seeks to rely on at the trial can be briefly summarized as follows:
 1. 498 - numerous protesters exiting a school bus, apparently upon arrival at the farm;
 2. 501 - protesters breaking into a barn;
 3. 502 - protesters breaking into a barn;
 4. 503 - arrival of one of the Binnendyk brothers outside a barn. He repeatedly tells a group of protesters "this is private property - please leave." The protesters say, "Call the police - we are not going anywhere";
 5. 504 - discussions between members of the Binnendyk family and protesters;
 6. 507 - a large number of protesters inside a pig barn, most of them filming on their cameras;
 7. 520 - Ms. Soranno speaking to two APD constables;
 8. 525 - Ms. Soranno speaking with S/Sgt. Murray, initial discussion, and negotiation;
 9. 568 - a statement by Ms. Soranno to the camera, regarding exposing the realities of factory farming in Canada;
 10. 604 - interactions/negotiations between Ms. Saranno and S/Sgt. Murray;
 11. 627 - Staff Sgt. Murray advising the group of protesters inside the barn that they were all under arrest for unlawful assembly, break and enter, and mischief, and then providing s. 10(b) information.

III. Analysis

A. Alleged Section 10(b) Charter Violation

[10] Section 10(b) provides:

10 Everyone has the right on arrest or detention

(b) to retain and instruct counsel without delay and to be informed of that right;

[11] The obligations of the police under s. 10(b) were described as follows in *R. v. Willier*, 2010 SCC 37 [Willier], as follows:

[28] Accordingly, s. 10(b) provides detainees with an opportunity to contact counsel in circumstances where they are deprived of liberty and in the control of the state, and thus vulnerable to the exercise of its power and in a position of legal jeopardy. The purpose of s. 10(b) is to provide detainees an opportunity to mitigate this legal disadvantage.

[29] The purposes of s. 10(b) serve to underpin and define the rights and obligations triggered by the guarantee. In *Bartle*, Lamer C.J. summarized these rights and obligations in terms of the duties imposed upon state authorities who make an arrest or effect a detention (p. 192). Section 10(b) requires the police

- (1) to inform the detainee of his or her right to retain and instruct counsel without delay and of the existence and availability of legal aid and duty counsel;
- (2) if a detainee has indicated a desire to exercise this right, to provide the detainee with a reasonable opportunity to exercise the right (except in urgent and dangerous circumstances); and
- (3) to refrain from eliciting evidence from the detainee until he or she has had that reasonable opportunity (again, except in cases of urgency or danger).

[30] The first duty is an informational duty, while the second and third duties are implementational in nature and are not triggered until detainees indicate a desire to exercise their right to counsel. As explained in *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, these duties are triggered immediately upon an individual's arrest or detention, as "the concerns about self-incrimination and the interference with liberty that s. 10(b) seeks to address are present as soon as a detention is effected" (para. 41).

[33] Detainees who choose to exercise their s. 10(b) right by contacting a lawyer trigger the implementational duties of the police. These duties require the police to facilitate a reasonable opportunity for the detainee to contact counsel, and to refrain from questioning the detainee until that reasonable opportunity is provided. However, these obligations are contingent upon a detainee's reasonable diligence in attempting to contact counsel: *R. v. Tremblay*, [1987] 2 S.C.R. 435; *R. v. Black*, [1989] 2 S.C.R. 138; *R. v. Smith*, [1989] 2 S.C.R. 368. What constitutes reasonable diligence in the exercise of the right to contact counsel will depend on the context of the particular circumstances as a whole. As Wilson J. stated in

Black, at pp. 154-55:

A rider is attached to these police obligations, namely that the accused must be reasonably diligent in attempting to obtain counsel if he wishes to do so. If the accused person is not diligent in this regard, then the correlative duties imposed upon the police to refrain from questioning the accused are suspended: see *R. v. Tremblay*, [1987] 2 S.C.R. 435.

- [34] Such a limit on the rights of a detainee are necessary, as Lamer J., as he then was, noted in *Smith*, "because without it, it would be possible to delay needlessly and with impunity an investigation and even, in certain cases, to allow for an essential piece of evidence to be lost, destroyed or rendered impossible to obtain. The rights set out in the Charter, and in particular the right to retain and instruct counsel, are not absolute and unlimited rights. They must be exercised in a way that is reconcilable with the needs of society" (p. 385).
- [35] Should detainees opt to exercise the right to counsel by speaking with a specific lawyer, s. 10(b) entitles them to a reasonable opportunity to contact their chosen counsel prior to police questioning. If the chosen lawyer is not immediately available, detainees have the right to refuse to speak with other counsel and wait a reasonable amount of time for their lawyer of choice to respond. What amounts to a reasonable period of time depends on the circumstances as a whole, and may include factors such as the seriousness of the charge and the urgency of the investigation: *Black*. If the chosen lawyer cannot be available within a reasonable period of time, detainees are expected to exercise their right to counsel by calling another lawyer or the police duty to hold off will be suspended: *R. v. Ross*, [1989] 1 S.C.R. 3; and *Black*. As Lamer J. emphasized in *Ross*, diligence must also accompany a detainee's exercise of the right to counsel of choice, at pp. 10-11:

Although an accused or detained person has the right to choose counsel, it must be noted that, as this Court said in *R. v. Tremblay*, [1987] 2 S.C.R. 435, a detainee must be reasonably diligent in the exercise of these rights and if he is not, the correlative duties imposed on the police and set out in *Manninen* are suspended. Reasonable diligence in the exercise of the right to choose one's counsel depends upon the context facing the accused or detained person. On being arrested, for example, the detained person is faced with an immediate need for legal advice and must exercise reasonable diligence accordingly. By contrast, when seeking the best lawyer to conduct a trial, the accused person faces no such immediacy. Nevertheless, accused or detained persons have a right to choose their counsel and it is only if the lawyer chosen cannot be available within a reasonable time that the detainee or the accused should be expected to exercise the right to counsel by calling another lawyer.

- [12] There is no doubt in this case that S/Sgt. Murray fulfilled the first duty, the informational duty of the police. In fact, Mr. Schafer video recorded S/Sgt. Murray providing the s. 10(b) information. As noted, this occurred at about 10:26 a.m. In so doing, S/Sgt. Murray addressed a group of approximately 50 protesters, including Mr. Schafer.

- [13] In addition to the s. 10(b) information provided by S/Sgt. Murray, it is agreed that Cst. Hagan provided a secondary warning to Mr. Schafer at 11:31 a.m., and that he asked Mr. Schafer whether he wished to speak with a lawyer. Mr. Schafer responded by saying "maybe in a bit". A few minutes later Cst. Conway seized the two cameras, removed the three SD cards from the cameras, and returned the cameras to Mr. Schafer before Mr. Schafer left the scene.
- [14] When asked, Mr. Schafer did not say that he wished to speak with a lawyer. He said "maybe in a bit", which means that he did not wish to speak with a lawyer at that time. He had by then been told about that right twice; first, when he was addressed as part of the group; then again, when asked individually by Cst. Hagan.
- [15] Mr. Schafer had plenty of opportunity to speak with counsel prior to speaking individually to Cst. Hagan. He would have had his own cell phone; but if not, there were dozens of cell phones available to him at the scene. There is no indication that he could not have spoken to a lawyer in conditions of reasonable privacy if he had so wished. In short, Mr. Schafer clearly had a choice as to whether to speak with counsel, and knew he had a choice, and declined. Detainees have an obligation to be reasonably diligent in exercising their right to counsel. Mr. Schafer opted not to do so.
- [16] This is not a case about police interrogation of a detainee. There was no interrogation.
- [17] I see no connection between the s. 10(b) issue Mr. Schafer raises and the lawfulness of the police seizure incidental to arrest.
- [18] The applicant relies on the words "eliciting evidence from the detainee" as set out in para. 29(3) of Willier, and argues these words should include refraining from conducting a search incidental to arrest. However, Willier was a case about the implementation of s. 10(b) rights in the context of a police investigative interview of a suspect. It was not about search incidental to arrest. The applicant cites no authority for the proposition that the police may not conduct a lawful search and seizure incidental to arrest until after a detainee has exercised the detainee's right to counsel under s. 10(b).
- [19] Search and seizure incidental to arrest would, in most cases, necessarily precede any practical opportunity for a detainee to receive legal advice. Although the police must meet the s. 10(b) informational requirement before performing a search incident to arrest, they are not obliged to suspend the search until the detainee has an opportunity to obtain legal advice: *R. v. Harasemow*, 2014 BCSC 2287 at paras. 61-65 (citing *R v. Debot*, [1989] 2 SCR 1140).
- [20] Mr. Schafer argues that no causal connection between obtaining the evidence and a s. 10(b) breach is required; a temporal connection may suffice to exclude the evidence under s. 24(2) of the Charter: *R. v. Rover*, 2018 ONCA 745 [Rover]. However, Rover is distinguishable. Rover is not a search incidental to arrest case. In that case, the police arrested the accused after he left his residence. He was charged with trafficking in narcotics. They decided to search the residence, after obtaining a search warrant. The detainee immediately said that he wished to

exercise his right under s. 10(b) to speak with a lawyer, but the police refused to comply with his request for nearly 6 hours, in order to conduct the search first.

[21] The court took note of the evidence that the police routinely prevented arrested persons from accessing counsel if the police intended to obtain a warrant to search a place for drugs and believed that the place was associated with the arrested person. The police evidence was that this was their customary or standard practice. The court excluded the evidence obtained on the search, quashed the convictions, and entered acquittals. In *Rover*, the close temporal connection between the discovery of the drugs and the s. 10(b) breach was sufficient to engage s. 24(2) of the Charter. No such temporal connection exists here, as no s. 10(b) breach has been established.

[22] In summary, the applicant has not shown a breach of his s. 10(b) rights.

B. Sufficiency of the ITO

[23] The applicant argues that the ITO to support issuance of the search warrant was deficient, and that the warrant should not have been issued.

[24] In the first ITO placed before a Judicial Justice on May 22, Cst. Reddemann sought "any digital photographs or videos associated to the alleged offences between April 20, 2019 and April 28, 2019". In addition, she sought a search warrant to search the SD memory cards for any digital photographs or video footage depicting the alleged offences.

[25] The justice refused to grant the search warrants, stating as reasons:

In the ITO you have identified a date range of the data to be searched for - however it was not adequately explained why the date range is necessary. Your items to be seized on the warrant is too broad and not reflective of the date range explained in the ITO.

[26] Constable Reddemann amended the ITO and the proposed form of search warrant. She removed the date range of April 20 to April 28, 2019. She sought digital photographs or videos "associated to the alleged offences (occurring on April 28) or digital photographs or video footage depicting the alleged offences". She also made some other amendments. She stated that the three Lexar SD cards may have photographs and video evidence associated to the alleged offences. She added that Ms. Soranno's cell phone was also seized.

[27] The search warrant was issued by a provincial court judge May 23, 2019, authorizing a search of the three SD cards seized April 28 and a search for digital photographs and video associated to, or depicting, the alleged named offences.

[28] My task as a reviewing judge is to consider whether the material filed in support of the warrant, as amplified on review, could support the issuance of the warrant: *R. v. Vu*, 2011 BCCA 536 at para. 33 (aff'd: 2013 SCC 60), citing, among others, *R. v. Garofoli*, [1990] 2 S.C.R. 1421, 1990 CanLII 52 (S.C.C.)

- [29] Unquestionably, ample grounds were set out in the ITO to issue a search warrant for the SD cards.
- [30] Contrary to the applicant's argument, the second ITO does not reflect the "date range" referred to in the first ITO. Instead, Cst. Reddemann focused the ITO on photo or video evidence "associated to" the offences, or depicting the offences. The date range was eliminated.
- [31] The applicant argues that the search warrant was overbroad in authorizing a search for photographs and video associated to the offences.
- [32] He cites *R. v. Khan*, [2005] O.J. No. 3486, 2005 CanLII 63749 (O.N.S.C.) [Khan], which in turn relied upon *R. v. Church of Scientology* (No. 6) (1987), 31 C.C.C. (3d) 449, 1987 CanLII 122 (Ont. C.A.) [Church of Scientology], (leave to appeal ref'd: [1989] 1 S.C.R. vii (note)). In Khan, the court, applying Church of Scientology, stated (Khan, para. 40):
1. The description of what is to be searched for must not be so broad and vague as to give the searching officers carte blanche to rummage through the premises of the target. A "good deal of specificity" with regard to the things to be searched for and seized is required.
- [33] In Khan, the accused was charged in connection with a fraudulent telemarketing scheme carried out from two commercial premises, during the period November 1999 and September 2001. Two search warrants were issued in respect of two business premises. Voluminous files, documents, computer-related equipment and data, hard drives and diskettes, and 15 computers were seized. The judge characterized the search warrants as creating "an extremely sweeping authority to search for and seize documents within the listed categories that were potentially highly personal in nature or, at the very least, could not possibly have had any connection to the targeted operation" (Khan, para. 52).
- [34] The Court ruled:
- [55] By failing to limit, either specifically or through incorporating by reference, appropriate categories by some particulars reflecting the nature of the alleged fraudulent operation and its time frame, the extent of discretion given to the executing officers was clearly excessive.
- [35] By contrast, in this case, the search warrant authorized a search of specific SD cards obtained from cameras in the possession of Mr. Schafer at the scene of the alleged offences, and only for photographs and video, and only for such photographs and videos that were either "associated to" the named offences, or depicting them. There were ample grounds to believe that the cameras would contain such evidence, given the circumstances of the seizure, as explained in considerable detail in the ITO.
- [36] While there was some latitude granted to the police in respect of seizing photographs and video "associated to" the offences, the authorization cannot be characterized as "extremely sweeping" as in Khan. The authorization was in fact tightly delimited, although some latitude was allowed.

[37] As pointed out in R. v. Vu, 2013 SCC 60, detailed search protocols are not required in a search warrant authorizing computer searches. However, the police remain obliged to carry out the search in a reasonable manner. They do not have a license to scour devices indiscriminately (para. 61).

[38] Bearing those principles in mind, I have no difficulty concluding that the search warrant was not overbroad.

[39] No argument is made that the search was not carried out in a reasonable manner.

IV. Conclusion

[40] The application is dismissed.

"Verhoeven J."

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