
CANADA / JUDGMENT

R. v. Sekhon

2020 BCSC 2247

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sekhon,

2020 BCSC 2247

Date: 20201023

Docket: 69059-2

Registry: Chilliwack

Regina

v.

Sukhdev Singh Sekhon

Before: The Honourable Madam Justice Sharma

Oral Ruling re Voir Dire #1

Counsel for the Crown:

S. Gill

Counsel for the Accused:

A. Sidhu

Place and Date of Trial/Hearing:

Chilliwack, B.C.

September 21 - 25, 30, 2020, October 19, 20, 22, 2020

Place and Date of Judgment:

Chilliwack, B.C.

October 23, 2020

- [1] This is the written version of a ruling delivered orally on October 23, 2020.
- [2] This ruling is a continuation of the voir dire, and constitutes my ruling on the admissibility of evidence. It follows yesterday's ruling in which I concluded that Mr. Sekhon had established a breach of his rights guaranteed under ss. 8 and 10(b) of the Charter (that judgment has since been published and is indexed at 2020 BCSC 2180). He now seeks exclusion of the evidence based on those breaches.
- [3] Crown's position is that under the applicable test, the evidence can and should be admitted for the trial of this matter. Defence counsel submits the evidence should not be admitted.
- [4] The test under s. 24(2) for exclusion of evidence is set out in *R. v. Grant*, 2009 SCC 32. There was no dispute that we are not dealing here with the first aspect of *Grant*, which has to do with the temporal nexus, or whether things were obtained "in a manner" that infringed guaranteed rights.
- [5] The three steps of the *Grant* test require me to look at: (i) the seriousness of the Charter-infringing state conduct; (ii) the impact of the breach on the Charter-protected interest, and; (iii) society's interest in having the case decided on its merits.
- [6] The primary consideration is whether the administration of justice would be brought into disrepute by the admission into trial of evidence that was obtained in violation of an accused person's rights. This is a reflection of the primary purpose of s. 24(2), which invokes both the integrity of the justice system, and public confidence into it. One looks at the impact of admission of such evidence from a long-term focus centred on societal concerns. In other words, this ruling and other rulings under s. 24(2) are not meant to be punitive against or punishing on the police.
- [7] I also emphasize comments in *Grant* that identify s. 24(2) primarily deals with the processes of evidence-gathering and the procedures of state conduct (para. 67). More generally, it also implicates the rule of law and upholding rights that are guaranteed into the Charter. Thus, for each of the three steps of the test, courts are required to consider whether exclusion of evidence impacts harm to the public perception and integrity of the administration of justice (para. 71).
- [8] I thank counsel for taking me through cases that were extremely helpful, but in the interests of time and providing this ruling today, I will not review all those cases.
- [9] Yesterday, I delivered a ruling in which I found a breach of s. 10(b) of the Charter because I concluded that Mr. Sekhon was not allowed to implement his right to counsel immediately, and that delay was not reasonable.

- [10] With regard to the strip search, I found it breached Mr. Sekhon's s. 8 rights. I stated that it was virtually determinative that Sergeant Kneebone, the person who was tasked with authorizing the strip search and ensuring it complied with Golden, gave evidence that had he known the van had not yet been searched for drugs, he probably would not have authorized it. On that basis, among others, I did decide there were insufficient grounds to conduct that strip search.
- [11] Turning to the first Grant factor (the seriousness of the state action or the police action), the case law identifies that conduct amounting to a breach should be viewed on a spectrum: Grant, paras. 74-75. On one end, there is conduct that is inadvertent, amounting to a minor violation. On the other end, there is willful or reckless disregard of the rights in issue. The court also noted that extenuating circumstances can attenuate the seriousness of the conduct. Good faith of state actors can also attenuate it, but the court was clear that would not necessarily obviate the seriousness (para. 75):

Wilful or flagrant disregard of the Charter by those very persons who are charged with upholding the right in question may require that the court dissociate itself from such conduct. It follows that deliberate police conduct in violation of established Charter standards tends to support exclusion of the evidence. It should also be kept in mind that for every Charter breach that comes before the courts, many others may go unidentified and unredressed because they did not turn up relevant evidence leading to a criminal charge. In recognition of the need for courts to distance themselves from this behaviour, therefore, evidence that the Charter-infringing conduct was part of a pattern of abuse tends to support exclusion.

- [12] Regarding the infringement of the right to counsel, I conclude the conduct was more towards the serious end of the spectrum. This was not an inadvertent or minor breach of s. 10(b); I find the conduct was deliberate. I disagree with the Crown's characterization that the police conduct amounting to the breach was in good faith.
- [13] Crown emphasized that Sergeant Smith testified that he turned his mind at the scene of arrest as to how to facilitate access to counsel. To the degree that the Crown wants me to rely on his state of mind, I agree that a state actor whose state of mind demonstrates a flagrant disregard for Charter rights, would weigh heavily in finding that conduct to be serious. I did not conclude Sergeant Smith demonstrated a flagrant disregard for Mr. Sekhon's rights.
- [14] However, the test is objective. The state of mind of the actors in question is only relevant to the extent that it constitutes evidence from which I can make fact findings or inferences about their conduct; that is an important distinction. I refer here specifically to of R. v. Taylor, 2014 SCC 50, paragraph 33. The court addresses the fact that, with regard to the right to counsel, "[b]arriers to access must be proven, not assumed". The court also emphasized the need for state actors to take proactive measures to implement the right to counsel.

- [15] I am not suggesting that Sergeant Smith had ill intent, or was unaware or ignorant of the right to counsel; I am not making a finding of bad faith. However, as the jurisprudence confirms, the absence of bad faith does not amount to good faith. Good faith in the context of s. 24(2) of the Charter is a fairly narrow concept. I am not assessing what was in Sergeant Smith's mind, but his conduct. By that measure, I do find the breach to be toward the serious end of the spectrum of infringing behaviour.
- [16] He stated he had a concern at roadside for the privacy of Mr. Sekhon's ability to call counsel. However, I have to focus on his conduct and not only what he said. After placing Mr. Sekhon in the police care, Sergeant Smith was taking notes. He also said he was directing or involved in assigning investigative tasks to other officers at the scene. He stated that the privacy concern arose from the need for him to stand close to Mr. Sekhon to keep an eye on him. However, I am not convinced by that logic. In other words, I do not accept that Sergeant Smith's having to stand close to the back of the police vehicle to keep an eye on Mr. Sekhon was incompatible with Mr. Sekhon's ability to have a private call with counsel.
- [17] I must also assess the seriousness of the conduct in light of my conclusion from yesterday's ruling that once they arrived at the police station, Mr. Sekhon's right to counsel was delayed for the purpose of conducting the strip search. In my view, there can be little question that conduct is serious.
- [18] With regard to the breach of s. 8 (the strip search) and the first ground under Grant, it is important to focus on what I am actually assessing: the seriousness of the police conduct in the context of the right to be secure against unreasonable search and seizure. We know from *Golden* that a strip search heightens the concern a great deal because it is per se humiliating and degrading. It is important to properly account for the conclusion that I have already made that the police officers did not meet the test from *Golden* to conduct a strip search.
- [19] Turning to the facts, the issue boils down to Sergeant Kneebone's testimony. The department had a process for seeking authority to conduct strip searches, but the existence of the process is not a replacement for assessing the seriousness of the conduct in question. The process was presumably meant to provide an objective overview to ensure that the dictates of the law regarding when a strip search incident to arrest can be carried out are met. I also presume there was no intention that the approval process be merely a rubberstamp.
- [20] In this case, I found, in part, that the grounds were insufficient based on Sergeant Kneebone's statement that he may not have approved the strip search had he known the van had not yet been searched. It was also relevant that the other person who was arrested at the scene at the same time and under the same circumstances, arising from the same surveillance, was not strip searched. That was not determinative, but in my mind, it was important.
- [21] I also noted in my ruling yesterday, to the extent that both Sergeant Kneebone and Sergeant Smith wanted to rely on there being a delay between the van being stopped and Sergeant Smith opening the van door to confront Mr. Sekhon, that was insufficient to establish

grounds independent from the arrest itself to justify the strip search. I specifically stated a concern that when you stop a vehicle and an occupant is suspected of trafficking, there is always a delay between the stop and securing the person for arrest. Sergeant Kneebone said a delay as brief as 10 seconds could be relevant because that provided sufficient time for the possibility of concealing drugs.

[22] However, to accept that as an independent basis to justify a strip search would, in my view, amount to basically saying every time someone is stopped in a vehicle for drug trafficking, there are sufficient grounds to conduct a strip search. That surely cannot be the law. Thus, I conclude in this case the police conduct was serious favouring exclusion of the evidence.

[23] The second ground of Grant looks to the impact of the police conduct on the person's Charter rights (paras. 76-77):

This inquiry focusses on the seriousness of the impact of the Charter breach on the Charter-protected interests of the accused. It calls for an evaluation of the extent to which the breach actually undermined the interests protected by the right infringed. The impact of a Charter breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused's protected interests, the greater the risk that admission of the evidence may signal to the public that Charter rights, however high-sounding, are of little actual avail to the citizen, breeding public cynicism and bringing the administration of justice into disrepute.

To determine the seriousness of the infringement from this perspective, we look to the interests engaged by the infringed right and examine the degree to which the violation impacted on those interests.

[24] I turn first to the violation of s. 10(b). It is true that in this case the delay was just over 50 minutes. While that is not determinative, it is a relevant factor.

[25] However, I find Justice Silverman's judgment in Lefaive to be very helpful. The accused was handcuffed in the police vehicle and not told of his right to counsel for 26 minutes, which tends to be more serious. However, I still find the case relevant. And I agree that in that case, because the accused had been denied the informational component, that makes it somewhat more serious, but it is still a relevant case.

[26] The Crown here said that the seriousness is mitigated because the police did not seek to elicit evidence from Mr. Sekhon before he called counsel. While that is true, of course, it cannot overcome the aggravating factor that the call to counsel was delayed at the station for no reason that I could discern except the desire to conduct a strip search.

[27] Crown wanted to rely on the officers' concern about evidence being discarded or becoming unavailable if they allowed Mr. Sekhon to call counsel. However, as I noted in my ruling yesterday, I am not persuaded by that submission. Surely, the purpose of the window in the small room set up in the police station for the purpose of calling counsel protects against that possibility.

- [28] Also, as I said yesterday, a sweep of the room before and after would easily eliminate any concerns about continuity of evidence. I refer again to the comment in Golden that the level of concern about evidence being discarded was surely low once they are in the back of a vehicle; that must be lowered to a significant degree once they are in the controlled environment of a police station.
- [29] For all those reasons, I do find that there was a serious impact on Mr. Sekhon's rights. This favours exclusion of the evidence.
- [30] With regard to the strip search conducted incident to arrest, it is not in compliance with Golden standard. I do find that to be serious conduct, which must be assessed in terms of its impact in relation to the right being protected. That is the right against unreasonable search. A strip search is a search of your body that is humiliating and degrading. I cannot think how it can be anything but serious.
- [31] I do not think the Crown disagreed with that, but quite fairly, Crown wanted to point out some factors that mitigated the seriousness. I agree that the police conduct while carrying out the search was respectful, it was brief, and it was no more invasive than it needed to be. However, the spectrum that I am looking at is not restricted to strip searches; it is a spectrum with regard to the right not to have your privacy invaded. Invasion of your bodily integrity as a subset of the right to be secure against any search is clearly serious.
- [32] It seems to me that the controversial issue is discoverability, which is an element of the second step of the Grant test. The Crown relies on that element discussed, among other places, at paragraph 137 of Grant:
- As discussed, discoverability remains a factor in assessing the impact of Charter breaches on Charter rights. The investigating officers testified that they would not have searched or arrested Mr. Grant but for his self-incriminatory statements. Nor would they have had any legal grounds to do so. Accordingly, the fact that the evidence was non-discoverable aggravates the impact of the breach on Mr. Grant's interest in being able to make an informed choice to talk to the police. He was in "immediate need of legal advice" and had no opportunity to seek it.
- [33] The Crown submits that if Sergeant Kneebone had made the inquiry and learnt that the van had not yet been searched, thereby delaying the strip search, there would not have been a breach. It submits that speaks to discoverability, which mitigates the impact here.
- [34] Part of the problem I have accepting that submission is that Sergeant Kneebone did not turn his mind to it. Despite his evidence that it was best practice to know whether drugs were found in the vehicle, and admitting normally he would ensure he had that information, he did not seek out that information when Sergeant Smith made the request for approval for a strip search. That concerns me.

- [35] Crown also said in the circumstances of this case, the evidence does fall into the category of what would have been discovered in any event based on the following: Mr. Sekhon might have turned the drugs over; they might have been discarded and discovered; or, the strip search could have been conducted in compliance with the Charter and the drugs would have been found.
- [36] The problem in this particular case, and what I found to be complicating the analysis, is that the invasion of Mr. Sekhon's bodily integrity was done contemporaneously and simultaneously with the police's knowing that he wanted to talk to his lawyer, and their not facilitating that right. I find it highly relevant to take that factor into account. In my view, that does favour exclusion of the evidence.
- [37] That brings me to the third step of the Grant test. The Crown argues that this factor does favour admitting the evidence into trial. It points out a number of factors that are highly relevant, including society's interest in a trial taking place on the merits in order to promote the interests of justice. In this case, we have real evidence. Drugs were seized and that does favour inclusion because the evidence is reliable.
- [38] It is relevant and important that that evidence is crucial to the Crown's case. I agree that the charges are serious. I also agree that one of the most concerning elements is that one of the drugs seized was fentanyl. I agree I can take judicial notice that in this province, the Provincial Health Officer, Dr. Bonnie Henry, declared some time ago a public health emergency with regard to opioids, of which fentanyl is one. I agree that the seizure of that drug, and the inability to have a trial on the merits about whether Mr. Sekhon was trafficking in fentanyl, is something that would tend to reduce the public confidence in the administration of justice.
- [39] Defence counsel fairly accepted that Crown's position on this point was in accordance with the law, in the sense that seizing real evidence including fentanyl are factors hard for his client to overcome. However, defence counsel also pointed out the amount of the drugs in general, (and I am not restricting this to fentanyl) was small. This was not a case where a large amount of drugs were seized in the realm of trafficking cases.
- [40] Crown correctly points out that fentanyl is particularly pernicious in that apparently even just a grain can be fatal. The problem with that submission is that apart from taking judicial notice of the opioid crisis which includes fentanyl, I do not have any evidence in front of me about the potency of the amount of fentanyl that was seized. While I accept that I can fairly assume that some formulations of fentanyl can be instantly fatal even with a very small amount, I do not have that evidence.
- [41] In my mind, overall, this factor is neutral.
- [42] Another factor that goes into this third step of Grant has to do with whether there is a pattern of behaviour. In my mind, I do find that on balance, this favours excluding the evidence. That is because of the interconnectedness of the two breaches in this case.

- [43] I am not making this decision on a cumulative consideration of the breaches, although I think that too would also favour exclusion. Rather, quite simply, I find that the administration of justice would be put into greater disrepute in the circumstances of this case if a reasonable person was properly appraised of what happened. Mr. Sekhon was effectively denied his right to immediately call his lawyer when he asserted that right immediately for the purpose, as I said, of having a strip search conducted. I appreciate that, subjectively, the police officers themselves had certain beliefs and thoughts about what was appropriate and lawful and, again, this is not a condemnation of any of the officers who testified in front of me.
- [44] The fact of the matter is that I found the grounds for the strip search were not compliant with Golden. However, more importantly, there was no good reason why Mr. Sekhon could not have been allowed to call his lawyer in that small room at the police station dedicated for that purpose room before they walked him down the hall to conduct a strip search.
- [45] As always in drug trafficking cases, there was a concern that he had an opportunity before being arrested to try to discard or conceal drugs on his body. However, as I said in my ruling yesterday, this was in the controlled environment of the Abbotsford Police Department, where there is a room dedicated for accused persons to call counsel. It has a window on the door. Accordingly, that particular risk was sufficiently low that it ought not to have been a factor in the police officers' mind. In my view, this strongly favours exclusion of the evidence in this case.
- [46] For all those reasons, I find that the evidence should be excluded because on balance its admission into evidence would cause the administration of justice to be brought into disrepute.
- [47] Because of that conclusion, it is not clear to me that I have to make any comments on the s. 490 application. I will comment that it was a technical breach. It represents a breach of s. 8 by the continued seizure and detention of particular items. There is a question in my mind about the nexus of that conduct and the seizure that took place in this particular case.
- [48] However, in terms of the conduct, I am satisfied the conduct here fell closer to the inadvertent end of the spectrum, and being less serious conduct. The officers' testimony demonstrated they were not clear about their authority to hold the items, although they believed they had that authority. That puts the conduct at the less serious end of the spectrum, favouring admission into evidence.
- [49] I did not really hear much evidence about the impact of this breach, although I can accept that the continued detention of a vehicle and a cellphone arising from the failure of police to be properly informed of the processes to allow for continued detention does represent a more than minimal impact on Mr. Sekhon's rights. However, in my mind, overall, on the third step in Grant, the facts do not favour excluding the evidence.
- [50] MS. GILL: Thank you, My Lady.

[51] MR. SIDHU: Thank you, My Lady.

[52] MS. GILL: The Crown is not calling any further evidence in this case.

[53] MR. SIDHU: Yes, the defence will not be calling any evidence.

[54] [SUBMISSIONS: The Crown confirmed it was not applying for a judicial stay]

[55] THE COURT: Mr. Sekhon is acquitted of all charges.

"Sharma J."

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