
CANADA / JUDGMENT

R. v. Shevaley

2018 BCSC 1608

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 1608 R. v. Shevaley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Shevaley,

2018 BCSC 1608

Date: 20180504

Docket: 26839

Registry: Vancouver

Regina

v.

Alexander Konstanovich Shevaley

Before: The Honourable Madam Justice Wedge

Oral Ruling on Voir Dire #2 Defence Application for

Exclusion of Evidence

Counsel for the Crown:

E.Z. Poll

P.M. Fullerton

Counsel for the Defence:

R.G. Orris, Q.C.

R.A. McConchie

Place and Date of Hearing:

Vancouver, B.C.

May 3, 2018

Place and Date of Judgment:

Vancouver, B.C.

May 4, 2018

- [1] THE COURT: Counsel, these are my reasons on this application. They are somewhat abbreviated, given the looming trial date and necessity for counsel to have time to prepare. If necessary, I will supplement them at a later date.
- [2] The applicant, Mr. Shevaley, applies to exclude evidence from the trial on the basis that it was obtained in violation of his rights under s. 8 of the Charter. Two issues have been placed in issue: (i) First, the search of the applicant's Samsung Note smartphone for Internet web browser history and Internet search history data conducted pursuant to a warrant to search and seize all data on the smartphone; and, (ii) Second, the interception of allegedly private communications between the applicant and his friend Nawid Sami while they were together in a police wagon after having been arrested and interrogated in relation to the death of the applicant's father. The applicant submits that the intercept was warrantless.
- [3] With respect to the first issue, the applicant submits that the information to obtain the search warrant for his phone did not disclose reasonable and probable grounds to believe that his phone's Internet web browser history or Internet search history data would afford evidence of the alleged offence. The applicant argues there was no evidentiary basis for this belief; rather, it appears to have been justified solely on the basis that the applicant had used the Internet in the past and the informant's subjective belief that the applicant "may have" performed Internet searches about his father's death. This, he argues, amounts to speculation or suspicion that falls short of the reasonable grounds standard.
- [4] With respect to the second issue, the applicant submits that the intercept of his private communications with Mr. Sami was conducted without prior judicial authorization and was, therefore, unreasonable. The police obtained a one-party consent authorization under s. 184.2 of the Criminal Code to intercept the communications between the suspects and several police officers who had consented to the intercept of the communications. The applicant says the authorization did not permit the interception of communications between himself and Mr. Sami to which no consenting officer was a party. This was the nature of the communication intercepted in the police wagon. As such, he argues the interception was outside the scope of the one-party consent authorization and is prima facie unreasonable. The applicant further says that the results of these unlawful searches should be excluded from the trial under s. 24(2) of the Charter.

- [5] With respect to the first issue, the applicant submits the phone search was highly intrusive, in terms of both its nature and scope. To sanction such a severe invasion of privacy on the basis of mere suspicion would be contrary to existing law. With respect to the second issue, the applicant says the police misconduct in relation to the unauthorized intercept was serious and the invasion of the applicant's privacy was significant. He submits that exclusion of the evidence would not eviscerate the Crown's case.
- [6] In response to the first issue, the Crown says the ITO discloses - and need only disclose - "reasonable grounds to believe that any computers they discover will contain the things they are looking for" citing *R. v. Vu*, 2013 SCC 60, at para. 48. This, says the Crown, citing *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 15, means, "anything relevant or rationally connected to the incident under investigation." Further, says the Crown, it is well established that "authorizing justices may draw reasonable inferences from the evidence in the ITO; the informant need not underline the obvious," citing *Vu* at para. 16.
- [7] With respect to the second issue, the Crown submits that the authorization issued by the judicial justice pursuant to s. 184.2 of the Code specifically contemplated the scenario which then unfolded. That is, it was contemplated that the undercover police officer would merely be present for a conversation between the target of the investigation and others, thus the authorization is valid. According to the Crown, the evidence on the voir dire establishes that the conversation between the accused and Mr. Sami was not a private one. The Crown points out, bearing in mind the applicant bears the onus here, that the accused was warned at the outset of his arrest on June 10, 2015, that his interactions while in custody would be recorded. For that reason, he did not have a reasonable expectation of privacy, and s. 8 of the Charter was not engaged. Thus, says the Crown, either the authorization was valid or it was unnecessary, because this was not a private communication. The Crown further submits that, even if the court finds a s. 8 Charter breach, the evidence is admissible under s. 24(2).
- [8] I will turn to the first issue, which concerns the accused's application to have the fruits of the search of his phone with respect to the Internet searches excluded on the basis that the ITO did not disclose reasonable grounds to extend the search of the iPhone beyond texts and emails. The narrow issue is whether the ITO discloses reasonable grounds to believe that the Internet searches within the phone would contain anything relevant to the investigation of the murder. Given the pressures of time, I will not set out all of the facts of the case, except to the extent they bear directly and essentially on the issue.
- [9] Mr. Shevaley is charged with the second degree murder of his father Vladimir Shevaley on March 1, 2015. The Crown's theory is that, during an argument with his father over his use of \$100,000 to purchase a Ferrari, Alexander applied pressure to his father's neck sufficient to asphyxiate him. Alex was 19 at the time; his father was 80. Alex told police investigating the death that he had visited his father on the eve of March 1 but that when he left, his father, albeit complaining of feeling unwell, was very much alive. Alex denied even touching his

father during the visit. Alex was the last known person to interact with his father that evening. As a result of his statements to police the night of Vladimir's death and some evidence found in the apartment suggesting Alexander had been attempting to access a safe kept locked by his father in his bedroom closet, as well as evidence that there was considerable discord in the father/son relationship as a result of the expenditure of the money on the Ferrari, police suspicions were heightened.

- [10] An autopsy of Vladimir was ordered and it revealed that his death was not the result of natural causes. Injuries to the neck disclosed in the autopsy tended to show that Vladimir had been strangled or somehow asphyxiated. As a result of police inquiries, it became evident that there was a lengthy history of discord between father and son. There were records of prior allegations of theft, fraud, and assault. There was recent evidence suggesting that Alex had taken money to purchase the Ferrari without his father's permission and that his father was demanding the return of the car. Alex told police he had gone to his father's the night of March 1 to give him the keys to the Ferrari and the ownership documentation. However, Alex acknowledged that when he left the apartment, he took the keys and documents with him.
- [11] The police successfully applied for the warrant to seize the phone and examine its contents. In the course of that examination, the police accessed Internet history data which included Internet searches performed, and webpages accessed, during a 53-day period between January 13 and March 6, 2015. The data revealed searches on topics related, among other things, to drugs, vehicles, Internet banking, and pornography. Significantly, from the investigator's perspective, was that the Internet history showed several searches related to the topic of choking. A user of Alex's phone conducted Google searches for "How to choke someone," and webpages entitled, "How to Choke a Guy Out in 10 Seconds," and "What exactly happens when you choke someone out?" All of these searches took place on January 20, 2015, some 40 days before Vladimir's death.
- [12] The law concerning the search of computers and other electronic devices is not in significant dispute here. The decision of Vu, cited earlier at para. 22, and R. v. Jones, 2011 ONCA 632, at paras. 49 to 50, established that for a search of an electronic device such as a cell phone to be reasonable, it must be no more intrusive than is reasonably necessary to achieve its objectives. Both the manner and scope of the search must be reasonable; a search warrant for items of evidence on devices cannot be interpreted as a licence to scour the devices indiscriminately.
- [13] Mr. Shevaley argued there was no suggestion in the evidence provided in the ITO that he had a reason to conduct Internet searches that could relate to the suspected murder of his father. For example, he argued there is no suggestion in the ITO that this was a planned or premeditated murder or one committed by unusual means. There remained, he argued, an evidentiary gap between the commission of the alleged offence and the use of the Internet on his phone. It was pure speculation that there could be anything in the Internet searches relevant to the offence. Further, he said there was no basis to believe that a search of the

phone's Internet history data from 40 days before Vladimir's death would afford evidence of the offence. At most, even if the ITO provided such evidence on which to base access to search history, the search should have been confined to the period from late February 2015, when the Ferrari was purchased, to March 6, 2015 when the phone was seized.

[14] As noted earlier, the Crown submits that the ITO as a whole sets out clear grounds allowing the authorizing justice to consider the grounds and draw reasonable inferences.

[15] The legal framework applying in the context of a challenge to the facial validity of a warrant to search is set out in *R. v. Liu*, 2014 BCCA 166, at para. 39, and reads as follows:

- The trial judge's role in reviewing the validity of a search warrant is to consider whether the material filed in support of the warrant . . . could support the issuance of the warrant.
- The trial judge should examine the information in its totality, not on a piece meal basis, in a "practical, non-technical, and common sense basis".
- The question is not whether the reviewing judge would have granted the order, but whether there was an objective basis on which the issuing justice could have done so.
- The appropriate standard is one of "reasonable probability" rather than "proof beyond a reasonable doubt" or "prima facie case". The phrase "reasonable belief" also approximates the requisite standard.
- Reasonable grounds may be said to exist at "the point at which credibly-based probability replaces suspicion".

[Emphasis in original.]

[16] I have reviewed the entirety of the lengthy ITO, as well as the helpful summary of relevant excerpts provided by counsel. The affiant recounts the evidence which suggested that Alex fraudulently obtained funds from his father's bank accounts through Internet banking in January and February of 2015, well before Vladimir's death. In addition, there were recent examples of illegal banking up to a few days before Vladimir's death connected to the purchase of the Ferrari. As a result, it was reasonable for the issuing justice to infer that this illegal banking occurred on an Internet connection device such as Alex's cell phone. There was also evidence that Alex had not been truthful about the timing of his meeting with his father, the timing of various calls he made after the visit, as well as where he went and what he did after the visit.

[17] There is also the evidence concerning the manner of the death of Vladimir. As attested to by the affiant in the ITO, interviews with Mr. Sami disclosed that Sami observed Vladimir to be healthy and drinking tea an hour or two before Alex told him of Vladimir's death. The ITO sets out the forensic evidence, highly suggestive of a choking death - that is, death by strangulation or other pressure to the neck. This evidence was treated by police as holdback evidence. It would be relevant to the investigation to determine whether the 19-year-old Alexander had accessed websites that gave instructions concerning death by choking. In my

respectful view, it is not a long walk between the forensic evidence and Internet searches by the accused concerning the manner of the death.

- [18] The timeframe, 40 days, is not unreasonable, in my view, given the ongoing discord between father and son and the evidence of the lengthy history of fraud and theft by the accused. The evidence obtained from the search is, as Crown submits, relevant to motive and intent. For that reason, it is my conclusion that the search of the phone was not in violation of s. 8 of the Charter and the evidence is admissible.
- [19] I turn, then, to the second issue, which is whether the authorization issued by the judicial justice pursuant to s. 184.2 was a valid authorization. Firstly, I accept that because the accused was a person in police custody who had been warned that his statements would be recorded while in custody, his expectation of privacy was considerably diminished. However, I conclude, on the evidence in this case, that it did not entirely obviate it. In this regard, I rely on the analysis of Justice Williams in *R. v. Pickton*, 2006 BCSC 383, at paras. 46 and 47, as well as the decision of Justice Pomerance in *R. v. Mohamud*, 2010 ONSC 6264, where she adopted the analysis in *Pickton*. Thus, in my view, s. 8 is engaged in this case.
- [20] I will turn, then, to the authorization itself. The affiant made clear in the ITO that the police intended to intercept communications between the accused and Sami in the presence of the consenting officer, who would be placed in the vicinity of those two men, in this instance, in the police van transporting the two men to the VPD cells. What was not made clear in the ITO was that the consenting officer would not actively participate in the communications. The operational plan, as it evolved, was that the consenting officer would pose as a highly inebriated homeless person slouched in the corner of the van. I am satisfied the police did not realize at the time that under s. 184.2, the consenting officer must be an intended recipient of the communications made by the accused and not simply present in the van as a person picked up by police for being inebriated. However, it is clear from the contents of the transcript of the intercept that neither the accused nor Sami intended the ostensibly intoxicated passenger to be a recipient of the communications, nor were they aware that this passenger was listening to their communications. They took him to be a drunk, likely passed out, who had no interest in their communications.
- [21] As I indicated to counsel earlier today, I am satisfied, on a reading of s. 184.2, as well as the analyses contained in the decisions of *R. v. Mohamud*, and *R. v. Carter*, 2011 ONSC 6752, that under s. 184.2 the authorization is limited to the interception of communications to which the consenting officer is a party. The question is whether Cst. Formby, posing undercover as a very intoxicated passenger in the van, was a "person intended by the originator to receive [the communication.]" As Justice Pomerance states in *Carter*, intention also implies knowledge that the consenting person in question was receiving the information. In this case, the accused clearly did not intend that Cst. Formby receive the information he was imparting to Sami, nor was he aware that Cst. Formby was a recipient.

- [22] Considering the police operation plan, it was by design that Cst. Formby would appear not to be interested in the discussion, and therein lies the problem. Again, I wish to be clear, there is no evidence to suggest the police were attempting to circumvent provisions of the Code requiring authorization other than that provided by s. 184.2. The law has, as yet, not directly and specifically addressed the scenario that unfolded here. Although the decisions of Carter and Mohamud are not binding on me, they are persuasive and I am satisfied that Justice Pomerance is correct in her interpretation of s. 184.2. Accordingly, I conclude that the intercept was warrantless.
- [23] The next question was whether Cst. Formby could, nevertheless, testify at trial about what he overheard in the van and whether, if so, he could use the transcript of the intercept in the course of his testimony. The question here, as I posed it to counsel this morning, is whether the evidence adduced from the officer about what he overheard was distinct from the intercept and the consequent Charter violation. I was concerned, as I expressed it to counsel, about the analysis of the Supreme Court of Canada in *R. v. Fliss*, [2002] 1 S.C.R. 535, and its application to the case at bar, as well as the comments of Justice Pomerance in *Mohamud*, cited earlier at para. 60. Fortunately for the court, counsel for the Crown and defence conferred on that issue in an attempt to resolve it to the court's satisfaction. In doing so, I must say counsel exhibited all the hallmarks of good counsel and responsible officers of the court.
- [24] Defence counsel advised that in her view Cst. Formby should be permitted to testify about the conversation he overheard because, on the facts, there was no principled basis for its exclusion. Defence counsel pointed first to the fact that Cst. Formby was not actively involved in the conversation. That was the problem with the intercept in the first place, under s. 184.2. But, as such, he did not elicit the statements from the accused. The accused spoke with Sami without any police involvement. Here, I assume counsel is referring to the caution by the Supreme Court of Canada in *R. v. Hebert*, [1990] 2 S.C.R. 151, and *R. v. Broyles*, [1991] 3 S.C.R. 595, that undercover police, or any state agent, must not elicit, in such circumstances, inculpatory statements of the accused. Second, said defence counsel, the court's conclusion that there was no bad faith or police misconduct of any kind favoured admission of Cst. Formby's evidence.
- [25] With respect to the manner in which Cst. Formby might use the transcripts of the intercept in his evidence at trial, counsel agreed that he could use it to truly refresh his memory but not to supplement his memory, thus being mindful of the decision of the Court in *Fliss* on this issue. Similarly, Sami, who is entitled to testify to the events in the van, could use the transcripts, but only, again, to refresh his memory and not to supplement it. I accept, as correct in law, counsel's agreements on those issues.
- [26] That concludes my ruling, and I would like to thank counsel for their helpful submissions and their assistance in resolving some of the issues with the Court.

The Honourable Madam Justice C.A. Wedge

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