
CANADA / JUDGMENT

R. v. Uy

2015 BCSC 2597

COURT

Supreme Court of British Columbia

DECIDED

9 October 2015

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2015 BCSC 2597 R. v. Uy

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Uy,

2015 BCSC 2597

Date: 20151009

Docket: 164510-2

Registry: Victoria

Regina

v.

Johnny Joshua Uy

Before: The Honourable Madam Justice J. A. Power

Oral Ruling on Voir Dire #1

Counsel for the Crown:

L. A. Kilgore and T. C. Johnson

Counsel for the Accused:

D. O. Berntsen

Place and Dates of Trial/Hearing:

Victoria, B.C.

October 5 - 9, 2015

Place and Date of Judgment:

Victoria, B.C.

October 9, 2015

INTRODUCTION

- [1] THE COURT: The accused, Johnny Joshua Uy, is charged on a two-count indictment with importing cocaine into Canada contrary to s. 6(1) of the Controlled Drugs and Substances Act and, Count 2, possession for the purpose of trafficking of cocaine contrary to s. 5(2) of the Controlled Drugs and Substances Act.
- [2] The drugs in question were two approximately one-kilogram bricks of cocaine which were vacuum-sealed. The drugs were seized from a backpack located in the vehicle with Washington licence plates that Mr. Uy was driving at the time of the arrest. Mr. Uy had, just prior to putting the vehicle in motion, been seen to place the backpack in the vehicle on the date of the arrest which was the 25th of December of 2014. This is a *voir dire* relating to the reasonable and probable grounds for Mr. Uy's arrest.
- [3] If the police did not have reasonable and probable grounds for the arrest, then it is common ground that the arrest would have breached Mr. Uy's s. 9 Charter rights and the resulting search of his vehicle incident to that arrest would be in breach of s. 8.
- [4] The defence contends that Mr. Uy was arrested on December 25, 2014, on suspicion as opposed to reasonable and probable grounds and that therefore, his warrantless arrest was unlawful. The Crown argues that two officers, Corporal LeBlanc who effected the arrest and Corporal Davey who directed the arrest, each subjectively had reasonable and probable grounds and that each officer's individual belief was objectively reasonable on the totality of the circumstances in this case.
- [5] The Crown and defence are agreed as to the legal standard that must be brought to the issue and indeed it is well known. Two requirements must be satisfied for an arrest to be lawfully made under s. 495(1) of the Criminal Code; that is, the arresting officer must subjectively have reasonable grounds on which to base the arrest and, number two, those grounds must be reasonable from an objective point of view; that is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed grounds for the arrest: *R. v. Storrey* (1990), 53 C.C.C. (3d) 316 (S.C.C.), at p. 324; *R. v. Jir* (2010) 264 C.C.C. (3d) 64 (B.C.C.A.), at para. 18; and indeed, there are many decisions that reference that standard. The standard is referred to interchangeably in the law as reasonable probability or credibility-based probability. It is established in the law that it is more than mere suspicion, but less than a *prima facie* case.
- [6] I am satisfied having heard the evidence here that the subjective element of the standard is not at issue in this *voir dire*. Both officers testified that they subjectively had reasonable and probable grounds and I accept their evidence. In my view, they were forthright in the

presentation of their evidence and did not attempt to buttress the limitations of their knowledge at the time of the arrest with information learned after the fact. For example, Corporal Davey did not expand on the knowledge he had of the running male with the bag, Mr. Uy. It was Corporal LeBlanc who had the greater knowledge in that area since he was the one who observed the male and arrested him. I am, as well, not troubled by the manner of delivery of the evidence by either officer and specifically that, out of court, Corporal LeBlanc prepared a list of factors that went into his decision. In my view, it does not detract from the weight of his evidence since his list of factors was based on information that he had available to him at the time of the arrest. The issue before me and the one that was argued in greater detail on this voir dire is whether the grounds relied on were objectively reasonable.

THE EVIDENCE

- [7] Turning now to a more detailed examination of the evidence, Corporal Davey and Corporal LeBlanc are experienced drug unit investigators who were members of the Federal Serious and Organized Crime, FSOC, Unit of the RCMP. They were involved in a larger or project-type investigation. Corporal Davey was the primary investigator or a team leader and Corporal LeBlanc was a team member who was assisting with surveillance the day of the arrest and it was he who actually effected the arrest. Since each officer had different roles in the investigation, each officer had somewhat different grounds for coming to his belief. It is my view that those differences are not substantive, but merely reflect the differing roles that each of them had in the investigation. I am also of the view that those differences are hallmarks of credibility respecting both officers.
- [8] As I have indicated, Corporal Davey was the primary investigator and he formed his grounds to arrest Mr. Uy based on his full background knowledge of the case combined with communications from Constable Miller who was another team member conducting surveillance that day. The information from Constable Miller was that a boat had approached close to shore and spun around and sped southbound. He also had information from Constable LeBlanc that an unknown male was leaving the beach area with a bag.
- [9] Corporal LeBlanc's grounds were based on his conversations with Corporal Davey and a formal briefing on the file which had occurred the day before December the 24th combined with his direct observations of the vessel as part of surveillance and his direct observations of Mr. Uy in the area where he was conducting that surveillance at Cattle Point. He, that is, Corporal LeBlanc, had the advantage of seeing directly the approaching vessel, the speed of the vessel heading away after its approach to shore, and the specific proximity of Mr. Uy when he emerged from the shore. Corporal LeBlanc also described the way that Mr. Uy was carrying the backpack which was by the top of the handle and he did observe Mr. Uy get into the car which, as I have indicated, had Washington plates.

- [10] I am persuaded based on the authority of *R. v. Le*, 2006 BCCA 463, at paras. 26 to 31, that it does not matter which officer actually made the decision to arrest if each officer had, in the totality of the information available to him, objectively reasonable and probable grounds for the arrest. In my view, the rapidly unfolding nature of the incident which occurred in this investigation is the type of incident referenced in *R. v. Le* and in *R. v. Debot*, [1989] 2 S.C.R. 1140.
- [11] Both officers testified on the voir dire and were cross-examined. Maps and photographs of the area of the arrest, Cattle Point, which is a park in the Municipality of Oak Bay, were introduced into evidence. During the course of the voir dire, I denied a defence application for a view of the area of the arrest since I concluded that a view would not assist me in my understanding of the evidence.
- [12] I will now, in reverse order to the order they were called on the voir dire, briefly summarize the evidence of each officer. In my summary, I have drawn from the Crown argument which was provided to me in submissions and have modified it where appropriate since I compared it to my notes on the evidence and found it to be accurate.

Corporal Davey

- [13] Corporal Davey had information from the U.S. Department of Homeland Security investigators regarding a suspicious vessel that had been checked by U.S. Fisheries officers on October the 9th of 2013. Corporal Davey testified that radar analysis by a Canadian authority showed the vessel leaving the area of Sequim, Washington, U.S.A., crossing the border to an area of Oak Bay and returning to Sequim, Washington. The individuals on the vessel were identified by U.S. authorities and were determined to be from California. They had rental vehicles and they had flown out of Sea-Tac Airport outside of Seattle.
- [14] Corporal Davey then received further information about a crossing that occurred on November the 15th of 2014. Again, this information came from the U.S. Department of Homeland Security. On that date, the information indicated that radar data again showed the same vessel going from Sequim, in particular, the John Wayne Marina, to the Oak Bay area in Canada. On that occasion, the vessel struck ground in Canadian waters at Mary Todd Island. The boat was towed ultimately by an American towing company. Initially a Canadian towing company and then an American towing company took it to U.S. Customs.
- [15] The individuals operating the vessel were identified by U.S. Customs as a Mr. Pang, who was the same individual from the previous crossing in October of 2013, and a Mr. Cam. Information available to Corporal Davey indicated that U.S. Customs noted that the individuals were fidgety when being examined by Customs, that a narcotics detection dog hit on a suitcase one of them had, but no drugs were found in the suitcase, that U.S. Customs obtained screen shots from Mr. Pang's iPhone showing step-by-step instructions on how to launch a boat, a reference to Oak Bay Marina at Willows Beach in Oak Bay, and a reference to a flight home from Sea-Tac Airport.

- [16] U.S. Customs and the tow operators reported to Corporal Davey that the individuals changed their stories. They said originally they were going to drop off the boat. Later, they said they were going for a joy ride. One of the individuals indicated that there was a third person involved associated to California. The Canadian tow operator observed that there were no life jackets in the boat; the navigation equipment still had the covers affixed; the operator of the vessel did not know how to operate it.
- [17] Further, Homeland Security investigation revealed that King, who was a third individual on land, had paid for hotel rooms in Sequim and that there was an additional charge of \$100 on check-out for smoking of marihuana in the room. It also revealed that the boat was purchased from Craigslist for \$12,000 in cash. There was also an indication that on purchase there was inconsistent explanations for the purchase of the boat. There was an indication that it was purchased for a dying friend and, later, it was said that it was a birthday present. In either event, the stories did not match. Corporal Davey was also advised by Homeland Security of additional intelligence that the people involved in the crossings were associated with a gang named the Vietnamese Boyz 2202 and that the gang worked in California and operated up and down I-5. Corporal Davey opened a file concerning these incidents on December the 5th of 2014.
- [18] He then received information on December the 8th of 2014 that the boat was being prepared and put into water and that one of the Asian males participating was believed to be Pang. Agent Sterrett notified Corporal Davey when the vessel had left John Wayne Marina in Sequim. Corporal Davey was able to put a small team of FSOC members together to observe the vessel as it approached in the area of Oak Bay as it had previously. The summary of the team observations on December the 8th included that the vessel was observed off Trial Island. It was travelling erratically going around Trial Island. It moved west into the McNeill Bay area and made 180-degree turn. In Corporal Davey's evidence, he indicated that it looked like it was lost. The vessel then proceeded back to the northeast. The vessel passed on the wrong side of a cardinal buoy and, that is, it passed closer to shore than it should have relative to that buoy. The boat went past the Royal Victoria Golf Course, north past the Oak Bay Marina, parallel to Willows Beach, and then ultimately toward Cattle Point.
- [19] Corporal Davey indicated that one of the males on the vessel made a hand gesture to the parking lot area of Cattle Point. Cattle Point is a municipal park where there are two boat launches. Immediately after that hand gesture, the vessel turned away in a southern direction and the vessel was observed with binoculars until it could be seen no further going south. Corporal Davey indicated that he took a couple of photographs of the vessel that day along with making personal observations.

- [20] Corporal Davey also indicated in his evidence that there was no radar data from December the 8th due to the weather conditions which included particularly choppy waves. He described the weather as just short of a small marine craft warning indicating that there were 20-knot winds. He described that boating in those conditions would be inconsistent with pleasure craft boating because of the high level of risk in those conditions.
- [21] He later learned from Homeland Security investigators that the vessel had run aground on Dungeness Spit in Washington State. Homeland Security surveilled the males after the boat was towed from the water and they were staying in a hotel. Homeland Security continued to monitor that vessel after December the 8th. They provided information to Corporal Davey that it was being repaired on December the 23rd of 2014 and that the boat mechanic was being paid double the normal rate to get the repair done as quickly as possible. On December the 24th, Homeland Security observed the boat being picked up and later launched at John Wayne Marina. They observed it circling in the water outside the marina which Constable Davey described in his evidence as possible testing of the boat. The boat was then taken back out of the water and the operators were observed fuelling the boat.
- [22] At no point in this narrative did the vessel report entry to Canada Customs even after the incident where it ran aground in Mary Todd Island.
- [23] On December the 25th at around 6:00 a.m., there was an update from Homeland Security. Corporal Davey was advised that a minivan met the crew of the boat and that the vessel was departing John Wayne Marina with no running lights. It was still dark at that time, 6:00 a.m. Corporal Davey then again set up a surveillance team for December 25th. He had provided a briefing to a group of officers including Corporal LeBlanc the day before December 24th in the event that such action on Christmas Day was necessary.
- [24] Corporal Davey summarized his knowledge of the surveillance up to that date. The vessel was again observed near the Trial Islands moving west in a similar pattern as on December the 8th. The vessel again proceeded into McNeill Bay before heading back east. It then again passed on the wrong side of the cardinal buoy around into Oak Bay. The vessel proceeded this time in the open usual channel and then approached the northern boat ramp at Cattle Point.
- [25] The team of officers which were stationed at various locations were conversing by radio as the vessel was being observed. Constable Miller radioed that the boat had come close to the shore, turned around, and increased speed towards the south. Corporal LeBlanc radioed that one male was observed on the beach heading away from the 24-foot Bayliner with a bag. Corporal Davey responded to that radio by telling Corporal LeBlanc to place that male under arrest.

Corporal LeBlanc

- [26] Corporal LeBlanc testified first on the voir dire. He testified that he joined FSOC on December the 9th of 2014. He had discussed the ongoing investigation with officers in the unit, in particular, Corporal Davey whom he shared an office with. He was formally briefed as part of the team of the unit on December the 24th of 2014 and therefore was aware of much of the prior investigation both from Homeland Security and the observations that had been made on December the 8th. The important aspects of his understanding of the investigation were that the boat had made the previous crossings from the U.S. to Canada on November the 15th of 2014 and December the 8th. He knew that on November the 15th, the boat had run aground on Mary Todd Island and that, on December the 8th, the vessel entered Canadian waters and then ran aground on returning to the U.S., that the operators appeared inexperienced, that the boat had made the crossing on December the 8th despite weather advisories of 20 to 25-knot winds inconsistent with a recreational trip. I pause at this point to note that both Corporal LeBlanc and Corporal Davey had some particular knowledge of recreational-type boating because each of them has some experience as a mariner.
- [27] Homeland Security in the U.S. reported the boat being prepared on December the 24th including being refuelled, that the individuals preparing the boat were staying at a hotel suggesting that they were not local to the area of Washington State, and that on December the 25th, Homeland Security reported that a minivan had met with the vessel occupants for a very brief period of time which occurred just as the boat was being launched. He was aware that the boat left the marina in the dark with no lights activated.
- [28] On December the 25th, Corporal LeBlanc was initially positioned in a spot he identified on Exhibit 1. He observed the boat move past the Trial Islands and follow the coast. From his observation point, he was able to observe it with the aid of binoculars, which he had with him, along with the naked eye. He observed that the males on the rear of the boat were looking towards the rear of the boat and the shore. This suggested to Corporal LeBlanc that the operators were looking for something on shore. Other officers maintained observation of the boat as it moved north and Corporal LeBlanc moved his position to Cattle Point. As he was watching the boat at Cattle Point, Corporal LeBlanc for the most part remained in his vehicle which was a Chevy Tahoe. He described his vehicle as "creeping along" as he observed the vessel. He was driving slowly watching the vessel when he watched it move closer into shore at Cattle Point.
- [29] He described that the boat was obscured by the contour of the land for a period of time which he described as three to five seconds. He then observed the boat move back out into the water where it proceeded south at a higher rate of speed. At around the same time, Corporal LeBlanc observed Mr. Uy emerge from behind the contour of the land in the same area where he had just lost sight of the boat. He described him in various ways, walking briskly, jogging, or scurrying from an area towards a break in the fence, and ultimately to a parked car in the parking lot. Corporal LeBlanc did say in his evidence that there was no one

else in that area but Mr. Uy. He described Mr. Uy carrying a backpack from the top, not over the shoulder, and he described that bag or backpack being placed into the car either on the front-passenger seat or on the floor. Corporal LeBlanc could not tell the precise positioning based on where he was viewing that action from. As I have indicated, Corporal LeBlanc noticed the car had Washington State licence plates.

- [30] Corporal Davey and Corporal LeBlanc both explained, as they went through these aspects of their observations and their knowledge, the specific importance that they attach to them as investigators. For example, the very nature of this boat trip on December the 25th of 2014 was described as suspicious given the nature of the holiday that day and the fact that there would be less law enforcement personnel working.

ANALYSIS

- [31] In assessing the grounds objectively that each officer had available to him, the test the court must apply is whether a reasonable person standing in his shoes would have believed that grounds existed to make the arrest. This test, it was described by Madam Justice Bennett at para. 24 of *R. v. Jir* (2010), 264 C.C.C. (3d) 64, referring to *R. v. Luong*, 2010 BCCA 158, also at para. 24:

The assessment of whether objective grounds exist undertaken by a trial judge is conducted by first looking at the observations of the officer (which the trial judge has found as facts) through the lens of someone who has the same experience, training, knowledge and skills as the officer who is making the observations, and then deciding if a reasonable person with the same lens would come to the same conclusion as the police officer. ...

- [32] In assessing the evidence available in that manner, I am considering the defence submissions on the *voir dire* which focused on two main themes relating to the evidence. The first theme was that the police did not have certain aspects of evidence which the defence characterized as missing pieces of evidence. Specifically, the defence argued that no one saw a bag or backpack loaded on the vessel when the van met the vessel in the early morning hours of Christmas Day, and that no one saw the bag or backpack offloaded from the vessel at Cattle Point because of that three to five-second gap in the Corporal LeBlanc's view.

- [33] I am persuaded, however, that my focus should be on what information the police did have as opposed to what they did not. As Justice Frankel succinctly stated in *R. v. Jir* at para. 29:

The flaw in this argument is that the question of whether Constable Fehr's grounds were objectively reasonable involves an assessment of the factual matrix that existed at the time the arrest decision was made. That other information, had it been available, might have strengthened or weakened those grounds is not a relevant consideration.

- [34] I conclude that the background information that Corporal Davey was aware of leading up to the arrest of Mr. Uy was, as the Crown argued, overwhelming. The only issue in Corporal Davey's mind was whether the possible illegal activity relating to the vessel was related to illegal activities such as human smuggling, guns, or drugs. I accept the evidence of Corporal Davey that the additional evidence of the male, Mr. Uy, running with a bag from the area that the vessel was seen approaching close to shore was sufficient to elevate his knowledge to reasonable grounds of importation of drugs.
- [35] The second theme pursued by the defence in argument was the number of possible innocent explanations relating to various aspects of the evidence. However, as noted in the case law, the focus should be on the totality of the circumstances as opposed to the possible innocent explanations for individual aspects of the evidence. So, for example, the fact that the vessel may have been pleasure-boating on Christmas Day, that the operators may have simply forgotten to turn on nighttime running lights in a well-lit marina, or that Mr. Uy might just have been an individual out for a brisk jog with a bag on Christmas Day are not facts I should consider in isolation. Rather, I should consider all of the information available to the investigators in the totality of the circumstances and as explained by them on the voir dire; *R. v. Jir* at para. 28, and *R. v. Shinkewski*, 2012 SKCA 63, at para. 13(d).
- [36] I have determined that Corporal Davey and Corporal LeBlanc each had reasonable and probable grounds which were objectively reasonable on all of the evidence. It follows that the arrest and the subsequent search incident to arrest of Mr. Uy was lawful. In the result, the defence application is dismissed.

"J. A. Power, J."

The Honourable Madam Justice J. A. Power

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/15/25/2015BCSC2597.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-uy-2015-bcsc-2597>

Prepared on 27 October 2026 · Esheria