

CANADA / JUDGMENT

R. v. Zacharias

2023 BCSC 270

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 270 R. v. Zacharias

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Zacharias,

2023 BCSC 270

Date: 20230116

Docket: 68317-2; 68317-4

Registry: Chilliwack

Rex

v.

George Don Zacharias

Before: The Honourable Mr. Justice Williams

Oral Ruling on Voir Dire

Re: Section 24(2)

Counsel for the Crown:

F. Lepine

Counsel for the Accused:

R. Dhanu

Place and Date of Trial/Hearing:

Abbotsford, B.C.

June 13, October 3, and

November 3, 2022

Place and Date of Judgment:

Abbotsford, B.C.

January 16, 2023

- [1] THE COURT: This is an oral ruling. I have issued two oral rulings in this matter to date and in the event there is a transcript prepared, I will reserve the right to make minor editorial corrections. I will not change the substance in any way.
- [2] George Don Zacharias is before this Court standing trial in respect of 10 allegations of offences under the Controlled Drugs and Substances Act, S.C. 1996, c.19 [CDSA] and the Criminal Code, R.S.C. 1985, c. C-46 [Code]. Specifically, he is charged with possession for the purpose of trafficking cocaine. This offence is alleged to have occurred at or near Abbotsford on July 11, 2017. The remaining nine counts all allege unlawful possession or storage of firearms; those offences are alleged to have occurred at Kelowna on July 12, 2017.
- [3] Mr. Zacharias has entered pleas of not guilty to each of the charges.
- [4] At the outset of trial, the Court embarked upon a multi-issue voir dire, essentially concerned with the admissibility of certain evidence. Evidence was heard and counsel have made submissions. To date, two oral rulings have been rendered dealing with allegations of Charter breaches and finding that certain breaches have been made out. I subsequently received the submissions of counsel with respect to the issue of consequences and remedies that should follow. This ruling deals with that.
- [5] The issues are best understood with a broad overview of the police investigation.
- [6] In early 2017, having received certain information from confidential sources who identified Mr. Zacharias as a cocaine and marihuana trafficker, a specialized section of the RCMP based in Kelowna, the Southeast District Combined Forces Special Enforcement Unit, began an investigation into the activities of Mr. Zacharias. General background information was collected and some surveillance was conducted. Ultimately, Mr. Zacharias was arrested and a quantity of cocaine was seized. As well, his residence was searched, resulting in the seizure of a number of firearms.
- [7] The specific investigational activities which are the subject of this voir dire are the following:

1. On March 28, 2014, Constable Orb swore an information to obtain a vehicle tracking warrant pursuant to s. 492.1(1) of the Code, and on that same date a judge of the Provincial Court of British Columbia in Kelowna issued the warrant, valid for 60 days. At the same time, a sealing order was issued by the court. Acting on the authority of the warrant, a tracking device was attached to a vehicle operated by Mr. Zacharias and that device was used to surveil him in the course of the investigation.
 2. On May 29, 2017, Corporal Traas filed another ITO seeking a further 60-day vehicle tracking order under the same Code provision. He also sought an order permitting the tracking of a telephone, that is a transmission data recorder warrant, for a similar period of 60 days pursuant to s. 492.1(2) of the Code. Both of these orders were issued by the same Provincial Court judge. The vehicle tracker remained in place and was monitored by the police in their investigation and, as well, measures were taken to track his cellphone as authorized by the warrant.
 3. On July 11, 2017, police were conducting a physical surveillance of Mr. Zacharias. They observed that he drove from Kelowna and went to an address in Vancouver. He was subsequently found to be making his way eastbound in the Fraser Valley, apparently travelling in the direction of Kelowna. At approximately 6:00 p.m., investigators directed uniformed personnel to conduct a vehicle stop and to arrest Mr. Zacharias. The vehicle was stopped and Mr. Zacharias, the sole occupant, was arrested without warrant for the offence of possession of cocaine for the purpose of trafficking. In the course of a subsequent search, a substantial quantity of cocaine, in the order of two kilograms, was found in Mr. Zacharias' vehicle and seized. He was then taken to the Abbotsford Police Department ("APD") headquarters and booked into cells.
 4. The following day, July 12, 2017, in the late afternoon, RCMP officers in Kelowna conducted a search of a residence associated to Mr. Zacharias located on McCarren Avenue in Kelowna. Their authorization for that search was a warrant issued by a judicial justice of the peace at the Justice Centre in Burnaby pursuant to s. 11 of the CDSA and s. 487.1 of the Code, acting on an ITO filed by telecommunication. Upon execution of the warrant, the police found a number of firearms which gave rise to the bulk of the charges before this court, that is Counts 2 through 10 on the indictment.
- [8] The issues for determination on the voir dire included:
1. Mr. Zacharias challenged the basis upon which the tracking warrant of March 28, 2017, was issued. He argued there was no proper basis for the warrant to be issued and alleged a breach of his rights under s. 8 of the Charter.
 2. Mr. Zacharias challenged the issuance of the tracking warrants, both for the vehicle and the telephone devices, issued on May 29, 2017, submitting that there was not a proper basis for the issuance of those warrants and claiming that the activities of the police in furtherance of those warrants was a breach of his rights under s. 8 of the Charter.

3. Mr. Zacharias alleged that the warrantless arrest that was effected on July 11, 2017 was without proper grounds and that it was a breach of his rights under s. 9 of the Charter. A search of Mr. Zacharias and his vehicle was conducted incidental to that arrest and, accordingly, the lawfulness of that search was also implicated in the analysis.
4. With respect to the search that was conducted at the McCarren Avenue residence in Kelowna on July 12th under the authority of the search warrant that had been issued, Mr. Zacharias alleged that there were not proper grounds for the issuance of that warrant, and accordingly it should be set aside, with the result that the search was unlawful and a breach of his rights under s. 8 of the Charter.

[9] In the first Charter ruling issued June 15, 2022, I found as follows:

- The first vehicle tracking warrant issued March 28, 2017, after editing, as detailed in my ruling, was upheld and Mr. Zacharias' application to strike it down was dismissed.
- The second vehicle tracking warrant issued May 29, 2017, after editing, as detailed in my ruling of June 15, was upheld and Mr. Zacharias' application to strike it down was dismissed.
- The telephone tracking warrant issued May 29, 2017, was not sustained on review, and I found that Mr. Zacharias has established that the issuance and the police acting upon that warrant constituted a breach of his rights under s. 8 of the Charter.

[10] Following additional submissions, I made further determinations with regard to the Charter issues. In an oral ruling issued October 3, 2022, I held as follows:

- The arrest of Mr. Zacharias without warrant was lawful and justified in accordance with s. 495 of the Code.
- The subsequent search of Mr. Zacharias' vehicle by police at the side of the road, which resulted in the finding of a significant quantity of cocaine, was lawful in that it was conducted within the ambit of the relevant common law authority. No Charter breach was made out.
- Two aspects of the interaction between the officers who conducted the stop and the subsequent arrest were alleged by Mr. Zacharias to be breaches of his Charter rights: the request that Constable Ermoleav made that he produce his driver's licence, and the fact that he was not provided with counsel access at the side of the road where he had been arrested. As for the former, the matter was advanced as being significant for two reasons: for one, Mr. Zacharias argued that the fact Constable Ermoleav made the inquiry he did suggested that he had doubts about the identity of the person he was about to arrest and should be taken as a factor undermining the grounds for the arrest without warrant. The second aspect of the submission was a contention that the inquiry, made as it was prior to the provision of s. 10 information, was a Charter breach. In my second ruling, I rejected the first leg of the argument. The lawfulness of the arrest was not tainted by the inquiry. As for the second point that is advanced by Mr. Zacharias, I agreed prior to the s. 24(2) submissions being made that I would entertain any argument that Mr. Zacharias saw fit to make on the matter.

· As for the fact that Mr. Zacharias was not provided with telephone access to counsel at the roadside and before being taken to the police station, in my second ruling I said this:

The evidence was that he did not have phone access at roadside, but rather was asked to hold off until arrival at the Abbotsford Police Department lockup. The reasons for wanting to hold off access until arrival at the police facility were explained by Constable Ermoleav - specifically with regard to security issues that would be occasioned by placing Mr. Zacharias alone in the police vehicle and the equipment that was in it.

The fact that the phone access could not be provided at roadside does not, in my view, support a finding of a Charter breach. The evidence disclosed that the logistics of providing the access at roadside were problematic and I accept that to be so. The evidence is also that the delay was modest and there is certainly no suggestion that there was any investigational activities such as questioning Mr. Zacharias done in that interval. Finally, as I understand, Mr. Zacharias indicated to the officers that he was prepared to wait. In making that observation, I accept that his preference was to have access at roadside, and so his agreement to hold off may be seen as to some degree an acquiescence to the inevitable - accepting second best. Nevertheless, accepting circumstances as they were, for the reasons I have explained, I find no Charter breach.

· After Mr. Zacharias had been taken to the APD's facility, he was placed in cells. Later in the evening, in anticipation of a judicial interim release and remand appearance before a justice, he requested an opportunity to consult with legal counsel and, in circumstances I will detail shortly, his side of the telephone conversation was electronically intercepted and recorded. Some considerable time later, a member of the APD listened to that intercepted communication. I found Mr. Zacharias had established that this constituted a breach of his Charter rights.

· With respect to the search of the residence in Kelowna that took place on July 12 under the authority of a search warrant, I made two related findings. The first was that a pre-search of the residence conducted by officers prior to and pending the anticipated issuance of a search warrant was not justified on the basis that there was a compelling security concern that would justify the activity under the limited common law police safety search power. The police conduct thus breached the s. 8 Charter rights of Mr. Zacharias. Further, as regards the search that was subsequently conducted under the authority of the warrant, I found that the contents of the ITO, once appropriate excisions were made, did not support the issuance of the warrant and I was unable to conclude that there was sufficient credible and reliable evidence to permit a justice of the peace to find reasonable and probable grounds to believe that an offence had been committed and that evidence of that offence would be found at the specified time and place. Accordingly, the search of the residence was not authorized by a valid warrant and the search was therefore unreasonable and a breach of Mr. Zacharias' Charter rights.

- [11] In addition to the issues and determinations that I have set out, Mr. Zacharias has advanced a number of specific claims respecting the police conduct in the course of the investigation. Two particular matters that I will address are inquiries that the police made with the office of Budget Car Rentals with regard to vehicle rentals that Mr. Zacharias made and a situation where a member of the investigational team initiated an electronic "ping" to determine the location of Mr. Zacharias' cellphone at a time that he was in the U.S.A.
- [12] For the purpose of this ruling, I am satisfied that each of those events was a breach of Mr. Zacharias' Charter rights.

Remedy

- [13] We are now at the stage of this litigation where the Court is required to determine what consequences should result from the Charter breaches that have been made out or events which Mr. Zacharias contends should be found to be violative of his Charter rights.
- [14] The operative provision of the Charter is s. 24(2). That provision is to be understood in the context of s. 24(1). Both subs (1) and (2) provide as follows:
- 24 (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
- (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.
- [15] While s. 24(1) allows for a range of remedies other than exclusion of evidence, as a practical matter, most claims seek the remedy of exclusion. In the present case, as I understand the submissions of Mr. Zacharias, in addition to seeking orders for exclusion of evidence, he also urges this Court to consider granting another type of remedy, a judicial stay of proceedings.
- [16] In adjudicating the Charter claims arising in this case, it falls to this Court to weigh and assess the circumstances and to determine an appropriate remedy which recognizes the totality of the circumstances.
- [17] In a big-picture sense, the following principles will inform and guide my evaluation of the claims and the determination of appropriate remedies.

- [18] In keeping with the plain wording of s. 24(2), the Court is obliged to evaluate whether the admission of evidence which was obtained in a manner that infringed a Charter right would bring the administration of justice into disrepute, having regard to the totality of the circumstances. The frame of analysis which is applied to make this determination has been developed in the jurisprudence and is well-settled. It has three components requiring the Court to consider three factors:
1. The seriousness of the Charter-infringing state conduct, including whether the evidence discloses a pattern of abuse or disregard for Charter rights. Such a consideration can exacerbate the seriousness of the breach. A pattern of breaches tends to support exclusion, in that courts ought to distance themselves from such behaviour;
 2. The impact of the breach upon the Charter-protected interests of the accused; and
 3. Society's interest in an adjudication of the case on the merits.
- [19] It is clear in the authorities that a causal connection between the obtaining of the evidence and the breach is not required. Trial courts are to take a broad and generous approach to the concept of "obtained in a manner"; the court must have in mind the overall purpose of s. 24(2) and the issue of whether admission of the evidence would bring the administration of justice into disrepute. The exclusionary rule reflects the proposition that routine admission of constitutionally-tainted evidence can have a long-term and deleterious effect on the repute of the administration of justice.
- [20] A consideration which can be a factor is the issue of good faith: whether the police were acting in good faith or their conduct was inadvertent or of a merely technical nature, or whether it was deliberate, wilful, or flagrant. Another somewhat related consideration is whether the violative conduct was motivated by urgency or necessity.
- [21] Good faith is not available to be found if a Charter violation is the product of a police officer's unreasonable error or ignorance as to scope of authority. The onus is on the Crown to demonstrate good faith. It is not for the defendant to demonstrate bad faith.
- [22] As a first point in conducting the s. 24(2) analysis, the court will take a broad view of the surrounding circumstances, looking particularly at whether the breach of Charter rights and the discovery of evidence are part of the same transaction or course of conduct. Connection may be temporal, contextual, causal, or some combination of these.
- [23] Finally, and I intend no disrespect to the advancement of claims of Charter violation, the court must, in my view, approach the assessment with an appropriate measure of balance and common sense. There are times when it seems that almost every interaction between an agent of the state and an accused person, and much of what the police have done, is alleged to be offside Charter compliance. Too often those claims are advanced with great fervour, contending that most everything is outrageous and egregious. In my most respectful view, while I acknowledge the duty of defence counsel to properly advance issues on behalf of an accused person, the approach to Charter litigation of which I have spoken can become

tiresome and run the risk of undermining the effectiveness of the claims being made.

[24] There should be absolutely no mistake, the Charter is a profoundly important part of Canadian law and has been immensely effective in giving life to a fuller recognition of our core values and providing an effective means of redress for violations, but the development of this area of the law is best served by an approach that is balanced and reasoned, and in the decisions I have made here, I have attempted to do that.

Discussion

[25] To bring an orderly approach to the task at hand, I propose to deal with the issues in four parts:

1. Investigational activities that preceded the arrest of Mr. Zacharias on July 11;
2. The arrest of Mr. Zacharias and the search of his vehicle;
3. Events that occurred on July 11, after Mr. Zacharias had been transported to the APD facility in Abbotsford; and
4. The search of Mr. Zacharias' residence in Kelowna on July 12.

[26] In fact, some portions of these reasons will deal with certain of the issues in a way that might seem somewhat cursory. As will become apparent, it is my view that there is one particular issue that is of special importance and impact in this litigation, and I will deal with that in greater detail than the others.

Pre-arrest Investigational Activities

Budget Car Rental Inquiries

[27] I would consider the seriousness of this conduct by agents of the state to be moderate. Officers sought to obtain records relating to Mr. Zacharias that, when examined carefully, are capable of disclosing information that was significantly personal and biographical. One factor that weighs in the analysis is the fact that at the time the police conducted these inquiries, there was no judicial determination as there now is that such investigational activities were improper or in breach of Charter rights. A decision establishing that proposition was not made until some considerable time later, in another case. Notwithstanding that fact, Mr. Zacharias argues that, essentially, the police ought to have known what they were doing was in fact violative of Charter rights. I am not especially persuaded by that submission. As I understand, the inquiry the police made with the rental agency was an apparently routine and accepted investigative measure. I am not minded to consider this to be a situation of police conduct that was done with clear knowledge that it was wrong, but where the officers forged ahead regardless.

- [28] The Court must consider the impact of the breach upon the Charter-protected interests of Mr. Zacharias. Although I do not know, chapter and verse, what information the police gleaned, I accept that the impact was at least moderate.
- [29] The third consideration is society's interest in an adjudication on the merits. In this case, the charge is serious and the finding of highly-incriminating evidence, two kilograms of cocaine, resulted from the investigation. Whether or not that evidence is to be admitted at trial is to be determined.
- [30] I am of the view that this breach standing alone in all the circumstances would not justify an order for exclusion. In taking that view, it is to my mind relevant that any reference to this information was excised from the ITO in the course of the Garofoli process. That is, there has been some degree of censure of the Charter-infringing conduct by refusing to permit it to be considered as a ground in support of the warrant being upheld. That is a factor to be weighed in the assessment.
- [31] That said, there is, of course, the issue of whether there are a series of breaches. In the present case, there are other breaches to be considered. While I would conclude that the appropriate disposition on this breach standing alone is that it would not by itself warrant an order for exclusion of the evidence, the fact it occurred is a consideration that will be available to take into account in an overall assessment.

Extraterritorial Ping

- [32] The next matter to be considered is what I have called the extraterritorial ping. The evidence discloses that while the police had their warrant to authorize tracking of Mr. Zacharias' cellphone, they became aware that he had left Canada for a vacation in the U.S.A. They made inquiries with another branch of government to effectively monitor that, and particularly to be advised when he would be returning. At one point, Constable Dyck was in the process of monitoring the status of the investigation. He testified that he believed Mr. Zacharias was out of the country at the time. Having heard nothing to the contrary, he conducted an electronic process to determine where the accused's telephone was located. His testimony was that he believed that if the defendant was out of the country, there would simply be no response to the electronic inquiry. He said that he did in fact get an electronic response which indicated Mr. Zacharias was in the U.S.A. The officer testified that he understood that there was to be no monitoring outside of Canada's borders, and he immediately concluded any electronic inquiry and, as I understand, reported what he perceived to be essentially a glitch in the system to some appropriate personnel in the RCMP.

- [33] In my view, the seriousness of this particular measure is modest. I accept the officer's evidence that he did not believe that he would be able to access the whereabouts of the telephone if it was outside of Canada, and what he did was more or less in the order and nature of a check. Additionally, the moment he realized the true state of affairs, he discontinued the electronic check. Accordingly, I am quite convinced that this must be regarded in terms of seriousness as relatively minimal and technical.
- [34] I do not believe there was any meaningful impact upon the Charter-protected interests of Mr. Zacharias. Furthermore, as regards the third component of the analysis, I do not accept that the fact that this event weighs in any significant way in favour of exclusion of the evidence. Society's interest in adjudication clearly prevails. As well, any nexus to the finding or obtaining of evidence is, on any assessment, however broad, slight.
- [35] In short, this is not something that would justify an order excluding the evidence of the cocaine, but it is eligible to be considered on the totality of breaches analysis as might be required.

The Telephone Tracking Warrant and Activities Taken Under Its Authority

- [36] In oral ruling #1, I found that the ITO which caused the Provincial Court judge to issue the warrant to track Mr. Zacharias' cellphone, once appropriate excisions had been made, did not support the issuance of the warrant and it was struck down. In the result, the surveillance activities of the police with respect to that device were in violation of Mr. Zacharias' Charter rights and a breach was made out.
- [37] Consideration of remedy must necessarily take into account the surveillance that was conducted of Mr. Zacharias, particularly on July 11, in that it involved the use of information from the phone tracking.
- [38] Dealing first with the issue of seriousness of the conduct of the state agents, there is no question but that this electronic surveillance was a significant intrusion into the personal privacy of Mr. Zacharias, in that it enabled the police to follow where he went and know his whereabouts. Given the ubiquitous nature of cellphone ownership and use, and the reliance which most everyone places upon these devices, tracking of this nature provides an almost complete means of permitting the state to keep track of a subject. Granted, the authority of the warrant did not permit the police to access any content of the telephone, and no such content was accessed, but the extent of the intrusion is significant and the seriousness of the breach is commensurately high.
- [39] In the s. 24(2) assessment it is, in my view, relevant that the police were acting pursuant to a warrant that they reasonably believed to be valid. In my consideration of whether the warrant could stand, I found no basis to conclude that there had been any misrepresentation in the setting out of grounds. I note that the ITO contained assertions that were, for legally-sound reasons, excised on the Garafoli challenge. I have no reason to find that the assertions that were excised were such that the affiant could have foreseen them as

problematic or improper, but advanced them nevertheless. There was no evidence of bad faith.

- [40] In respect of this matter, Mr. Zacharias argues the police "ought to have known that there was insufficient grounds for such a warrant to issue." Insofar as that implies police bad faith or improper conduct, I am unable to accept it. It is apparent to me that an experienced Provincial Court judge considered the grounds as they were set out to be sufficient. That, in my mind, is telling and very much cuts against this particular contention of the defence.
- [41] There is another matter for the Court to consider to the best extent it can: What input did the information from the phone tracker have in terms of the police activities of July 11 leading to the arrest? That informs the matter of the impact of the Charter-protected interests on Mr. Zacharias, as well as the nexus between the breach and the obtaining of the cocaine. The fact is that there were a number of police activities going on that day, all directed to surveilling Mr. Zacharias from the time he left his residence in Kelowna in the morning, through the trip to Vancouver, and his meeting with a third party on the west side of Vancouver, and then as he made his way east out of the city, culminating in the stop of his vehicle and his arrest around 6:00 p.m. that day.
- [42] As I say, I cannot discern the exact role the phone tracker played in that, other than to accept that it was a factor of some importance.
- [43] Turning to the second aspect of the Grant test, my assessment of this dimension of the breach is that the impact was moderate to serious in its magnitude.
- [44] As for society's interest in seeing this case adjudicated on its merits, that is substantial, as I have noted. That said, there is very much a balancing of interests to be done.
- [45] I do not intend to say more with respect to this particular issue, in that it is my view that the ultimate determination is, as I shall explain, dictated by another issue in the case.

The Arrest and Search of the Vehicle

- [46] The specific issue to be addressed, and that has not yet been ruled upon, is the matter of Constable Ermoleav having asked Mr. Zacharias, upon first stopping his vehicle, to produce his driver's licence. I am satisfied that this inquiry or request or demand does not constitute a breach of Mr. Zacharias' Charter rights. There was lawful authority for the officer to make that inquiry. It is glaringly apparent that nothing of any consequence was gleaned, and I took it quite explicitly from the evidence of the officer that he was going to carry through on the stop regardless. He did what he did as a precautionary measure, and I am loath to criticize him for that.

- [47] Similarly, I have concluded that the search of the vehicle at the roadside, which resulted in the finding of the two kilograms of cocaine, was conducted in accordance with common law authority to search incidental to an arrest. To be clear, I find no Charter breach in this conduct.
- [48] Finally, as I have stated before, I find the arrest was adequately warranted under the authority of s. 495 of the Code. In making that conclusion, I have had to take into account the somewhat unknowable issue of what contribution the tracking of Mr. Zacharias' cellphone had to the ability of the police to advance their investigation and effect the arrest as they did.
- [49] For reasons that will become apparent, I do not consider this to be an issue that the Court is required to resolve with certainty.

Events at APD

- [50] In my respectful view, what occurred at the APD lockup some hours after Mr. Zacharias' arrest is the critical issue in the matters that are before this Court to be decided.
- [51] The circumstances, as I described in Ruling #2, are that upon arriving at the APD cells, Mr. Zacharias was, as I understand, permitted telephone access to counsel. That was done in a timely way and he was afforded appropriate privacy for the call. No part of that is in dispute.
- [52] He was subsequently interviewed by investigators from the Kelowna group. The Crown does not seek to rely on anything arising from that interview.
- [53] Some considerable time later, long after the events of the arrest and search, and after Mr. Zacharias had been released to bail, the Kelowna investigators became aware of what I would described as a wholly unfortunate situation. The details of it are these: In the evening of July 11, Mr. Zacharias was being held in a cell at the APD facility. Because he was expecting to have a judicial interim release hearing a short while later by telephone, he wished to consult with counsel, also by telephone. A telephone was brought to him on a trolley and parked outside his cell, such that he was able to use it without leaving his cell. Presumably it was left there by the jail guard, who then left the area. Mr. Zacharias used that phone to contact a lawyer and discuss some aspect of his circumstances.
- [54] What was not known to him and, I am satisfied, was not known to the RCMP officers conducting the investigation of Mr. Zacharias, is that the APD had installed a microphone setup in the general lobby of the cellblock - that is, not in individual cells- that was capable of overhearing or intercepting and recording communications of persons who were in the cell facility. To be clear, there was no interception in the sense of both sides of the call being heard or recorded; only Mr. Zacharias' side of the conversation was heard and recorded.
- [55] It must be understood that when I make that distinction, I am not in any way minimizing the significance of what occurred. I am simply endeavouring to be accurate in my description.

- [56] The situation came to light sometime later, when the investigating RCMP group in Kelowna was assembling its package of information to provide to Crown counsel as part of the prosecution process. Evidently a request had been made of the APD to provide material related to the time Mr. Zacharias was in custody at the APD facility. When the material arrived, it is my understanding that a member of the secretarial staff began to collate the material and make it ready to forward to Crown. That person apparently began to transcribe a recording that was in the package and quite quickly recognized that the recording was of one side, that is Mr. Zacharias's side, of his telephone call to counsel.
- [57] To the credit of the transcriber, immediately after it was understood what this was, steps were taken to ensure that no one listened to it. Officers involved in the investigation were alerted. They, too, made sure that no one listened to the recording, and Crown counsel was made aware of the situation.
- [58] To the best of my knowledge, all proper measures were taken by the RCMP and Crown counsel to deal with this recording in an acceptable fashion.
- [59] Regrettably, that cannot be said as regards the APD.
- [60] On my understanding of the situation, the APD was advised of the problem. Seemingly at a corporate or organizational level, steps were taken to decommission the recording system forthwith and it is no longer in operation.
- [61] However, one senior member of the APD who had some managerial role in the operation of the lockup apparently came to be involved in the department's follow-up investigation and response. As part of his actions, he received a copy of the recording and, quite astoundingly, listened to it. To the best of my ability to discern, there was no logical reason - legal, administrative, or any other purpose - to have done so. In addition, it turns out the officer in question who testified in the course of the voir dire holds a bachelor's degree in law. He is "legally trained".
- [62] In my second ruling, I said this with respect to that:

This officer did what he did at a time when he should have well known this was an irregular situation. On the face of it, this was an unlawfully intercepted private communication of an individual in custody in cells, speaking to a lawyer, or at least one side of such a communication. In my view, that officer's actions were wrong and deserving of censure. As regards his motive, is it unclear to me. My best guess is that it was some amalgam of curiosity and bad judgment.

- [63] In Ruling #2, I articulated certain conclusions with respect to this matter, including that:

- This installation had been in place for some time before the events at bar;
- The impact upon Mr. Zacharias was not due to any intentional or ulterior design by any investigators to intercept his private communications. It was, as I understand, more likely an arrangement that had been poorly thought out and put in place by the APD;

· I am satisfied that there was no live monitoring of the communication between Mr. Zacharias and his counsel, and that the fact that it occurred only came to the attention of the Kelowna investigators sometime later in the course of preparing their disclosure. Quite properly, when the investigators realized the true state of affairs, they did not listen to the contents of the intercept and they immediately apprised Crown counsel. There is no suggestion that the prosecution in this case relies in any way upon contents of any intercepted conversation. In fact, I conclude the investigators have not ever listened to the recordings. I am satisfied the investigators in the matter at bar did not know of the recording equipment or that there had been any interception until long after the event; and

· This situation is very significantly aggravated by the fact that a member of the APD, even though he must undoubtedly have been aware of the significance of the situation, elected to listen to the recording.

[64] Much could and has been said as to the core sanctity of communications between an individual and his or her legal counsel, taking into account the fact that such communications are especially vital when the individual is facing serious charges, and so the need for legal advice is particularly acute. There is also the fact that the individual is at the mercy of the state, in the sense of being held in custody without a means to consult counsel other than as the jailer permits. In light of all these considerations, the importance of the right to consult with counsel in a private setting is manifest.

[65] It thus falls to this Court to determine an appropriate remedy for this breach.

[66] Let me first address the matter in the framework of the Grant analysis.

[67] The seriousness of the breach is great, given the importance of the right to counsel. In accordance with my discussion above, there are two levels upon which the breach must be measured. The first is that the interception occurred. That was wrong and must be recognized as such. As I have mentioned, I believe that the arrangement that was in place in the cellblock was likely the product of a badly conceived scheme to make the task of providing telephone counsel access to persons lodged in the cells an easier process for jail staff - it apparently alleviated the need to escort a prisoner to another location in the facility to make the call, and so demands on staff were less. I am prepared to accept that there was no specific intention to listen in on those calls, but that is scant comfort.

[68] Police agencies, given the types of activities that occur within their premises and given what should be expected with respect to their understanding of the legalities of ensuring protection of constitutional rights, should be held to a high standard. In fact, I believe what occurred was a product of carelessness bordering on ineptitude.

[69] That said, it was abjectly wrong and deserving of a clear message of censure.

[70] There are certain points I wish to note. The first is that the police agency which conducted the investigation of Mr. Zacharias and which has mounted this prosecution is a section of the RCMP based in Kelowna. Those officers are not part of the APD and, in fact, the APD is only

a factor in this case because of the somewhat happenstance fact that Mr. Zacharias was arrested in Abbotsford while travelling back to Kelowna. I make this point because it seems clear to me that the RCMP investigators had no idea that the intercept occurred and did not in any way knowingly cause it to occur or seek to benefit from it. They are essentially free of blame or fault in the matter.

- [71] However, for the purpose of this ruling, I do not accept that such distinctions can make a difference. The short answer is that Mr. Zacharias had been arrested by agents of the state and he was in their custody continuously until after the intercept occurred. To draw a distinction between the two police agencies in aid of diminishing the gravity of the situation would, in my view, do a grave disservice to the important role of courts in taking the rights of citizens, all citizens, seriously and protecting those rights properly.
- [72] Accordingly, the fact there were two agencies with different roles is not material.
- [73] Another point is that what occurred here was not an isolated or one-off thing. It seems evident that many other conversations of this type were also recorded in a similar way. That means the breach is of the type characterized as systemic, and that factor goes to enhance the seriousness of the matter.
- [74] Counsel for Mr. Zacharias has made submissions to the effect that it is self-evident that other persons must also have been impacted by this recording arrangement. I accept that to be almost certainly so, but I choose not to develop that aspect of the matter in this ruling. Beyond noting the systemic nature, I do not consider there to be any useful or necessary reason to delve into that, given the nature of this litigation.
- [75] Finally, Mr. Zacharias has urged this Court to consider staying these proceedings as a fit and appropriate remedy, one that adequately reflects the seriousness of the breach.
- [76] I have considered that submission and the relevant authorities. Ultimately, to my mind, it is necessary to recognize that a stay of proceedings is, as it has sometimes been described, the ultimate, the most draconian of remedies. It should be reserved for only the most serious of situations. The Court should consider the issue in light of a number of factors, including what alternate remedies are available.
- [77] On reflection, it is my view that a remedy short of a stay is sufficient to adequately address the breach in issue.
- [78] The issue of the impact of the breach on the Charter-protected rights of Mr. Zacharias is clear; it was of grave impact. I say that even recognizing that the investigation has quite assiduously refrained from using or accessing the record of his words.
- [79] Finally, the Court must look at the issue of society's interest in the adjudication of the case on its merits. Is the exclusion of the evidence, considered in that light, too great a price to pay for the conduct of the police?

- [80] Even though this event occurred post-arrest and after the finding of the cocaine, that is not dispositive. I consider that the matter of Mr. Zacharias being held in the cellblock and having to consult with counsel can properly be characterized as part of and temporally proximate to the arrest and finding of the cocaine. The fact that he was in custody and required to consult with counsel was a direct consequence of the finding of the drug.
- [81] The finding of the cocaine was not as a consequence of the state's conduct in regard to the intercept. There was no clear cause and effect relationship such that an order to exclude the drugs, as evidence in the prosecution against Mr. Zacharias, is easily seen as logical and warranted. Instead, it is possible to see such a disposition as a windfall for Mr. Zacharias. The effects of excluding the cocaine as evidence will, I expect, in the vernacular, gut the case for the prosecution, and that is not an especially palatable outcome. A reasonable member of the community could be forgiven for concluding that it is a much less than perfect example of justice that a person who is caught red-handed in possession of two kilograms of cocaine, a drug that cause enormous harm and destruction in our society, walks away without being held responsible.
- [82] There is validity to that perspective.
- [83] However, there are fundamental principles that we hold in high esteem and the Charter is a significant embodiment of those. It makes those values clear and it provides an effective means for them to be meaningfully upheld and enforced.
- [84] In this case, the interception and recording of the communications between individuals being held in custody of the state and legal counsel, a critical lifeline for such persons, is a breach of a fundamental right that cannot be accepted or excused. It demands a response that is meaningful and which makes clear that courts will not countenance state conduct that offends those rights.
- [85] That breach, standing alone, requires a clear and definitive response. To my mind, there can be no other plausible or reasonable result but that the drug exhibit must be excluded as evidence available to the Crown in this prosecution and I so order.
- [86] In light of this ruling, there is no need to consider the cumulative effect of other Charter breaches that have been found and discussed in this ruling. I would simply observe that they are also capable of providing some support for this outcome.

Search of the Kelowna Residence

- [87] The matter of the residential search in Kelowna was addressed in my second ruling. Essentially, I have found that the pre-search was not authorized and concluded that it constituted a breach of the privacy rights of Mr. Zacharias. Additionally, I concluded that the ITO did not adequately support the issuance of the search warrant, with the result that the warrant was struck down. Accordingly, the search of that residence was warrantless and, I find, unreasonable.

- [88] It seems to me that the decision I have reached with respect to the admissibility of the drug exhibit seized July 11, that it must be excluded as evidence, also works to undermine the defensibility of the residence search, in that the police having found the cocaine on the prior day was a factor which informed their grounds to obtain a search warrant. The order for exclusion would thus appear to be another element in a series of considerations which militate against a search of the dwelling house being found lawful or reasonable.
- [89] In terms of the criteria to be applied in assessing the remedy which should follow, I will begin with the observation that a warrantless search of a dwelling house is very serious. Although the police may have had reasons to believe that they were acting under the authority of a properly-issued and valid search warrant, they were not. Accordingly, I must maintain my conclusion that the breach was a serious one.
- [90] As regards the second criterion, the impact of the breach upon Mr. Zacharias' Charter-protected interests, a thorough and intrusive search of his dwelling house is self-evident. It is high.
- [91] To be clear, I find that both the first and second elements of the Grant test are quite decisively made out in favour of the accused and, that being so, I cannot conclude that the third factor, society's interest in an adjudication on the merits, can prevail.
- [92] In the circumstances, it is my conclusion that the fruits of the search of the residence must be excluded.

Conclusion

- [93] For the reasons set out herein, the cocaine seized in the vehicle search of July 11, 2017, is ordered to be excluded as evidence in the trial of Mr. Zacharias. Similarly, the items seized in the search of his residence in Kelowna on July 12, 2017, are ordered to be excluded as evidence in the trial.
- [94] CNSL F. LEPINE: Thank you very much, Mr. Justice. If we could please move onto the trial. The Crown will call no evidence and invite the Court to acquit Mr. Zacharias on all counts.
- [95] THE COURT: Thank you. Sir?
- [96] CNSL R. DHANU: Yes, I invite the Court to acquit.
- [97] THE COURT: Very well. In the circumstances, all of the charges will stand dismissed.
- [98] CNSL F. LEPINE: Thank you. Thank you, Mr. Justice.
- [99] CNSL R. DHANU: Thank you, My Lord.
- [100] THE COURT: Thank you, counsel.

"Williams J."

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