Case Name:

R. v. Luu

Between
Regina, and
Uyen Bao Luu and Sarilynn Meiyung Chan

[2002] B.C.J. No. 472

2002 BCPC 67

Burnaby Registry No. 76619

British Columbia Provincial Court
Burnaby, British Columbia

Alexander Prov. Ct. J.

Heard: December 4, 2001.
Oral judgment: February 5, 2002.

(32 paras.)

Civil rights -- Property -- Search warrants -- Standard for authorization -- Search and seizure -- Warrantless search and seizure, what constitutes -- Canadian Charter of Rights and Freedoms -- Denial of rights -- Remedies, exclusion of evidence -- Interpretation, particular words and phrases -- Bring the administration of justice into disrepute.

Voir dire to determine the admissibility of evidence obtained pursuant to a search warrant. A peace officer received an anonymous tip regarding a possible marijuana grow operation at a residence. He attended the residence five times over the course of four weeks and made various observations which he included in an information to obtain a search warrant. He said that he noticed a strong odour of growing marijuana at the front of the house, and on the basis of the wind direction, concluded that the house was the only possible source of the odour. He failed to mention that on the four other attendances he did not notice any odour. He also failed to mention that his ability to observe the house was limited by no back lane access, that his view of the back was further obscured by trees and shrubs, and that he did not go on to any of the surrounding properties to confirm the source of the odour. A search warrant was issued. The accused Luu and Chan were found inside, and both were charged with unlawful production of cannabis as well as possession for the purpose of trafficking. They alleged an infringement of their right to be free from unreasonable search under the Canadian Charter of Rights and Freedoms.

HELD: The evidence was excluded. It was not reasonable for the peace officer to conclude that the subject residence was the only possible source for the marijuana odour. As such, the conclusion was excised from the information to obtain, along with various other errors and omissions. The result was that there was an insufficient basis on which to

issue a search warrant. The police actions were not motivated by any urgency or by the necessity to prevent the loss or destruction of evidence. There was a deliberate entry into a personal residence on spurious grounds, which was a serious breach of the accused's right to be free from unreasonable search. The inclusion of the evidence would have brought the administration of justice into disrepute.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, ss. 8, 24(2).

Controlled Drugs and Substances Act, ss. 5(2), 7(1).

Counsel:

C. Osborn, for the Crown.
J. Solomon, for the defendant.

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1 **ALEXANDER PROV. CT. J.** (orally):-- The accused stand charged on two counts: that on or about the 12th day of January, at or near the City of Burnaby, in the Province of British Columbia, that they did unlawfully produce a controlled substance, to wit: Cannabis (marihuana), contrary to s. 7(1) of the Controlled Drugs and Substances Act; and on Count 2, on the same date, at the same location, that they did unlawfully possess a controlled substance, to wit: Cannabis (marihuana), for the purpose of trafficking, contrary to s. 5(2) of the Controlled Drugs and Substances Act.

2 At about 8:00 p.m. on the evening of January 12th, 2001, several members of the RCMP, acting on the authority of a search warrant issued earlier that day, executed a search warrant at a home located at 8496 16th Avenue, Burnaby, British Columbia. The two accused were found inside the residence at the time the warrant was executed. The police also found 236 marihuana plants and related paraphernalia.

3 A voir dire was declared at the outset of the trial to determine whether the search constituted a breach of the accuseds' rights to be secure from unreasonable search and seizure, as guaranteed by s. 8 of the Charter. If yes, whether the evidence obtained should be excluded pursuant to s. 24(2) of the Charter.

4 The prosecution has called viva voce evidence from one witness, the affiant peace officer. I have also heard submissions, and received written arguments from both the prosecution and the defence.

5 Counsel for the accused submits that there are three issues to be addressed. 1) Does the Information to Obtain contain sufficient allegations of fact upon which the J.P. could have issued the warrant, taking into consideration the evidence on review? 2) If the warrant is quashed, is the search, nonetheless, reasonable? 3) If the search is unreasonable and in violation of s. 8 of the Charter, should the evidence obtained as a result of that search be excluded pursuant to s. 24(2) of the Charter?

6 There must be reasonable and probable grounds to issue a search warrant. See R. v. Sanchez (1994), 93 C.C.C. (3d) 357. It is not the function of the court on review to substitute its opinion as to whether the warrant should have been issued in the first place. The Supreme Court of Canada, in R. v. Garofoli [1990] 2 S.C.R. 1421, set out the test for review at page 1452, and I quote:

> The reviewing judge does not substitute his or her view for that of the authorizing judge. In other words, if on the record it is amplified on review that there were reasonable grounds, the reviewing judge should not interfere. The significance of fraud, non-disclosure, misleading

> evidence and new evidence is to determine whether there continues to be any basis for the decision of the authorizing judge.

7 The evidence discloses that the affiant peace officer received an anonymous Crime Stoppers tip about a possible marihuana grow operation at the subject residence. The police officer then undertook an investigation. He attended at the residence five times between December 16th, 2000, and January 11th, 2001. He made various observations and prepared and swore an Information to Obtain on January 11th, 2001. It provides the following information, and I quote from the Information to Obtain:

> On the 4th of December, 2000, information was received by the Burnaby RCMP from an anonymous tip that the residence located at 8496 16th Avenue has a marihuana grow operation located in the basement. On January 11th, 2001, the peace officer attended and confirmed that 8496 16th Avenue, Burnaby, British Columbia, did in fact exist. The peace officer made note that the lower windows in the basement were blacked out with no light showing through the blinds; this observation made by the police officer on five previous attendances to this address. The police officer also smelled a strong odour of growing marihuana directly in front of the house at 8496 16th Avenue, Burnaby, British Columbia. The police officer determined that the given location of the house on the corner and, with the given direction of the wind, that the odour of growing marihuana could only be coming from that residence. The police officer has experience with 25 marihuana grow operations. The anonymous tip of the home containing a marihuana grow, the darkened windows in the basement, and the detection of odour of growing marihuana coming from the home, are all consistent with a home that is currently growing marihuana. The police officer verily believes that the information contained herein to be true and correct.

8 The peace officer gave evidence about the observations he had made leading up to his swearing of the Information to Obtain. He said he had been at the premises on December 16th, 19th, and 23rd, 2000, and on January 4th and 11th, 2001. Those dates were not set out in the Information to Obtain.

9 On December 16th, when he attended at the residence at about 3:00 p.m., he noticed that the basement windows were covered and had bars. He said there was no one home. He also stated that the residence was located on a corner and there was no back lane access. The peace officer was unable to walk completely around the house. He also noted a garage door on the north side of the house and heavy black cables outside the front of the house leading to the garage. He testified there were no tracks in the snow.

10 On December 19th, the peace officer noted that there were no vehicles at the residence, that the lights were on in the living room, in the right-front bedroom, and in the rear of the residence. He testified that there were no lights on in the basement.

11 On December 23rd and January 4th, the peace officer confirmed that his observations were the same as those of December 19th, except that there was now a dog at the residence.

12 On January 11th, the peace officer observed lights on in the residence and a vehicle with a licence plate number HXJ 207, which he confirmed was registered to the accused Luu. The peace officer said he observed no condensation on the windows. He did notice a wind coming from behind the residence and the odour of growing marihuana as he stood near a lamppost in front of the house.

13 None of these observations is particularly remarkable, either independently or together, save and except perhaps the odour of marihuana near the front of the house. The evidence as amplified is troubling, however, when considered together with the facts alleged in the Information to Obtain. There were a number of material facts that the peace officer did not disclose to the J.P.: that he did not observe any condensation on the windows on the five occasions that he had attended at the residence; that his ability to observe the residence was limited because of lack of back-lane access; that

his view of the rear yard and rear basement windows was obscured because of trees and shrubs and the lack of back-lane access; that his ability to isolate odours in the surrounding area was made more difficult for the same reason; and that there was another house immediately behind the suspect property and that he did not go on any of the surrounding properties to confirm the source of the odour, and that he did not notice any odour of marihuana on his four previous visits to the residence.

14 It is important to bear in mind that an application for a search warrant is made ex parte. The British Columbia Court of Appeal in R. v. Donaldson (1990), 58 C.C.C. (3d) 294 held that, and I quote:

> It is thus essential that the police not deceive the Justice [of the peace] as to the basis on which the search warrants are being sought.

15 It is an established principle that deception or non-disclosure does not necessarily lead to the quashing of a search warrant. See R. v. Monroe (1997), 8 C.R. (5th) 324. Rather, the review in court must, in such a case, carefully scrutinize the circumstances and determine, after excising any offending data from the affidavit, whether there is still a sufficient basis to support the issuance of a search warrant. I refer to R. v. Garofoli again for that proposition.

16 In assessing the evidence of the affiant, rarely have I seen a peace officer so ill prepared to testify. The peace officer testified early on in the proceedings that he had no independent recollection of the matters in question. He said he was relying on his notes and the continuation report. His evidence as to how this matter came to his attention in the first place was not consistent. He initially testified that the alleged grow operation came to his attention through a BC Hydro tip. He then said he had confused this file with another, and that he in fact initiated the investigation based on a CrimeStoppers tip.

17 The peace officer testified that he did not keep a copy of that CrimeStoppers tip. He said it was kept in the master file. After standing down briefly, the peace officer returned to the stand and testified that he had in fact kept a copy of the tip for his own file.

18 It is one thing to be honestly confused, but the peace officer left the court with the impression that he had not even taken the time to glance at his notes before giving evidence. Further, the peace officer's evidence as to whether the garage outside the residence was north or east of the house was inconsistent with his continuation report and with the photographic evidence filed by the prosecution. His assertion in cross-examination that he was not confused about directions is simply not believable in light of his earlier admission that he had no independent recollection of these matters.

19 I do not accept his explanation that his prior written reference to the garage being on the east was a grammatical error. I find the recollection of the peace officer to be unreliable, and this is not a finding that I make lightly.

20 I find that the Information to Obtain itself is artfully drafted to support the issuance of a search warrant on the barest of substantive observation. The peace officer's observations about window coverings and bars are overstated and inaccurate. He conceded, in cross-examination, that the windows were not in fact blacked out, they were actually covered with conventional curtains or blinds. The reference to blacked-out windows should be excised in the Information to Obtain.

21 The physical difficulties in observing the property due to its location and lack of lane access, the existence of another home immediately backing the subject residence, and the consequent potential difficulties in isolating any odour were not disclosed to the J.P. More importantly, the peace officer did not disclose that on four prior attendances at the property he had not noticed any odour of marihuana.

22 The statement that this peace officer had been involved in 25 prior grow-operation investigations is, in itself, without further context and information, meaningless. It was likely included in the Information to Obtain to suggest a particular level of experience or expertise which is not supported by anything beyond that bald assertion.

23 Though there may be cases where a strong odour of growing marihuana is a sufficient basis for a search warrant, this is not one of those cases. On the evidence before me, I find that the peace officer was not in a position to isolate the odour of growing marihuana to the subject residence. He testified that there was a wind from behind the subject property on the one and only day he noticed a strong odour. There was also another house directly abutting the suspected residence. The peace officer did not go to the rear of the suspected residence to rule out the neighbouring property as a source of the odour. He did not take steps to isolate the source of the odour. In the circumstances, the peace officer's conclusion that the odour of growing marihuana could only emanate from the subject residence is not a reasonable conclusion and should be excised from the Information to Obtain.

24 If one excises the above allegations from the Information to Obtain, one is left with very little. I find that, taking into consideration the evidence on review and amplification, there is insufficient basis upon which the J.P. could have issued a search warrant for the subject residence. I find that the resulting search was a warrantless search. There were no exigent circumstances. The prosecution has not attempted to argue the reasonableness of the search. Its only submission is that the search was conducted reasonably. That does not change the fact that the search was unreasonable and in violation of s. 8 of the Charter.

25 The prosecution submits that even if the warrant is quashed and the search is found to be in breach of s. 8 of the Charter, that the evidence, marihuana plants and related items, is non-conscriptive and, relying on R. v. Stillman (1977), 113 C.C.C. (3d) 321, S.C.C., that the evidence obtained as a result of that search should not be excluded.

26 In R. v. Stillman, the Supreme Court of Canada set out the following factors that the court must consider on an application to exclude evidence pursuant to s. 24(2) of the Charter. These include:

1) factors affecting the fairness of the trial process;
2) the seriousness of the violation;
3) the possibility the administration of justice could be brought into disrepute by excluding evidence, even though it was obtained in violation of the Charter.

27 There is little doubt that the evidence obtained as a result of the search was real non-conscriptive evidence which existed independent of any Charter breach. As my brother Judge Crabtree found in R. v. Degroot, an unreported decision of the Provincial Court of British Columbia, June 14th, 2001, Port Coquitlam Registry:

> The fact that it is non-conscriptive weighs in favour of its admission, in that it would not adversely affect the fairness of the trial process. Therefore, the question of whether the evidence ought to be excluded is determined on the basis of the second and third factors in Stillman.

28 In considering the seriousness of the breach, I take into account the relatively insignificant, inaccurate and overstated observations of the peace officer in support of the application for the search warrant. The resulting breach was beyond technical or inadvertent. It was a deliberate entry into a personal residence on the spurious grounds. Though I am unable to conclude on the evidence before me that the peace officer acted in bad faith, his actions are consistent with an attempted shortcut to a more thorough investigation. There is no evidence to suggest that the police actions were motivated by any urgency or the necessity to prevent the loss or destruction of any evidence.

29 I find that the breach in this case is a serious one. The entry into a private residence is obtrusive in that it concerns premises associated with a high degree of privacy. See R. v. Krammer [2001] B.C.J. No. 2689 (B.C.S.C.) September 21, 2001, a decision of the Honourable Mr. Justice McEwan. Before excluding evidence, however, another factor the court must consider is the seriousness of the offence alleged. Cultivation of marihuana is a very serious offence, punishable by seven years imprisonment. Possession for the purpose of trafficking pursuant to s. 5(2) of the Controlled Drugs and Substances Act is punishable by life imprisonment. The court must also consider the exclusion of evidence could result in an absence of evidence, leading to an acquittal. That being the case, I adopt the reasoning set out in the British Columbia Court of Appeal decision in R. v. Dellapenna, [1995] B.C.J. No. 1526, a 1995 decision of that court:

> If we are concerned here with the respect in which law-abiding citizens hold the administration of justice then, relying upon my own observations, I am of the opinion that there are at least two things that are occasionally done by the few peace officers who are not upright which the law-abiding citizen thoroughly disapproves of: one is physically mistreating persons in custody and the other is not telling the truth upon oath, whether from dishonesty or gross carelessness. If I am right in that observation, then to admit this evidence would bring the administration of justice into disrepute among those who know the facts.

30 The evidence sought to be excluded is critical to the prosecution's case. That evidence is indicative of a serious criminal activity at the premises where the search was conducted. The evidence also discloses that the search was not undertaken on reasonable and probable grounds, but on the barest suspicion initiated by a tip of unknown reliability. Further investigation may have yielded more concrete grounds for the peace officer's suspicions, and hence a proper basis for a warrant. However, the evidence as presented falls short of that threshold. There is no recognized principle in Canadian law that the end justifies the means.

31 In R. v. Krammer (supra), the court found, at paragraph 29, and I quote:

> Weighing the harm to the administration of justice of exclusion, against the harm attendant upon admitting the evidence, I think a properly informed and right thinking member of the community would appreciate that despite the accuracy of the suspicion in this case, the state of the police information at the time the search was conducted did not rise to the threshold required in our system of justice. I think that a reasonable person would appreciate the need for vigilance in the protection of the principle at stake, and would recognize that this particular Charter breach occurred in a context where urgency and necessity were not factors: that is, this is not an arm-chair exercise in second-guessing an exigent decision, but a question of how much compromise is tolerable in a particular set of circumstances.

32 That reasoning is equally applicable to the case at bar. The evidence obtained as a result of the warrantless search of January 12th, 2001, is therefore excluded. For the reasons set out above, I find that its inclusion in the circumstances of this case would bring the administration of justice into disrepute.

ALEXANDER PROV. CT. J.

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