COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Vi,*
2010 BCCA 496

Date: 20101029
Docket: CA037734

Between:

Regina

Respondent

And

**Gia Hung Vi (also known as
Giahung Vi and Jia Xing Wei)**

Appellant

Before: The Honourable Mr. Justice Donald
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Groberman

On appeal from: Provincial Court of British Columbia, December 1, 2009
(*R. v. Vi*, Courtenay Docket 33808)

Oral Reasons for Judgment

Counsel for the Appellant:	J.I. Solomon
Counsel for the Respondent:	J. Hartney
Place and Date of Hearing:	Vancouver, British Columbia October 29, 2010
Place and Date of Judgment:	Vancouver, British Columbia October 29, 2010

[1] **DONALD J.A.**: Gia Hung Vi appeals from his convictions for producing marihuana and possessing it for the purposes of trafficking, recorded on 1 December 2009 at the Provincial Court in Courtenay.

[2] He was earlier convicted of the same offences on 8 January 2008, but his appeal was successful (2008 BCCA 481) and he was tried again.

[3] The case for the Crown was the evidence of a grow-op obtained in the search of a home in Courtenay under a warrant. The defence was an attack on the validity of the warrant.

[4] Counsel for the appellant sought leave to cross-examine the police officer who swore the information to obtain the warrant. The application was submitted in writing. It listed six areas for cross-examination in some detail and set out the argument in support.

[5] The issue on appeal is whether the trial judge erred in law in dismissing the application. The reasons for the ruling of 30 November 2009 are brief and I quote them in full:

> [1] THE COURT: This is a ruling on the application to cross-examine the deponent on the Information to Obtain in this case.
>
> [2] The basis of this application is that it would assist the court in determining whether there was a foundation for the issuance of the search warrant by the judicial justice of the peace.
>
> [3] To permit cross-examination, I must be satisfied that it is necessary to enable a defendant to make full answer and defence. Defence counsel argued that his cross-examination would likely disclose that there was a good deal of information known to the informant that he did not disclose in the Information to Obtain.
>
> [4] I have no doubt that that is the case, but it is not incumbent on an informant to put down everything he found or did not find, or pursued or did not pursue, in the course of his investigation. He need only provide facts which in total will support the issuance of the warrant, and the issuing authority (here the judicial justice of the peace) is entitled to rely on the accuracy of those facts.
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> [5] There is nothing in defence counsel's argument to indicate that he has reason to believe that the informant, an RCMP officer with a total of 25 years of policing as of the date of the Information to Obtain, including the

> investigation of some 20 marihuana grow operations, will abandon or recant his averments in the Information to Obtain.
>
> [6] I am assisted in this view by the words of the Court of Appeal of British Columbia in the *Queen v. Readhead* (or Reedhead [phonetic] depending on how it is pronounced), [2008 BCCA 193]. At [para. 10], these words appear:
>
> > The justice of the peace was not given the basis or platform for a neutral, detached, reasoned balancing of the competing interests involved. But once it is accepted what was not disclosed was neutral, in the sense it did not negate the existence of a grow operation, any concern there might be in this regard must fall away.
>
> [7] The application to cross-examine the deponent is therefore denied.

[6] In my respectful opinion, the judge used the wrong test. If it were necessary to demonstrate that cross-examination will cause a deponent to concede he did not have reasonable grounds that an offence has occurred, a practically impossible task, then there would never be an opportunity to cross-examine on the information to obtain. On the authorities, all the defence must show is a reasonable likelihood that it will assist the court in assessing the basis of the warrant. In *R. v. Pires; R. v. Lising*, 2005 SCC 66, [2005] 3 S.C.R. 343, Charron J. for the Court wrote:

> [40] As discussed earlier, the *Garofoli* leave requirement is simply a means of weeding out unnecessary proceedings on the basis that they are unlikely to assist in the determination of the relevant issues. The reason that the test will generally leave just a narrow window for cross-examination is not because the test is onerous – it is because there is just a narrow basis upon which an authorization can be set aside. Hence, in determining whether cross-examination should be permitted, counsel and the reviewing judge must remain strictly focussed on the question to be determined on a *Garofoli* review – whether there is a basis upon which the authorizing judge could grant the order. If the proposed cross-examination is not likely to assist in the determination of this question, it should not be permitted. However, if the proposed cross-examination falls within the narrow confines of this review, it is not necessary for the defence to go further and demonstrate that cross-examination will be successful in discrediting one or more of the statutory preconditions for the authorization. Such a strict standard was rejected in *Garofoli*. A reasonable likelihood that it will assist the court to determine a material issue is all that must be shown.
>
> [Emphasis added.]

[7] Here, the defence sought to show in six discrete areas that the deponent either did not make full disclosure – *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992,

requires at para. 46 “full and frank disclosure of material facts” – or his observations do not support reasonable grounds.

[8] The appellant wanted to expose weaknesses in the information to obtain. He was prevented from doing so on the premise, expressed at para. 4 of the reasons above, that a deponent need only put down enough to support the warrant. This proposition and the “recantation” test find no support in this Court’s decision in *R. v. Readhead*, 2008 BCCA 193, cited by the judge. In *Readhead*, cross-examination was allowed. The passage quoted by the judge has to be understood in that context.

[9] The defence here was not intending to pursue inconsequential matters left out by the deponent but material facts that might put the information to obtain in a different light.

[10] I would allow the appeal, set aside the verdicts of guilty, and order a new trial.

[11] **KIRKPATRICK J.A.**: I agree.

[12] **GROBERMAN J.A.**: I agree.

[13] **DONALD J.A.**: The appeal is allowed and a new trial ordered.

“The Honourable Mr. Justice Donald”