COURT MARTIAL

Citation: *R v Noel*, 2014 CM 2002

Date: 20140221
Docket: 201376

Standing Court Martial

Canadian Forces Base Halifax
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Ex-Ordinary Seaman M.D. Noel, Applicant

Before: Colonel M.R. Gibson, M.J.

EXCLUSION OF EVIDENCE PURSUANT TO SECTION 24(2) ON THE BASIS OF AN ALLEGED VIOLATION OF SECTION 10(B) AND SECTION 8 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

(Orally)

[1] The applicant, Ordinary Seaman Noel, seeks exclusion of evidence for alleged violations of his section 8 and paragraph 10(b) *Charter* rights and the exclusion of evidence pursuant to section 24(2) of the *Charter*.

[2] Section 8 of the *Charter* provides that:

> Everyone has the right to be secure against unreasonable search or seizure.

[3] Subsection 10(b) of the *Charter* states that:

> Everyone has the right on arrest or detention
>
> ...

> (b) to retain and instruct counsel without delay and to be informed of that right.

[4] Subsection 24(2) of the *Charter* provides that:

> 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.

[5] The evidence heard on the *voir dire* on this issue included the testimony of four military police witnesses: Sergeant Boivin, Corporal Sabalbal, Master Corporal Chase, and Corporal Boyd and also an Agreed Statement of Facts concerning the participation of Corporal Dejaegher. The accused, Ordinary Seaman Noel, also gave evidence. In addition there were a number of documents, photos and physical evidence introduced as exhibits.

[6] The applicant seeks exclusion of .65 grams of cannabis and drug paraphernalia seized in the search of the house, garage and vehicle at 11A Swordfish Drive. He also seeks exclusion of certain photos taken from his cellphone which was seized by the military police on 17th of April, 2013, as well as some statements made to military police on that occasion.

[7] In addressing these issues I shall first deal with the section 10(b) issues, then the section 8 issues in the order of: the vehicle; items seized in the house and garage; and then the cellphone and finally the Order that the court will make in respect of the application.

[8] In assessing whether to exclude evidence under section 24(2) the guidance of the Supreme Court of Canada has most recently been provided in the case of *R v Grant*, which can be found at 2009 Supreme Court of Canada 32. What the Supreme Court of Canada has essentially guided or given guidance on in that case is the steps that a court should follow in making the assessment of the 24(2) issue. First of all, of course, the court must make an assessment as to whether there actually has been a violation or denial of a substantive *Charter* right, in this case, section 8 or 10(b). And if such a violation is found, is made out, then consider the potential exclusionary remedy under section 24(2).

[9] The court provided its guidance on the considerations that a court should make at paragraph 67 to 128 of the *Grant* case. And the test that is provided for there essentially boils down to this: the court must conclude or assess three factors. The Seriousness of the Charter-infringing State conduct; The impact on the *Charter*-protected interests of the Accused; and thirdly, society's interest in an adjudication of the case on its merits.

[10] So turning now to the question of the 10(b) issues which relate to two statements made by Ordinary Seaman Noel to members of the military police during the period in which he was under arrest at his residence at 11A Swordfish Drive on the 17th of April, 2013. The evidence indicates that these statements are: first of all, a statement very shortly after he was placed under arrest in response to a question from Corporal Sabalbal as to whether drugs might be found, that he allegedly stated, "No." And then the second statement at some later point in the interaction when some drugs were produced or found as a result of the search by the military police and he was asked a question that he responded, "Were they found in the drawer downstairs?" or words to that effect and some subsequent statements.

[11] The court does not accept the prosecution's assertion that there was a valid waiver of 10(b) rights by Ordinary Seaman Noel on this occasion. The police were not obliged to suspend their search during the period after they had arrested him before he could be provided access to a lawyer, but they were obliged to hold off from trying to elicit or receive any statements from the accused during this period.

[12] And in particular because the standard for a waiver of this *Charter* right set out by the Supreme Court of Canada in the *Clarkson* case and subsequent cases is indeed very high, the court is not satisfied that there was any waiver. In that case, there was clearly a violation of Ordinary Seaman Noel's section 10(b) *Charter* rights on this occasion. The court will thus have to apply the three prongs of the *Grant* test that I've already set out: seriousness of the State's conduct; impact on the *Charter* interest's of the Accused; and, society's interest in the case being adjudicated on its Merits. Having done so in this case the court is of the opinion that there was a violation of the 10(b) *Charter* rights and that the statements should be excluded pursuant to 24(2).

[13] I turn now to the question of evidence found in the vehicle, specifically a Dodge Nitro vehicle with licence plate EXE592. The vehicle was not included, not specified, in the search warrant that was issued by the Justice of Peace in respect of this search. The case law indicates that there is to be no presumption that a vehicle should be included in items found on a particular property that is specified in the warrant. The court is satisfied that Ordinary Seaman Noel had a reasonable expectation of privacy in that vehicle notwithstanding that it was not registered to him and that thus the search of the vehicle was a warrantless search and therefore presumptively unreasonable.

[14] There were no exigent circumstances in the case that would have precluded the members of the military police from seeking to obtain a warrant that specifically addressed that vehicle. There was no evidence provided before the court of a smell of marihuana or any other obvious indicia that there might be marihuana present, therefore, the court finds that it was a violation of Ordinary Seaman Noel's section 8 *Charter* rights to search that vehicle and applying the *Grant* criteria considers that any physical evidence found in that vehicle should be excluded from evidence.

[15] I turn now to the question of physical evidence found within the house and the detached garage found at 11A Swordfish Drive. Considering this, the court would first

like to address one particular point regarding the provisions of the warrant. The warrant issued pursuant to section 11 of the *Controlled Drugs and Substances Act* authorized a search in a place and then specified that as, "11A Swordfish Drive". The court considers that in so specifying what was meant to be included within the warrant is different then the specification of a dwelling place pursuant to a warrant issued under the *Criminal Code*. That is to say, that it was reasonable for the military police officers conducting the search to conclude and consider that all structures found at that civic address, 11A Swordfish Drive, were included within the ambit of the warrant. That is to say, that the garage in addition to the actual house were properly within the scope of places that might be searched.

[16] The standard of review of an Information to Obtain or ITO has been considered in a number of cases and the court, of course, must consider what that standard is in addressing the first prong of the applicant's argument regarding sufficiency of the ITO. The standard of review for challenging a judicial authorization was set out in the Supreme Court of Canada case of *Garofoli* by Justice Sopinka where at paragraph 56 he stated:

> The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge.

[17] In the Supreme Court of Canada of *Araujo* at paragraph 46 the court said this:

> Looking at matters practically in order to learn from this case for the future, what kind of affidavit should the police submit in order to seek permission to use wiretapping? The legal obligation on anyone seeking an *ex parte* authorization is <u>full and frank</u> disclosure of <u>material facts</u>. So long as the affidavit meets the requisite legal norm, there is no need for it to be as lengthy as *À la recherche du temps perdu*, as lively as the *Kama Sutra*, or as detailed as an automotive repair manual. All that it must do is set out the facts fully and frankly for the authorizing judge in order that he or she can make an assessment of whether these rise to the standard required in the legal test for the authorization....

[18] In *Cunsolo* the court indicated that reference should be had to all data within the four corners of the information.

[19] In the *Colbourne* case at paragraph 41 the court specified that the ultimate question for the court is:

> Where the non-disclosure [in cases where there was advertent or inadvertent non-disclosure] is not the product of an improper motive

> or part of an attempt to mislead the Justice of the Peace, the question becomes whether the second Justice of the Peace acting judicially and having been advised of the prior refusal could have issued the search warrant....

[20] In the circumstances of this case having regard to all the evidence the court is satisfied that the ITO could properly be issued. The arguments about whether the odour of marihuana or items found in garbage bags are sufficient in of themselves don't have direct application to the facts of this case because, of course, the evidence that was adduced in the ITO represented a combination of these factors. But the cases produced by the applicant indicate that where such factors; that is to say, odour of marihuana or garbage bags were only there by themselves that that would not be sufficient by themselves alone to justify the issuance of the warrant, however, in this case these were included by the applying members of the military police as part of a package of information that was put before the issuing Justice of the Peace. So therefore, as I said, assessed as a whole the court is satisfied that the ITO was sufficient.

[21] The court also considers that there was no obligation upon the military police to use a specific alternative method of inquiry, for example, using an undercover officer before seeking to apply for the warrant. Clearly, the members of the military police as they frankly indicated in their evidence did make some mistakes in retrospect in terms of the information that was provided on the ITO, but the court is satisfied that the members of the military police did not intentionally mislead the Justice of the Peace in this case. Therefore the court considers that there is no section 8 violation in respect of the physical evidence that was found in the house or in the detached garage.

[22] I turn now to the question of the photographs that were found on the cellphone that were introduced in evidence in the *voir dire*. And in considering this question, of course, the relevant issues are what was properly seized as a search incident to arrest and what the scope of inquiry the military police could make in respect of that cellphone if it was properly seized incident to arrest.

[23] I find very instructive a case provided by counsel, a resent case of the Queen's Bench for Saskatchewan on this case and I'm going to quote at some length from it because I believe it's directly relevant to this question of the cellphone and that is the case of *Adeshina*, A-d-e-s-h-i-n-a. The citation is 2013, SKQB 414 a judgement of Justice Acton in the Queen's Bench for Saskatchewan.

[24] At paragraph 28 of that decision Justice Acton said:

> The decision of the Supreme Court in *Vu*, also establishes a violation of the s. 8 rights of the accused respecting information obtained in the data dump of Samsung Galaxy cellphone unless it was specifically referred to in the warrant issued on July 2, 2011.
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> The question before the Court then becomes the application of s. 24(2) of the *Charter*. Cromwell J. in *Vu*, *supra*, was also required to make a s. 24(2) *Charter* analysis respecting evidence derived from the search of the personal computer and the cellphone. Cromwell J.

> concisely sets out the criteria required under a s. 24(2) application, where he states in paragraph 68:

And then I'm now quoting from Justice Cromwell in the *Vu* case at paragraph 68:

> > Section 24(2) of the *Charter* requires that evidence obtained in a manner that infringes the rights of an accused under the Charter be excluded from the trial 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". The burden is on the party seeking exclusion to persuade the court that this is the case. In *R. v. Grant* the Court established that:
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> [w]hen faced with an application for exclusion under s. 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (1) the seriousness of the *Charter*-infringing state conduct (admission may send the message the justice system condones serious state misconduct), (2) the impact of the breach on *Charter-protected* interests of the accused (admission may send the message that individual rights count for little), and (3) society's interest in the adjudication of the case on its merits.

So returning to paragraph 30 of the *Adeshina* case, Justice Acton went on:

> In dealing with the first requirement, being "(1) the seriousness of the *Charter*-infringing state conduct ... Cromwell J. stated that the *Charter*-infringing state conduct was not serious in the issue before him in that "the officers carried out the search in the belief that they were acting under the lawful authority of the warrant granted by the justice".

Paragraph 31, Justice Acton continued:

> In the circumstances before the Court, the Court does accept as law that the *Charter*-infringing state conduct was not serious. The officer genuinely believed, as incorrect as this is, that his search incidental to arrest of the LG phone allowed any future investigation of the contents of the cellphone as part and parcel of the seizure incidental to arrest. He also believed that the Samsung Galaxy cellphone was seized under the warrant to search the minivan. The arresting officer saw no difference between analysing the marihuana seized from the minivan and the data dump of the cellphone.
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> The arresting officers did not have the luxury of the Supreme Court of Canada's decision in *Vu* to clarify the law at the time. I conclude that the violation was not serious.
>
> In analysing the second stage of the inquiry wherein Cromwell J. stated at paragraphs 72:

And here he's quoting from the *Vu* case again:

> I turn to the second stage of the inquiry. I accept the trial judge's finding that the privacy interests that are at stake in computer searches are of the highest order and that the search conducted here was "very intrusive and comprehensive." At the same time, the record does not indicate that the police gained access to any more information than was appropriate, given the fairly modest objectives of the search as defined by the terms of the warrant. As the trial judge pointed out, the computers in this case were not forensically examined as they were in *Morelli*. On balance, this factor favours exclusion, but not strongly so.

Justice Acton then continued:

> The current circumstances are somewhat different and more severe. The arresting officer gained access to more information than was appropriate, including the accused's personal choices in lifestyle and adult "XXX" movies, which he downloaded, as well as "selfies", photos of the accused without his shirt on. The Samsung Galaxy cellphone was forensically examined. This strongly favours the exclusion of the evidence obtained.

He then goes on to quote the third stage of the 24(2) inquiry conducted by Justice Cromwell at paragraph 73 of the *Vu* case which I won't read at length. Justice Acton continued:

> In applying the third stage of the s. 24(2) inquiry, this Court accepts that the documents and photographs retrieved from the two cellphones are reliable, real evidence. This evidence is required in establishing knowledge and control over the marihuana found in the minivan. The absence of this evidence could weaken the Crown's case.
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> I accept that there is a clear societal interest in adjudicating on their merits charges of possession of marihuana for the purpose of trafficking, especially when such large quantities were seized from the minivan.
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> Balancing all of these factors, I am of the view that the evidence should not be excluded. The arresting officers believed (although wrongly) on reasonable grounds that the searches of the cellphones were authorized either as being incidental to arrest or under the warrant obtained for the search of the minivan. The evidence obtained was reliable and real evidence which was important to the adjudication of the charges on their merits. I therefore allow the inclusion of the evidence obtained from the LG and Samsung Galaxy cellphones as evidence in the trial of this matter.

[25] So the court considers that that extract from the *Adeshina* case is very close on its facts to the circumstances in evidence before this court martial. In this case the court considers that there was a section 8 violation in the seizure of the cellphone and the extraction or taking of photos of text messages on the phone, but comes to the same conclusion as the court in *Adeshina* in respect of the application of the *Grant* test; that is

to say, in balancing the three *Grant* factors that that evidence should not be excluded under section 24(2).

DISPOSITION

[26] So to summarize the court's findings and ruling on these issues, the physical evidence obtained as a result of the search of the house and garage at 11A Swordfish Drive and the photos of the text messages on the cellphone will not be excluded from evidence pursuant to the application. And the court makes the following order: first, the two statements made by Ordinary Seaman Noel to members of the military police at his residence while under arrest on 17 April 2013 are to be excluded from evidence; secondly, the physical evidence obtained from the search of a Dodge Nitro vehicle licence EXE592 on 17 April 2013 is excluded from evidence.

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