Citation

Date:
Docket: 115051
Registry: Surrey

IN THE PROVINCIAL COURT OF BRITISH COLUMBIA
Criminal Court

REGINA

V.

Gordon Clarence Kits and Michele Christine Lenten

REASONS FOR JUDGMENT
OF THE
HONOURABLE JUDGE T. DENNIS DEVITT

Counsel For the Crown:	S.G. Price
Counsel For the Accused Kits:	John W. Conroy, Q.C.
Counsel For the Accused Lenten:	P.Durovic

Place of Hearing:	Surrey
Date of Judgment:	July 3, 2002

INTRODUCTION:

[1] The accused face four charges involving possession of Marihuana for the purposes of trafficking, the unlawful production of that substance, the unlawful possession of a substance known as Psilocybin, and the unlawful possession of Cannabis Resin for the purposes of trafficking.

NATURE OF THE APPLICATION:

[2] This is an application to exclude evidence pursuant to s. 24(2) of the Charter. The evidence was the subject of a search warrant for which the accused's says there were no reasonable grounds for its issuance. As a result the search was unreasonable and contravened s.8 of the Charter.

GROUNDS FOR THE WARRANT AS AMPLIFIED:

[3] The information which led to the investigation by the police came from a person of unknown reliability The information was in the form of a bald statement that the informant believed that there was a grow operation at a specific address. In support of that belief the informant provided the following information:

- that the residents of that address use to live across the street;
- that they moved into the target residence over a year previously;
- that the target property is a rental property; and
- that they drive a maroon car.

Other than that information there was nothing provided to support the statement of a grow operation There was no information of an odour from the target residence or of cars coming and going at odd hours. (Ref. para. 3 of the information to obtain the search warrant (ITO)).

[4] Armed with that information Const. Dechant of the R.C.M.P. commenced an investigation. On March 14th 2001 the officer drove by the address in question which was described as a large rural fenced property with an attached double garage in which there was a Ford Explorer licence number FJE 939. In addition there was a large 8 bay garage at the end of the driveway south of the house and a large barn to the south of the driveway with a smaller outbuilding behind the barn. Parked in front of the barn was a older model truck licence number A67336 and a motor home bearing licence No. CTA 187. There was a black Jeep Cherokee in front of the house with licence no. GSF 755. (Ref. para. 4 of the ITO)

[5] On the same day the officer then did a C.P.I.C. Inquiry regarding licence no. FJE939 and learned it was associated with a red

1993 Explorer registered to Gordon Clarence Kits. Mr. Kits had a drivers lic. no. 3839757 and was born April 25 1964. and had no criminal record. The officer also checked licence A67336 which was associated with a brown Chev. box truck registered in the same name with the same address. A check of the motor home revealed it was registered to Lys Rosamadruga whose address was 24292 River Road Langley. The Jeep Cherokee was registered to Eddy Sciffmacher of 2895 Victoria Street Abbotsford. (Ref. paras. 6 to 10 of the ITO)

[6] The next day, Mar.15th. Const. Dechant spoke with Corp. Cameron who informed him that she attended the Greyhound Bus Depot in Langley to investigate a suspicious package and in turn she was informed by an employee Paul Docherty of Greyhound that on that day a woman age 35 to 40 with dirty blonde shoulder length hair wearing a green Mackinaw shirt came into the depot with a cardboard box to be transported to Penticton. Mr. Docherty noted a strong smell of Marijuana coming from the package. The package weighed 3 lbs. The woman left in a dark purple Ford Explorer Lic. no. FJE 939. The shipper was Wicker 2000 of Langley with the same address as the target property. The consignee was "The Indoor Garden Centre" of Penticton B.C. Corp. Cameron turned the package over to Const. Dechant who noted a strong odour of raw Marijuana coming from within The officer seized the package and opened it without having obtained a warrant. (Ref. para. 12 of the ITO)

[7] Inside the package were 3 metal style brackets in black foam and a envelope containing a letter and a sales receipt. There was

a strong odour of Marihuana coming from the foam. On one of the pieces of foam there was a very small bit of green plant like material which the officer believed to be Marihuana. The letter provided instructions on how the brackets connect so that "bulb wires" can be punched through. The shipper's signature was M. Lenten. Wicker 2000 the shipper. Const. Dechant was aware of Wicker 2000 and said that she queried it at the time but was not aware what it did. There was no business licence registered for the target property. The informant states that the brackets were directly related to equipment commonly used for growing marihuana indoors such as high intensity discharge lights. That conclusion is based on suspicion; It is equally probable that they were used for some other lawful purpose.

[8] On March 16th Const. Dechant was informed by Const. Cooke that on Oct, 21,1998 he executed a search warrant for 2017 240th street. A grow operation was discovered having taken place but was moved or harvested. A small amount of dried marihuana was found in the residence. These accused were present during the execution of the warrant but no charges were laid. However, there is nothing in the ITO that these accused lived at that address in 1998. According to the informant they moved into the target residence over a year ago. There is no explanation why there were no charges laid. Without the full information this data is likely to lead the justice to draw an adverse inference that these accused were somehow connected with that grow operation.

[9] On March 19th Const. Dechant obtained B.C, Hydro consumption records for the target property. As of Nov. 19 ,1999 Michelle Lenten was the current subscriber. Const. Dechant was informed by Mr. Rick Ogilvie of B.C. Hydro that the consumption was "a little higher than would normally be found for this type of account". There is no evidence that Mr. Olgilvie was aware of any manufacturing that may have been carried on at the target property. Const. Dechant concluded that based on her experience grow operations use high intensity lamps which in turn consume a large amount of electricity and that there was a high consumption rate at the target property. (Ref. para. 23, 24. of the ITO) However, that over statement of high consumption did not accord with what Olgilvie said which was it was a little higher than normal.

[10] On March 19th Const. Dechant was informed by a Const. Shaw of the R.C.M.P. Green Team that he attended at a property owned by Lys Rosamadruga and executed a Warrant to search during which a 351 Marihuana plant operation was discovered in an outbuilding and that Lys Rosamadruga was charged with possession for the purpose of trafficking and theft of electricity. The only connection between the target property and this individual is the presence of a motor home in his name on the property. There is nothing in the ITO about what happened to those charges and whether the individual was convicted or acquitted. Again without the full information there is a danger that the conclusion drawn by the justice was that there was a conviction. Why else would the information be there? The result is guilt by association.

[11] On March 22 or 23rd Cpl. Smith accompanied by Const. Dechant with the aid of the FLIR equipment checked the out buildings on the target property as well as other properties in the area for heat signatures manifesting heat escaping from the properties. Cpl. Smith was responsible for paras. 29,30 and 31 of the ITO. Const. Dechant was unable to say what other properties were checked and how they compared with the target property. In cross examination the officer was not familiar with the instrument and could only say Smith pointed it at other buildings. The evidence is that Const. Dechant didn't pay much attention to what Smith did. She said that she accompanied him and that he did his thing. Notwithstanding Const. Dechant deposed in the ITO that Cpl. Smith examined several barns and out buildings of similar construction in the area which did not display the same elevated heat signature as the target property. The result of the FLIR when analyzed were inconsistent with those expected, namely, where there were vents and an expectation of heat loss the heat signatures were not high. Where there was a high signature no grow operation was present. In my view that kind of evidence cannot be given much weight unless supported by other cogent evidence. Details of comparisons with similar properties were not put before the issuing Justice. The only information is a the bare assertion that the barn had an elevated heat signature for the upper floor but not the roof vents and that some of the other buildings had elevated surface temperatures. The residence did not have any unusual heat signature.

ANALYSIS:

[12] Much of the information is suspicion, misinformation or incomplete information which when put together constitutes a house of straw and not reasonable grounds. At first blush these pieces of disparate information may appear to have some connection leading to reasonable grounds for a belief of a grow operation at the target property. On closer scrutiny, however, any attempt to connect the information leads to anything but reasonable grounds.

[13] For example, the ITO refers to a common factor in grow operations of excessive power consumption. However, the evidence is to the contrary in this case. The B.C. Hydro official referred to the consumption as a little more than normal for this type of account. Just what is meant by this type of account is unclear. He wasn't aware that there may have been a business operating on the property. Furthermore, apparently there were horses on the property which may increase consumption. The statement of excessive Hydro consumption is an exaggeration of the evidence which I can only conclude was to bolster the application. Similarly, the references to prior drug searches with no connection to these accused except that they were there and no charges having been laid tends to lead to false deductive reasoning. Likewise, is the reference to a drug bust in Dec.19, 2000 of the residence of the owner of the mobile home but on a different property. The only connection to these accused and the target property is his vehicle was on that property. The relevance of that information eludes me except for guilt by association or suspicious circumstances. There

is little or no probative value to the information but it is highly prejudicial.

[14] The evidence of these accused having lived across the street and having moved to the target property is designed to establish that drug growers tend to want existing altered properties to avoid the high cost of transforming a property to be suitable. But there is no evidence these accused moved directly from one residence to the other. All that is known is that they moved over a year before. It is true that they were present in 1998 when a search of the property took place but that was two years prior.

[15] In my view the opening of the package was done deliberately without a warrant. The officer was aware that the shipper was "Wicker 2000" and queried that, nevertheless, because the person who signed for the shipper was Michelle Lenten and because there was a smell of marihuana when the package was squeezed the officer seized the package and opened it. Inside the package were brackets wrapped in foam. The smell emanated from the foam and a tiny bit of leaf. This isn't a case of Greyhound having a contract allowing it to open the package as in the *R v. Epp [2001] B.C.J. 1818* case. This was a warrantless search which was unreasonable. There was an expectation of privacy in the package. see *R v. Randall* {1997} Y. J. No. 15

[16] The role of the reviewing Judge of a search warrant is not to substitute his or her judgment for that of the issuing justice. The issue is whether there were reasonable grounds as amplified on this hearing

for the issuance of the warrant. The scope of an investigation into that issue will, where the initial information comes from a person of unknown reliability, depend on the nature of the particulars contained in the tip and the reliability of the tipster as verified through investigation. Where the information is scanty and comes from a confidential source of unknown reliability a relatively thorough investigation is essential in order to provide that critically important corroboration. see *R v. Ryckman* [1996] O.J. No. 4473 p1 @ p23

[17] Furthermore, the obtaining of a search warrant is exparte and in camera ,as such , the evidence is not subject to the litmus test of cross examination. As result there is a high responsibility placed upon those applying for the warrant to handle the truth with impeccable care. Presumably, every fact placed before a Justice of the Peace is designed to assist in securing the warrant and so errors, ambiguities or mis-statements as to any fact are cause for concern. see: *R. v. Monroe* [1997] B.C. J. No. 1002 p9.

[18] The standard of proof required for a search warrant is reasonable grounds which has been held to equate with reasonable probability. see *R v. Debot [1989] 2S.C.R. 1140 at 1166* . Suspicion upon suspicion does not constitute reasonable grounds.

[19] In the circumstances the statements about the presence of these accused at a previous search should be excised from the material. Similarly the statement that they lived across the street and that grow operators want existing facilities should be deleted. The police then

state that Lys Rosamadruga was the subject of a police search ,however, the only connection with these accused is that his mobile home was on their property. In my view that information should also be excised from the information as it is calculated to mislead the justice into believing that these accused are associated with that person on a criminal level. There is no evidence to support that conclusion. Again it is a matter of suspicion without a factual foundation.

[20] In the same manner the overstatement about high Hydro consumption is not born out of the evidence. The Hydro official said the consumption was a little more than usual for that type of account. No explanation was provided about the type of account in question but this is farm property with a business apparently being operated on it albeit without a licence. In my view any suggestion that the consumption was excessive does not accord with the evidence and is false and misleading and ought to be deleted.

[21] The opening of the package without a warrant was unnecessary. There were no exigent circumstances. The police had seized the package and could have included it in a application for a warrant. The opening of the package was a unreasonable search . Therefore the evidence about the package ought to be excluded.

[23] The issue is whether the application without those components to which I have referred establishes in its totality reasonable grounds. In my view it does not. The FLIR evidence in my

opinion is not of sufficient probative reliability to support the application. As Esson J.A. said *R. v. Monroe* [1997] B.C.J. No. 1002:

> "But where it turns out that two of the three facts were stated deceptively, the fact of the informant having wrapped his experience around the facts must tell against the reliability of the third fact which is. by its nature, not independently verifiable."

[24] As was said Southin J.A. in *R. v. Dellapenna* (1995), 31 C.R.R. (2d) 1. and adopted in *R. v. Monroe* [1997]B.C.J. 1002:

> "The learned judge found that the informant did not intentionally mislead
> By that, I take it the learned judge meant that the informant did not swear this information saying to himself." I am going to tell the justice of the peace a pack of lies." But the informant plainly did not say to himself, "Have I got this right? Have I correctly set out what I've seen, what I've been told, in a manner that does not give a false impression?"

[25] I am not prepared to find that the police acted in bad faith or in a sinister manner. However, I believe they were overly zealous in their desire to verify the information provided by the anonymous tipster. As a result they were careless in informing the justice of the circumstances. They did not stop and ask the questions posed by Southin J.A. Nor did they take the impeccable care required as stated in R. v. Monroe, supra.

[26] Notwithstanding the serious violations involved since the evidence which was the subject of the search is real evidence it would

ordinarily be admissible unless after a consideration of S. 24 (2) the Administration of Justice would be brought into disrepute by its admission into evidence.

[27] In *R. v. Krammer 2001 VCJ No. 2689 Sept 21, 2001 para. 29 McEwen J. said:*

> "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 armchair exercise in second guessing and exigent decision, but a question of how much compromise is tolerable in a particular set of circumstances."

[28] In my opinion those words are particularly apt to the case at bar. Accordingly, the evidence gathered under the search warrant is inadmissible pursuant to S.24(2) of the Charter as to admit it would bring the administration of justice into disrepute. In arriving at this conclusion I have not overlooked what was said in *R. v. Sismey* 55 C.C.C. (3d) 281 that the search warrant procedure is a fundamental tool of investigation. Search warrants are obtained on the basis of hearsay evidence. They should not be subject to technical objections which do

not go to a substantial point in relation to the warrant itself or to the process which authorizes the warrant. Nevertheless, the police must abide by the principles of law as enunciated in such cases as *R.v. Dellapenna and R.v. Monroe*, supra.

T. Dennis Devitt, Judge
Provincial Court of British Columbia