COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Rocha, 2018 ONCA 84
DATE: 20180130
DOCKET: C60980

Hoy A.C.J.O., MacPherson and Rouleau JJ.A.

BETWEEN

Her Majesty the Queen

Respondent

and

Jason Rocha

Appellant

Paul J.I. Alexander, for the appellant

Tanit Gilliam, for the respondent

Heard: January 26, 2018

On appeal from the conviction entered on June 26, 2015 and the sentence imposed on September 15, 2015 by Justice Nancy L. Backhouse of the Superior Court of Justice.

REASONS FOR DECISION

[1] The appellant Jason Rocha was convicted of possession of a controlled substance (cocaine) for the purpose of trafficking (x4) and possession of property obtained by crime. He received a global sentence of five years and eight months imprisonment.

[2] In March 2013, a confidential informant ("CI") told police that a male known as "Jason" worked at and was selling powdered cocaine from a bar called "Os Dragoes" and kept cocaine at his home. The CI described "Jason". The CI's handler, Detective Taylor, knew the male described from a prior investigation. Database searches confirmed Jason Rocha's address as 64 Crawford Street.

[3] Surveillance was conducted at 64 Crawford Street and 703 College Street, the address of the "Os Dragoes" bar. The description of that surveillance in the unredacted portions of the Information to Obtain ("ITO"), which was prepared by Officer Stehlik, can be summarized as follows:

- On March 26, 2013, a male later identified as Alan Rocha, the appellant's brother, was seen getting into a car with a brown paper bag at 64 Crawford Street. The car was driven by a woman believed to be the appellant's mother. The car later arrived at the bar where patrons were already waiting. Alan Rocha, with a brown paper bag in his possession, unlocked the front door and entered with the woman and the patrons. The officers conducting the surveillance noted a flow of customers entering the door leading to the establishment and leaving in what they considered an abnormally short time for patrons of a bar or restaurant.
- Surveillance of the bar continued on March 27, 2013 where the same flow of customers was noted by the observing officers.

[4] The unredacted portions of the ITO summarized the CI's credibility as follows:

- Two cases in which the CI provided information that culminated in arrests and charges, one in 2011 and one before that.
- The CI had a track record of providing accurate and truthful information.
- The CI was financially motivated and aware that monetary rewards are only paid out upon successful results of an investigation.
- The CI acknowledged that he would face criminal charges for making false reports to police.
- The CI is immersed within the criminal subculture, has several contacts in the GTA, and is privy to information not normally available to the general public.
- The CI does not appear to have a criminal record.

[5] The ITO also contained details of a 2008 case against the appellant and others, where a search warrant was executed at the bar and the appellant's residence. The ITO stated that drugs and firearms had been seized, but also that the charges were dismissed at trial (2011 ONSC 2518, appeal dismissed 2012 ONCA 707).

[6] The warrant was executed at the appellant's residence on April 5, 2013. Police seized 800 grams of cocaine, 505 oxycodone pills, drug paraphernalia and $32,880 in cash.

[7] At the outset of the trial, the appellant applied for the fruits of the search of his residence to be excluded. In his view, the search warrant should not have been issued and the search and seizure infringed his rights under s. 8 of the *Canadian Charter of Rights and Freedoms*.

[8] At trial, a heavily redacted copy of the ITO was disclosed to the appellant. The Crown conceded that the redacted ITO could not adequately make out the grounds for the warrant. A judicial summary was prepared and provided to counsel. The judicial summary can be summarized as follows:

- The CI gave accounts of his firsthand observations of Jason's drug trafficking at the bar including when and the number of times the observations were made. Sale of cocaine had been observed recently on a specific date. The CI also specified the circumstances surrounding the sale of drugs inside the bar and his/her means of knowing of Jason's drug trafficking.
- The CI provided very specific information regarding the CI's means of knowledge that "Jason" keeps cocaine at his home. The information is not

based on “rumour” or “gossip”. The CI made recent observations at the bar that lend support to the CI’s statement that “Jason” keeps cocaine at home.

[9] Some information was excised and other information amplified the ITO. References to the 2008 drug seizures from 64 Crawford were excised. Reference to a brother of the applicant having died of a drug overdose was excised for lack of probative value. The ITO was amplified to show that the CI had no criminal record. The trial judge granted defence counsel leave to cross-examine the affiant.

[10] The defence argued that the Crown’s application to use step 6 of the *Garofoli* procedure (*R. v. Garofoli*, [1990] 2 S.C.R. 1421) ought not to have been granted because the CI’s means of knowing that the applicant kept drugs in his home is redacted, preventing the accused from challenging it in argument or by evidence. In the trial judge’s view, the judicial summary explained how the tip was compelling. The defence was able to cross-examine the affiant on a number of issues relating to the credibility of the CI and the accuracy of investigative/corroborative details. The defence’s submissions together with the affiant’s cross-examination led the trial judge to find that the accused was sufficiently aware of the nature of the excised material to challenge it by argument or evidence. Step 6 was found to be appropriate.

[11] Applying the criteria in *R. v. Debot*, [1989] 2 S.C.R. 1140 (“*Debot*”) to this case, the trial judge determined that the issuing justice could reasonably have

found that: the tip was compelling with respect to criminal activity at the bar and the presence of cocaine at the appellant's home; the CI was credible; and the tip was corroborated.

[12] The trial judge rejected the defence argument the tip was insufficiently corroborated because no undercover agent entered the bar to observe criminal activity. Police officers testified that the bar's patrons are a close-knit community and they would not have engaged in criminal activity in the presence of a stranger. That explanation was found to be credible by the trial judge.

[13] The trial judge also rejected the defence's contention that reference to the 2008 search was deliberately misleading. Reference to the search was excluded because the applicant's *Charter* rights were breached during that search, not because the reference was misleading.

[14] Accordingly, the s. 8 application was dismissed.

[15] The trial judge nonetheless conducted a s. 24(2) analysis in case of an erroneous conclusion in relation to the appellant's s. 8 rights. The trial judge found that the police acted in good faith. Even though the search was conducted in the appellant's home, society has a great interest in adjudicating the case on its merits. Accordingly, the admission of the evidence would not bring the administration of justice into disrepute.

[16] The appellant appeals the trial judge's ruling relating to the search warrant on four grounds.

[17] First, the appellant contends that the trial judge erred by relying on redacted material that was not summarized and that the appellant could not challenge.

[18] We do not accept this submission. The trial judge did not err in relying on the redacted material, the nature of which was set out in the judicial summary. The detail of the redacted information does not have to be communicated to the defence. The issue is whether the nature of the material was sufficiently summarized and disclosed. In our view, the defence was sufficiently aware of the material's nature to challenge it by argument or by evidence, as the trial judge comprehensively demonstrated in paragraph 22 of her ruling.

[19] The appellant then submits that the reviewing judge used judicial scrutiny as a substitute for the meaningful participation of the defence. Specifically, he relies on the portion of the trial judge's reasons where she states:

> My ability to fully explain my findings with respect to 64 Crawford is limited by the fact that some of the information remains redacted. For protection of his Charter rights, the applicant must essentially rely on judicial oversight (of at least 2 levels in this case) to ensure, to the extent practicable, that there were reasonable grounds for issuing the warrant.

[20] We are not persuaded by this submission. In our view, in this passage the trial judge was simply indicating that the determination as to the existence of

reasonable grounds supporting the issuance of the warrant would be made by the judge based in part on redacted information that had not been disclosed to the appellant. It does not, as suggested, indicate that the nature of the redacted information relied on by the trial judge was not disclosed in the judicial summary. Nor do we interpret it as suggesting that, using the judicial summary and other information available to the appellant, he was not in a position to mount both a facial and sub-facial attack on these redactions.

[21] Second, the appellant submits that the ITO did not meet the *Debot* criteria, namely, whether the CI's tip was compelling, whether the CI was credible, and whether there was corroboration for the tip (the "three Cs").

[22] We are not persuaded by this submission.

[23] The tip was compelling. It was detailed and current. It was not limited to conclusory allegations of criminal conduct. It was sourced to the informant's "direct" observations and personal knowledge. The source had a first-hand basis for the information and gave detailed information about the drug activity. It was not based on rumour or gossip. The appellant has not demonstrated that there was no basis upon which the tip could be relied upon as compelling.

[24] The source was credible. The informer was known to police, immersed in the criminal sub-culture, and privy to details not normally known to the public. He

had provided valuable information to the police before. He was aware that he might face criminal prosecution by giving false information.

[25] The information was corroborated. Numerous material aspects of the tip were confirmed by police, including the appellant's connection to the bar and 64 Crawford Street and activity at the bar suggestive of drug trafficking.

[26] Third, the appellant asserts that the police affiant failed to make full, frank and fair disclosure in the ITO. The ITO contained three specific references to the 2008 case involving the appellant, where a search warrant was executed at the appellant's home and bar. The ITO stated that drugs and firearms had been seized, but also that the charges were dismissed at trial. The police affiant did not know, and accordingly did not state, that the reason for the dismissal of the 2008 charges was police breach of s. 8 of the *Charter*. This omission, contends the appellant, was so misleading as to require the search warrant to be set aside.

[27] We disagree. On this point, we explicitly agree with the trial judge's reasons:

> I do not agree with defence counsel's characterization of the reference to the 2008 search and seizure as deliberately misleading. While the ITO did not state that the evidence had been excluded against the applicant, it did state in 3 separate places (each time the 2008 investigation was referenced) that the charges were dismissed against the applicant after a trial. If the reference to the 2008 search and seizure had been omitted, the affiant would have been criticized for failing to disclose facts upon which the affiant was in reality relying. Notwithstanding that it was relied upon as a ground in the ITO, highlighting the history of 64 Crawford

> Street including the dismissal of all charges against the applicant ensured that the issuing justice would not rely on it as evidence of reasonable and probable grounds at the time of this application for a search warrant. The references were excised because the evidence was excluded against the applicant due to his *Charter* rights having been breached, not because it was misleading.

[28] The appellant's fourth submission is that the trial judge's alternative conclusion, namely that if a *Charter* s. 8 breach were established, the search warrant should be upheld under s. 24(2) of the *Charter*, is in error. In light of our conclusions on the first three issues, this issue does not arise.

[29] The appeal is dismissed.

"Alexandra Hoy A.C.J.O."
"J.C. MacPherson J.A."
"Paul Rouleau J.A."