COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Pham, 2025 ONCA 37
DATE: 20250120
DOCKET: C70744

Rouleau, van Rensburg and Coroza JJ.A.

BETWEEN

His Majesty the King

Respondent

and

The Khanh Pham

Appellant

Ricardo Golec and Hedieh M. Z. Kashani, for the appellant

Moray Welch, for the respondent

Heard: January 9, 2025

On appeal from the convictions entered on December 20, 2021 and the sentence imposed on June 22, 2022 by Justice Robert F. Scott of the Superior Court of Justice.

REASONS FOR DECISION

[1] The appellant appeals his convictions for production and possession of methamphetamine for the purpose of trafficking under ss. 7(1) and 5(2) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. He was sentenced to eight years' imprisonment. At the hearing of the appeal, he abandoned his sentence appeal. We dismissed the conviction appeal with reasons to follow. These are our reasons.

[2] The convictions followed from the trial judge's ruling on the appellant's *Charter* application. The appellant asserted that his rights under ss. 10(a) and 10(b) of the *Canadian Charter of Rights and Freedoms* had been breached when, upon arrest, the police failed to inform him of the reasons for his arrest and of his right to counsel in Vietnamese. The appellant argued the police further failed to provide him with counsel for three hours and ten minutes after his arrival at the OPP detachment in Madoc.

[3] While there was some evidence predating the arrest that showed the appellant understood some English, the trial judge found that "[i]t was apparent [the appellant] was having difficulty understanding the arresting officer, or it appeared so." It was not disputed that the "language that [the appellant] extensively understood" was Vietnamese.

[4] The day before the appellant's arrest, the police had obtained a warrant to search a residence where the appellant had been observed regularly attending

and a vehicle registered to the appellant – in fact, the appellant was travelling in this vehicle at the time of his arrest. The search of the residence and vehicle was conducted on the day following the appellant's arrest. Prior to the search, Detective Constable Price, one of the arresting officers, attempted to interview the appellant to eliminate safety concerns that could arise from the suspected drug manufacturing operation in the residence. By that time, the appellant had been brought to the Madoc detachment and spoken to duty counsel with the assistance of a Vietnamese interpreter.

[5] At the *voir dire*, the appellant argued that, as a result of the breaches of the appellant's *Charter* rights, particularly the s. 10(b) breach that was conceded by the Crown, the trial judge ought to exclude from evidence at trial the various items seized in the execution of the search warrant that had been obtained on the day prior to his arrest. That evidence consisted of equipment located in the residence that demonstrated the appellant was operating a meth lab, as well as over 26 kilograms of methamphetamine located in the vehicle in which he was traveling when he was arrested.

[6] Although the trial judge accepted the Crown's concession that the appellant's rights had been breached, he determined that the evidence ought not to be excluded pursuant to s. 24(2).

[7] The issue on appeal is whether the trial judge erred in his s. 24(2) analysis.

[8] The appellant contends that the trial judge committed five errors in his s. 24(2) analysis and that a proper analysis would have resulted in the exclusion of the evidence. Specifically, the appellant submits that the trial judge erred by:

1. Considering only the implementational part of the right to counsel under s. 10(b) and ignoring breaches of s. 10(a) and of the informational component of the right to counsel under s. 10(b);
2. Misapprehending the evidence concerning the systemic nature of the breaches with respect to detainees unskilled in the English language;
3. Giving insufficient weight to the impact of the breaches on the interests of the appellant when applying the second *Grant* factor;
4. Failing to consider that the appellant was not offered the opportunity to speak with counsel of his choice; and
5. Concluding that the evidence obtained pursuant to the search warrant was temporally and contextually distinct from the breach.

[9] We did not give effect to these arguments.

[10] First, the trial judge was clearly aware of the informational and implementational concerns raised by the appellant under both ss. 10(a) and 10(b) with respect to the delay in obtaining a Vietnamese speaking officer or interpreter. We acknowledge that the focus of the trial judge's analysis was on the delay between the appellant's arrival at the Madoc detachment and when he was able

to speak to duty counsel with the assistance of an interpreter. Despite this focus however, when the trial judge's reasons are read together with the submissions of counsel at the application hearing, it is clear that the trial judge was addressing the delay with respect to obtaining a Vietnamese interpreter, and that he understood this to be necessary for the purpose of informing the appellant of and implementing his rights under ss. 10(a) and 10(b).

[11] Second, the trial judge's reasons reflect a careful review of the evidence. He concluded that the delay in accessing a Vietnamese interpreter was due to a mistake by Detective Constable Price that was "isolated and situational specific". This finding was available on the record, and we see no basis to interfere.

[12] Third, we also see no basis for finding that the trial judge gave insufficient weight to the impact of the breaches on the appellant's interests. While it can reasonably be inferred that the delay had an impact on the appellant without direct evidence, it is noteworthy that he did not testify on the *voir dire*. For this reason, counsel put little emphasis on the second *Grant* factor in the course of their submissions on *voir dire*. The trial judge considered all of the evidence before him and found that the appellant had not been mistreated in any way, and that no attempts were made to obtain a statement from him before he had the opportunity to speak to duty counsel with the assistance of a Vietnamese interpreter. Moreover, defence counsel had conceded that there was no causal link between the breach of the appellant's *Charter* rights and the evidence obtained through the

search of the residence and the vehicle since it had been authorized by a warrant issued prior to the appellant's arrest.

[13] Fourth, nothing in the record supports the suggestion that the appellant asked to speak with a particular lawyer, or that he was dissatisfied with the advice he received from duty counsel.

[14] Fifth, we do not accept the appellant's submission that the trial judge erroneously concluded that the evidence was temporally and contextually distinct from the breach. This submission is based on the following language in the trial judge's reasons:

> In relation to all of the other actions by the police on that day and the following day, it was [causally], temporally and contextually distinct and separate from the arrest. Breach of the s. 10(b) in the time following the [appellant], does not attach to that evidence. The evidence is admitted under s. 24(2) of the *Charter*.

[15] This paragraph comes at the end of the trial judge's reasons dismissing the appellant's *Charter* application, which were delivered orally, and followed his analysis applying the *Grant* factors. In our view, this passage is not integral to the trial judge's reasons for dismissing the application; it references "other actions of the police" and not the conduct underlying the *Charter* breach that had been conceded by the Crown. The parties' positions on the application were clear. In the course of their submissions, the trial Crown had conceded that there was a temporal or contextual connection between the breaches and the evidence

obtained pursuant to the warrant but maintained that there was no causal connection between the breach and the evidence. Defence counsel, for their part, had conceded that no causal link existed, as noted above. Viewed in context, therefore, we do not accept that the trial judge's reasons reflect the errors alleged.

[16] For these reasons, we dismissed the conviction appeal. The sentence appeal is dismissed as abandoned.

"Paul Rouleau J.A."
"K. van Rensburg J.A."
"S. Coroza J.A."