Case Name:

R. v. Cavan

Between
Her Majesty the Queen, Respondent, and
Henry Noel Cavan, Defendant/Applicant, and
Lynn Cavan, Defendant/Applicant

[2014] O.J. No. 4833

2014 ONSC 5857

Court File No. CR-13-30000666-0000

Ontario Superior Court of Justice

M.G.J. Quigley J.

Heard: October 6 and 7, 2014.
Judgment: October 7, 2014.

(17 paras.)

Criminal law -- Powers of search and seizure -- Search warrants -- Validity -- Application by co-accused to exclude evidence dismissed -- Police executed warrant in course of investigating drug offences by son of co-accused, resulting in parents being charged with firearms offences -- Co-accused challenged validity of warrant -- Counsel agreed to resolution that rendered it unnecessary to make any findings regarding sufficiency of warrant -- Resolution was appropriate given apparent issues with sufficiency of ITO.

Statutes, Regulations and Rules Cited:

Controlled Drugs and Substances Act, S.C. 1996, c. 19, s. 11

Criminal Code of Canada, R.S.C. 1985, c. C-46, s. 472, s. 491

Counsel:

Craig Coughlan, for the Crown.

Leora Shemesh, for the Defendant/Applicant, Henry Noel Cavan.

Jordana Goldlist, for the Defendant/Applicant, Lynn Cavan.

Ruling on *Garofoli* Application

1 M.G.J. QUIGLEY J.:-- In this case, the police sought and obtained a judicially authorized *Controlled Drugs and Substances Act* (*CDSA)* warrant to search the premises at 512 Danforth and 18 Valcourt, associated with the son of these accused, Dean Cavan, and also 35 Irvine where these accused, the parents, lived.

2 The execution of those warrants led to these firearms possession charges against the parents. I note that Mr. Cavan was the holder of permits and licences permitting him to hold certain types of firearms. Ms. Cavan did not have such permits, but neither, I am told, was there any evidence that the firearms were hers. They were originally suspected of nothing. The police would never have accessed their house were it not for the issuance of warrants to search those three properties relative to alleged offences committed by their son, Dean.

3 So now here they have challenged the admissibility of the firearms-related evidence that arose out of that search on the basis (i) that police did not have reasonable and probable grounds to obtain the warrant for 35 Irvine, and (ii) that at its root, the affiant, D.C. Charron, was not full, frank and fair in the statements made in the Information to Obtain (ITO) to the issuing justice. As such, the applicants claim the warrant ought not to have been issued and that the search and seizure violated their constitutional rights. They say the entire product of the execution of that search ought to be excluded.

4 Prior to issuing a warrant, whether under s. 487 of the *Criminal Code* or s. 11 of the *CDSA*, the issuing justice must be satisfied that there are reasonable grounds to believe that the object of the search will afford evidence with respect to the commission of an offence.

5 If the ITO submitted in support of the request for the warrant does not set out facts which provide adequate grounds to support it, and upon which a justice could have been satisfied, then the warrant is invalid and a search or seizure carried out under its authority is necessarily unreasonable. The standard of review for that question and the task is to determine on an application like this whether the authorizing justice could have granted the authorization to issue that warrant, based on the record that was before the authorizing justice as amplified or excised on this review.[1]

6 Of course "mere suspicion" does not amount to reasonable and probable grounds. Further, the fact that evidence may be found at a location that could substantiate charges is an inadequate basis to justify issuing a search warrant, in the absence of a *reasonable* belief or *probability* of obtaining material evidence of the commission of a criminal offence. There must be more than mere *possibility* or *hope*.[2]

7 It bears repeating that in the seminal decision of the Supreme Court in *Hunter v. Southam*[3], Dickson J. emphasized that the interest of the police in detecting and preventing crime will only start to legally supersede the interest of individuals in being left alone at the point where "credibly-based probability replaces suspicion."

8 The "totality of the circumstances" must be considered in determining whether reasonable grounds exist to support the authorization of a search warrant.[4] The test is not synonymous with

proof beyond a reasonable doubt, or even a *prima facie* case.[5] The standard envisions a *practical, non-technical and common sense probability* as to the existence of the facts and inferences asserted.

9 The affiant may draw *reasonable* inferences and the case law also establishes that *some* deference should be shown to the practicalities of an investigation, and to the inferences drawn by a trained and experienced police officer.[6] I would add, however, that the deference we may show to the experience of police officers, or anecdotal evidence they may provide based on their experiences in other cases, cannot itself serve as a foundation for the issuance of a warrant in the particular case -- there has to be evidence that supports the reasonable belief in the particular case.

10 In conducting a *Garofoli* review of the ITO, after taking account of the evidence of D.C. Charron on the cross-examination that was conducted on consent, I would have been required to excise any errors from the affidavit and to amplify the record if I found that there were material facts that ought to have been included, such as, for example, the fact that Dean Cavan's earlier charges were withdrawn but that this was not included in the ITO.

11 After excising any erroneous facts and amplifying the record to include any material omissions, I would then have had to determine whether there continued to be any reliable information upon which the issuing judge could have granted the authorization, that is, evidence that if believed could support the warrants to search those three premises. As *R. v. Araujo* shows, the question is simply whether there was at least some evidence that might reasonably be believed on the basis of which the authorization could have issued.[7] It is not a case of me being permitted to substitute my judgment on sufficiency for that of the issuing justice.

12 If I had concluded on the record that was before the issuing justice, as amplified on review, that the authorizing judge could have granted the authorization, then I would not have been able to interfere. By corollary, if I had found that there had been material non-disclosure or misleading evidence included in the ITO, or new facts that ought to have been included, their impact would solely have gone to whether the justice could have issued the warrant, not to reach a new decision, and the amplification of the evidence, if any, arising from that review, could not have enhanced the sufficiency of an ITO which was not on its own capable of supporting the warrant that was issued by the justice.[8]

13 Here, in light of what counsel have now advised me pertaining to a resolution of the case, it will be unnecessary for me to continue with this *Garofoli* application and to make any findings relative to the sufficiency of the warrant or whether the inferences drawn were reasonable. That is probably just as well.

14 This resolution obviates the need for me to make any findings, and it avoids the need for or the ability of this proceeding to continue. I think that is a good result in this case. I would prefer not to have written a ruling in this case. I know the affiant has extensive experience as an officer in such cases, and I do not doubt that he approached his task with good intentions, but I will finish by repeating that that is not enough.

15 I would repeat that the deference we may show to the experience of police officers, or the anecdotal evidence they may provide based on their experiences in other similar cases, cannot replace the existence of or need for cogent evidence which when considered in its totality, can support the issuance of the warrants. Those beliefs and that experience cannot itself serve as a foundation for the issuance of a warrant in the particular case -- there has to be evidence that supports the reasonable belief.

16 While it will no longer be necessary for me to make any of these findings, or to consider the adequacy of the investigative approach taken in this case by the affiant, it should be plain to anyone who reviewed the ITO and who heard his evidence given in cross-examination that there were issues with the sufficiency of the ITO in this case. I cannot say what the result would have been had the application continued, because counsel may have persuaded me that the standard was met here. All I can say at present is that it is not clear to me that the threshold would have been met.

17 What is clear to me is to remind the participants, especially the officers and the Crown, that a case like this arguably shows that it is important from time to time that police officers refresh their knowledge of fundamental concepts, like the meaning of reasonable and probable grounds as defined in s. 472 and in the *CDSA*, as compared to *suspicion* or belief that may exist but that is *not supported by evidence*. I will leave the matter at that.

M.G.J. QUIGLEY J.

1 *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at paras. 52-56; *R. v. Grant* (1993), 84 C.C.C. (3d) 173 at paras. 48-50.

2 See *R v. Debot* (1989), 52 C.C.C. (3d) 193 (S.C.C.) at p. 213; *R. v. Finlay and Grellette* (1985), 23 C.C.C. (3d) 48 (Ont. C.A.) at para. 78, leave to appeal denied in *Re Finlay*, [1986] 1 S.C.R. ix; *R. v. MacDonald*, [1992] N.B.J. No. 585 (N.B.C.A.); *R. v. Philpott*, [2002] O.J. No. 4872 at paras. 67-73; J. Fontana and D. Keeshan, *The Law of Search and Seizure in Canada*, 7th ed. (Markham, Ont.: LexisNexis, 2007) at p. 30.

3 (1984), 14 C.C.C. (3d) 97 (S.C.C.) at p.114-115.

4 *R. v. Sanchez* (1994), 93 C.C.C. (3d) 357 at 367 (Ont. Ct. (Gen. Div)).

5 *R. v. Debot*, below.

6 *R. v. Jacobson* (2007), 207 C.C.C. (3d) 270, 2006 CarswellOnt 2331 (O.C.A.) per Rosenberg J.A.

7 *R. v. Araujo*, [2000] 2 S.C.R. 992 at para. 51.

8 *R. v. Garofoli*, above, at p. 188 and *R. v. Araujo, ibid*., at para 59