SUPREME COURT OF CANADA

CITATION: R. *v.* Reilly, 2021 SCC 38

APPEAL HEARD: October 14, 2021
JUDGMENT RENDERED: October 14, 2021
DOCKET: 39531

BETWEEN:

Her Majesty The Queen
Appellant

and

Liam Reilly
Respondent

CORAM: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

UNANIMOUS JUDGMENT READ BY: Moldaver J.
(paras. 1 to 4)

NOTE: This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

Her Majesty The Queen *Appellant*

v.

Liam Reilly *Respondent*

Indexed as: R. *v.* Reilly

2021 SCC 38

File No.: 39531.

2021: October 14.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Constitutional law — Charter of Rights — Search and seizure — Remedy — Exclusion of evidence — Police attending at accused's residence and unlawfully entering through unlocked rear door to arrest him for robbery and firearms-related offences — Police conducting clearing search and subsequently obtaining search warrant based in part on observations from clearing search — Trial judge recognizing police conduct breached Charter but holding that warrant valid and evidence admissible and convicting accused — Majority of Court of Appeal agreeing warrant valid but finding trial judge erred in treating Charter-compliant police conduct as mitigating

Charter-infringing conduct and in compartmentalizing analysis of factors to determine whether to exclude evidence — Majority excluding evidence, setting aside convictions and ordering new trial — Order for new trial upheld.

Cases Cited

Referred to: *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 8, 24(2).

APPEAL from a judgment of the British Columbia Court of Appeal (Willcock, Fenlon and Griffin JJ.A.), 2020 BCCA 369, 397 C.C.C. (3d) 219, 70 C.R. (7th) 175, [2020] B.C.J. No. 2095 (QL), 2020 CarswellBC 3250 (WL), setting aside the convictions of the accused and ordering a new trial. Appeal dismissed.

Mark K. Levitz, for the appellant.

William E. Jessop, for the respondent.

The judgment of the Court was delivered orally by

[1] MOLDAVER J. — We would dismiss this appeal, substantially for the thorough reasons of Justice Griffin on behalf of the majority of the Court of Appeal. We agree that the trial judge

erred in his analysis under s. 24(2) of the *Canadian Charter of Rights and Freedoms* by considering *Charter*-compliant police behaviour as mitigating (2018 BCPC 362).

[2] We also agree that the trial judge erred by improperly conducting the overall balancing — whether including the evidence would bring the administration of justice into disrepute — within the first two factors in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353. The language of *Grant* is clear: this overall balancing occurs at the end (para. 85). Judges must first consider whether each of the three factors weigh in favour of inclusion or exclusion of the evidence before asking whether — having regard to all factors — inclusion of the evidence would bring the administration of justice into disrepute. Conducting overall balancing within the first two *Grant* factors waters down any exclusionary power these factors may have. This type of analysis undermines the purpose and application of s. 24(2).

[3] With respect, however, we are unable to agree with the majority of the Court of Appeal that the trial judge properly considered all relevant *Charter*-infringing state conduct under the first *Grant* factor. The trial judge considered the *Charter*-infringing state conduct related to only two of the three s. 8 breaches. Failing to consider state conduct that resulted in the third breach — the clearing search — was an error. Regardless of whether the third breach was caused by the first two breaches, and regardless of the fact that it was considered necessary in the wake of Constable Sinclair's unlawful entry, it was nonetheless a breach of Mr. Reilly's s. 8 *Charter*-protected rights and must be considered under the first *Grant* factor. Trial judges cannot choose which relevant *Charter*-infringing state conduct to consider.

[4] The trial judge committed errors that required the majority of the Court of Appeal to conduct a fresh s. 24(2) analysis. In our view, we do not lack jurisdiction to consider alleged errors in the majority's fresh analysis. We see no reason to interfere with their fresh analysis. Accordingly, we would dismiss the appeal and affirm the exclusion of evidence and the order for a new trial.

Judgment accordingly.

Solicitor for the appellant: Attorney General of British Columbia, Vancouver.

Solicitors for the respondent: Jessop Criminal Law, Vancouver.