COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Sadikov, 2014 ONCA 72
DATE: 20140127
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MacFarland, Watt and Epstein JJ.A.

BETWEEN

Her Majesty the Queen

Appellant

and

Sadyk Sadikov and Elizabeth Harding

Respondents

Nick Devlin and Jason Mitschele, for the appellants

Dirk Derstine and Janani Shanmuganathan, for the respondent Sadyk Sadikov

David E. Harris, for the respondent Elizabeth Harding

Heard: June 26, 2013

On appeal from the acquittals entered by Justice Frances P. Kiteley of the Superior Court of Justice, sitting without a jury, dated October 26 and 28, 2010.

Watt J.A.:

[1] During the summer and early fall, 2008, Project Hidden Dragon, a police undercover investigation, focused on rampant drug trafficking and use at Club 338, a licensed establishment in Toronto's Entertainment District.

[2] Undercover police officers saw frequent drug transactions carried on overtly before the unseeing eyes and unhearing ears of club security, serving, and supervisory staff. A full menu was available. Cocaine. Marihuana. Ecstasy. Ketamine. And more.

[3] Four times during Project Hidden Dragon, an undercover police officer bought powder cocaine at Club 338 from a man who told the officer that his name was "Alex". He said he lived nearby. Alex's real name is Sadyk Sadikov, one of the respondents in this appeal.

[4] Project Hidden Dragon ended on October 20, 2008. Shortly after 4:00 that morning, police executed warrants under s. 11 of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, (*CDSA*)

simultaneously at Club 338 and at a second-floor apartment at 306 Adelaide Street West (306 Adelaide), a short distance from the Club. Shortly thereafter, they forcibly entered 302 Adelaide Street West (302 Adelaide) without a warrant.

[5] The search at 306 Adelaide yielded drugs, a gun, money and two pitbulls. Police arrested the only occupant at the apartment, the respondent Elizabeth Harding, the respondent Sadikov's sometime girlfriend. The warrantless search at 302 Adelaide revealed drugs and a gun. After the entry, the premises were secured until a search warrant could be obtained.

[6] Police arrested Sadikov at Club 338 when they executed the search warrant at the club.

[7] At the respondents' joint trial, the presiding judge quashed the search warrants for 306 and 302 Adelaide, then excluded the evidence of drugs, guns, and money found there on execution of the warrants. The judge acquitted the respondents of all charges arising out of the searches and seizures at 306 and 302 Adelaide.[1]

[8] The Crown appeals the respondents' acquittals alleging that the finding of constitutional infringement and the exclusion of the evidence obtained during the search are procedurally and substantively flawed. These reasons explain why I have concluded that the findings of the trial judge are tainted by legal error to such an extent that a new trial is required.

THE BACKGROUND FACTS

[9] The respondents' trial began with challenges to the searches conducted at 306 and 302 Adelaide. Sadikov contested the reasonableness of both searches and the admissibility of the evidence obtained as a result. Harding, who was the only listed tenant of the apartment searched at 306 Adelaide, did not participate in the challenge to the search of her apartment. Later, after the trial judge had decided that the searches in both places were constitutionally deficient, and that evidence obtained during the searches should be excluded, Harding sought and was granted the benefit of the exclusionary ruling.

The Warrantless Search at 302 Adelaide

[10] The appellant takes no issue with the trial judge's decision that the warrantless entry at 302 Adelaide could not be justified on the basis of exigent circumstances. Nor does the appellant quarrel with the trial judge's decision to quash the subsequent search warrant issued for 302 Adelaide, which was granted substantially on the basis of the observations made during the warrantless entry and search. Further, the appellant advances no argument about the exclusion of evidence (drugs and a gun) recovered during the search of 302 Adelaide.

The Motion for Leave to Cross-examine the Affiant

[11] During the *voir dire* on the warrantless search at 302 Adelaide, Sadikov's trial counsel (not Mr. Derstine) sought leave to cross-examine the informant and sub-informants (affiant and sub-affiants) who authored or contributed to the ITOs for the warrants at 306 and 302 Adelaide. Counsel relied upon the evidence given by the police officers who had testified on the warrantless search *voir dire*, their notes, and the evidence they gave at the preliminary inquiry.

The Trial Judge's Ruling on the Motion for Leave

[12] The trial judge dismissed Sadikov's motion for leave to cross-examine the affiants of the ITOs for the search warrants executed at 306 and 302 Adelaide. The trial judge found some discrepancies and deficiencies in the ITOs but was satisfied that none detracted from the conditions precedent necessary for issuance of the warrant. She was satisfied further that no basis had been shown to grant leave to cross-examine the sub-affiants.

The Warranted Searches at 306 and 302 Adelaide

[13] The *voir dire* continued on the warranted searches at 306 and 302 Adelaide. Sadikov called four witnesses who gave evidence about his arrest at Club 338, the execution of the warrant at 306 Adelaide, and the items found and photographed at 302 Adelaide.

The Ruling of the Trial Judge

[14] The trial judge found and listed several deficiencies in the ITO for the warrant for 306 Adelaide. She expressed her conclusion in these terms:

> Based on the amplification evidence and the deficiencies referred to above, I am persuaded that there was no objective basis for the belief that there were reasonable grounds to associate Mr. Sadikov with the 2nd floor unit of 306 Adelaide and that narcotics would be found in that location. The warrant must therefore be quashed.

[15] The trial judge then turned her attention to the admissibility of the several items found in the second-floor apartment at 306 Adelaide when the warrant was executed. Drugs. A fully-loaded handgun. Money. She considered the infringement serious and the impact on the Charter-protected interests of the respondent significant. Although society's interest in the adjudication of allegations of serious crime on the merits favoured admission of the evidence, a proper balancing of all the factors mandated exclusion. The case for the Crown on the counts that depended on this evidence collapsed.

The Grounds of Appeal

[16] The appellant advances two related grounds of appeal. The first focuses on the procedure the trial judge followed in determining whether the searches in issue were constitutionally infirm. The second alleges that the trial judge exceeded the scope of permissible review of the search warrant issued for 306 Adelaide.

[17] The central theme common to both grounds of appeal is the effect of the trial judge's decision to deny Sadikov leave to cross-examine the affiant of the ITO that formed the basis upon which the warrant to search 306 Adelaide was issued. The effect of such a ruling, according to the appellant, is to foreclose an inquiry into sub-facial validity of the warrant. But here, despite the ruling, the trial judge engaged a sub-facial review that went beyond the bounds of what is permitted according to the authorities.

Ground #1: The Procedural Irregularity

[18] As mentioned, at trial, Sadikov sought leave to cross-examine the affiants whose ITOs constituted the evidentiary basis on which the *CDSA* warrants to search 306 and 302 Adelaide were issued.[2] The

trial judge refused leave. A brief reference to the basis of the application and of the refusal will help to put the claim of procedural error in its proper setting.

The Basis of the Application for Leave to Cross-examine

[19] D/C Evelyn testified and gave evidence about the time of his observations of a man who looked like Sadikov walking toward and then entering 306 Adelaide on October 6, 2008. After that testimony, counsel for Sadikov sought leave to cross-examine the affiant who swore the ITO for the warrant for 306 Adelaide and several sub-affiants. The principal basis for the application was the discrepancy between D/C Evelyn's time estimate and the time reported by the affiant, based on information provided by the undercover officers and others engaged in surveillance, as to when Sadikov left the Club for 306 Adelaide on October 6, 2008.

[20] The application for leave to cross-examine the affiant took place during the *voir dire* on the warrantless entry and search of 302 Adelaide. Counsel on both sides referred to passages in the preliminary inquiry transcript and in the notes of undercover officers, the affiant and other officers who made observations at or near 306 Adelaide on October 6 and 15, 2008, that linked Sadikov to the address and two pitbulls that apparently live there.

The Ruling of the Trial Judge

[21] The trial judge concluded that, despite some internal inconsistencies in the notes of the officers, and between their notes and the contents of the ITO, leave to cross-examine should be refused. She reasoned:

> I am not satisfied that cross-examination of the affiant will support the inference that the affiant knew or ought to have known that information in the ITO was false. Taking into consideration the entirety of the Information to Obtain as it relates to the person referred to as "Alex" and Mr. Sadikov, I am not satisfied that leave to cross-examine the affiant is necessary for Mr. Sadikov to make full answer and defence. It follows that leave to cross-examine the sub-affiants is not necessary.

The Arguments on Appeal

[22] For the appellant, Mr. Devlin says that the starting point for the analysis is the presumptive validity of the search warrant and the truth of the contents of the ITO on the basis of which it was issued. The only way to defeat these presumptions, he contends, is to challenge the honesty and integrity of the affiant directly. Leave to cross-examine the affiant is the threshold that must be met in order to attack the presumptively-truthful ITO.

[23] What happened here, Mr. Devlin argues, is that the trial judge blurred the line between facial and sub-facial challenges to search warrants. Apart from circumstances that do not arise here, there must be at least a limited cross-examination of the ITO affiant if a sub-facial challenge is to be made. After all, a sub-facial attack challenges the truthfulness of the ITO the affiant submitted to the authorizing judge. Absent an order granting leave to cross-examine, the trial judge was not entitled and should not have proceeded to conduct a sub-facial review and make findings of sub-facial deficiency.

[24] Mr. Devlin submits that the principles of fairness also precluded the trial judge from making adverse findings against the affiant without having heard the affiant's evidence. These principles are

akin to those that animate the rule in *Browne v. Dunn* (1894), 1893 CanLII 65 (FOREP), 6 R. 67 (H.L.). Once leave to cross-examine the affiant had been refused, the trial judge was precluded from making findings against the affiant's credibility and integrity or against the truth of the contents of the ITO. The manner in which the trial judge proceeded denied the Crown recourse to amplification as a rehabilitative mechanism.

[25] For Sadikov, Mr. Derstine takes the position that the refusal of leave to cross-examine the affiant does not preclude sub-facial review of the ITO or the making of adverse findings in connection with its contents or the truthfulness and integrity of its affiant. Refusal of leave to cross-examine the affiant simply means that if a claim of sub-facial validity is to succeed, it must be on some evidentiary basis other than what might be elicited on cross-examination of the affiant.

[26] Mr. Derstine says that it was Crown counsel who adduced D/C Evelyn's contradictory evidence about the time observations were made on October 6, 2008. The evidence was admitted on the *voir dire* initiated by the Crown in an attempt to legitimize the warrantless entry and search of 302 Adelaide on the basis of exigent circumstances. It was open to the Crown to call other evidence about the timing of the observations on the *voir dire*, but Crown counsel decided not to do so. Thus, the evidence on the warrantless entry *voir dire* was available for use on a sub-facial attack on the warrant for 306 Adelaide.

[27] Mr. Derstine contends that the fairness principles that underpin the rule in *Browne v. Dunn* exert no influence here. The rule applies to counsel who propose to adduce evidence that contradicts what a witness for an adverse party has said. Such a rule does not apply to a fact-finder in circumstances such as the present.

[28] For Harding, who did not participate in any challenge to the constitutional integrity of the searches at trial, Mr. Harris queries whether the procedural error the appellant asserts raises a question of law alone. If it does, he adopts Mr. Derstine's submissions on the merits.

The Governing Principles

[29] Several principles inform the decision on this ground of appeal.

The Requirement of a *voir dire*

[30] A *voir dire* is held to determine the admissibility of evidence proposed for admission by a party to a criminal proceeding: *R. v. Parsons* (1977), 1977 CanLII 55 (ON CA), 17 O.R. (2d) 465 (C.A.), at p. 469, aff'd 1980 CanLII 31 (SCC), [1980] 1 S.C.R. 785. On the *voir dire*, it is for the trial judge to determine whether the conditions precedent to the admissibility of the proposed evidence have been met. The *voir dire* is a separate proceeding from the trial proper and the evidence taken on a *voir dire* forms no part of the evidence at trial unless the parties expressly agree to its incorporation: *R. v. Erven*, 1978 CanLII 19 (SCC), [1979] 1 S.C.R. 926, at p. 932; *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443, at para. 66; *R. v. Dela Cruz*, 2007 MBCA 55, 220 C.C.C. (3d) 272, at para. 24; and *R. v. Gauthier*, 1975 CanLII 193 (SCC), [1977] 1 S.C.R. 441, at p. 454.

[31] Each admissibility issue warrants a separate inquiry or *voir dire*.[3] It seems logically to follow from the very nature of a *voir dire* as a separate proceeding that evidence adduced on one *voir dire* does not, without more, become evidence on another *voir dire* held to determine a different admissibility issue.

The Procedure on a *voir dire*

[32] The manner in which a *voir dire* is to be conducted is left to the discretion of the presiding judge, and is not subject to rigid or pre-fabricated rules. Relevant factors include, but are not limited to, the nature of the issue under consideration and of the case itself, as well as the means of proof available: *R. v. Kematch*, 2010 MBCA 18, 252 C.C.C. (3d) 349, at para. 43. See also Rule 34.01 of *the Criminal Proceedings Rules for the Superior Court of Justice (Ontario)*, (*Criminal Proceedings Rules*).

[33] In many instances, evidence proposed for admission may implicate more than one admissibility rule. In prosecutions for unlawful homicide, for example, statements the deceased has allegedly made to others, expressing fear of the accused and recounting incidents of actual or threatened violence, may engage both the hearsay and bad character rules. A police interview of the accused may be challenged on voluntariness and constitutional grounds. It is commonplace to conduct a single *voir dire* to determine admissibility in these cases and a prudent use of judicial resources to do so. That said, presiding judges must be scrupulous to ensure that their rulings respect differing burdens and standards of proof and reflect an informed understanding of the governing admissibility rules: *R. v. Voss* (1989), 1989 CanLII 7167 (ON CA), 50 C.C.C. (3d) 58 (Ont. C.A.), at pp. 79-80.

The Warranted Search *voir dire*

[34] Admissibility challenges occur frequently where Crown counsel seeks to adduce evidence, real evidence, of things found and seized during a search of a person, place, or thing. Real evidence, like items found and seized during a search, which meets the standards of relevance and materiality, is prima facie admissible. And this remains so whether the investigative conduct that yielded the evidence is lawful or unlawful.

[35] Challenges to the admissibility of real evidence seized during a search involve a two-step inquiry. Because the criminal trial process cares about the constitutionality of state conduct that produces evidence that the Crown proposes to introduce in a criminal prosecution, the first step is an inquiry into constitutionality. The second step, reached only after a demonstration of a constitutional infringement, is an inquiry into the admissibility of the evidence obtained by the infringement. Both inquiries impose an onus on the person who claims unconstitutional conduct and seeks exclusion of the evidence obtained by it. The standard of proof required is proof on a balance of probabilities.

[36] In trials in the Superior Court of Justice, an accused who seeks exclusion of evidence alleged to have been obtained by a constitutional infringement is required to comply with Rule 31 of the *Criminal Proceedings Rules*. The Rule promotes constructive use of judicial resources and avoids surprise by requiring, among other things, a written application that contains a precise, case-specific statement of the basis and grounds upon which exclusion is sought, a detailed summary of the evidence or other material upon which reliance is placed, and a statement of the manner in which the applicant proposes to introduce the evidence. Challenges to the constitutionality of warranted searches may involve either or both a facial and sub-facial attack on the authorizing warrant. No reason in principle requires a separate *voir dire* for each mode of attack, although many prefer a discrete hearing for each.

[37] A facial validity challenge requires the reviewing judge to examine the ITO and to determine whether, on the face of the information disclosed there, the justice could have issued the warrant: *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992, at para. 19. The record examined on a facial review is fixed: it

is the ITO, not an amplified or enlarged record: *R. v. Wilson*, 2011 BCCA 252, 272 C.C.C. (3d) 269, at para. 39.

[38] Sub-facial challenges go behind the form of the ITO to attack or impeach the reliability of its content: *Araujo*, at para. 50; and *Wilson*, at para. 40. Sub-facial challenges involve an amplified record, but do not expand the scope of review to permit the reviewing judge to substitute his or her view for that of the authorizing judicial officer: *Araujo*, at para. 51; and *R. v. Garofoli*, 1990 CanLII 52 (SCC), [1990] 2 S.C.R. 1421, at p. 1452. The task of the reviewing judge on a sub-facial challenge is to consider whether, on the record before the authorizing justice as amplified on the review, the authorizing justice could have issued the warrant: *Araujo*, at para. 51; and *Garofoli*, at p. 1452. The analysis is contextual: *Araujo*, at para. 54. The reviewing judge should carefully consider whether sufficient reliable information remains in the amplified record, in other words, information that might reasonably be believed, on the basis of which the enabling warrant could have issued: *Araujo*, at para. 52.

[39] One method of attacking the reliability of the content of the ITO is to cross-examine its author, the affiant. An accused does not have an absolute right to cross-examine the affiant. Leave to cross-examine is required. And leave is not granted, just for the asking: *Garofoli*, at p. 1465; and *R. v. Pires*; *R. v. Lising*, 2005 SCC 66, [2005] 3 S.C.R. 343, at paras. 3 and 31. To obtain leave to cross-examine the affiant, an accused must show that the proposed cross-examination will elicit testimony that tends to discredit the existence of a pre-condition to the issuance of the warrant, as for example, reasonable and probable grounds: *Garofoli*, at p. 1465; and *Pires*; *Lising*, at para. 40.

[40] The proposed cross-examination may be directed at the credibility or reliability of the affiant. But cross-examination that can do nothing more than show that some of the information relied upon by the affiant is false is not likely to be useful unless an applicant can raise an inference that the affiant knew or ought to have known that the information was false: *Pires*; *Lising*, at para. 41.

[41] Refusal of leave to cross-examine the affiant removes any evidence that might have been elicited on cross-examination from what an applicant may rely upon to attack the reliability of the content of the ITO on a sub-facial review. The applicant remains free, however, to adduce other relevant and material evidence, admissible on the inquiry into sub-facial validity, in an attempt to show, based on the amplified record, that no sufficiently reliable information remains on the basis of which the warrant could have issued: *Pires*; *Lising*, at para. 32.

The Principles Applied

[42] In support of his claim that a new trial should be ordered on the basis of procedural error in the conduct of the review of the search warrant issued for 306 Adelaide, Mr. Devlin makes two specific complaints. The first is that the trial judge was wrong to quash the warrant for sub-facial invalidity once she refused Sadikov leave to cross-examine the affiant. The second is that the principle that animates the rule in *Browne v. Dunn* precludes any findings adverse to the credibility of the affiant and the reliability of the information he provided in the ITO.

[43] As I will briefly explain, I would not give effect to either of these specific complaints.

[44] First, refusal of leave to cross-examine the affiant does not foreclose a challenge to the sub-facial validity of the warrant. Several reasons support this conclusion.

[45] Cross-examination of an affiant is a means to achieve an end, not the end in itself. The cross-examiner seeks to obtain evidence, the affiant's answers to the questions asked, to challenge the reliability of the information provided by the affiant in the ITO on the basis of which the warrant was issued. To obtain leave to cross-examine, the applicant must show a reasonable likelihood that the proposed cross-examination will elicit evidence that tends to discredit the existence of a condition precedent to the issuance of the warrant: *Garofoli*, at p. 1465; *Pires*; *Lising*, at paras. 3 and 40; and *R. v. Mahal*, 2012 ONCA 673, 113 O.R. (3d) 209, at para. 38, leave to appeal to S.C.C. refused, [2012] S.C.C.A. No. 496. Refusal of leave to cross-examine the affiant precludes the availability of evidence that might be elicited on cross-examination as a source of evidence to impeach the reliability of the information contained in the ITO. However, refusal of leave to cross-examine the affiant does not deprive the applicant of the right to advance a sub-facial challenge to attack the reliability of the ITO, only of the use of evidence that might have been elicited in cross-examination of the affiant to do so.

[46] Consider an analogy to proof of fact 'X' at trial. A party tenders an item of evidence to prove fact 'X'. But the trial judge rules the proposed evidence inadmissible because it is hearsay that does not fall within a listed or the principled exception. This ruling does not disentitle the party to prove fact 'X'; it only requires the party to do so by some method of proof other than what has been rejected as hearsay.

[47] Nothing in the controlling jurisprudence expressly or by necessary implication supports the proposition that refusal of leave to cross-examine the affiant precludes a sub-facial challenge to the reliability of the contents of the ITO. Indeed, a canvass of those precedents would seem to support a contrary conclusion: see e.g. Pires; *Lising*, at para. 32.

[48] Second, reliance by analogy on the principles that underpin the rule in Browne v. Dunn is misplaced.

[49] What is termed the "rule in *Browne v. Dunn*" is a principle designed to provide fairness to witnesses and parties. It requires counsel to give notice to those witnesses whom the cross-examiner intends later to impeach. However, it is not a fixed rule: the extent of its application resides within the discretion of the trial judge. Whether, or to what extent, the rule will be applied depends on the circumstances of each case: *R. v. Giroux* (2006), 2006 CanLII 10736 (ON CA), 207 C.C.C. (3d) 512 (Ont. C.A.), at para. 42, leave to appeal to S.C.C. refused, [2006] 2 S.C.R. viii.

[50] The so-called rule in *Browne v. Dunn* is a rule for cross-examining counsel to follow when counsel proposes to impeach a witness' account of events later by introduction of contradictory evidence. While counsel's failure to follow the *Browne v. Dunn* rule may resonate in a trial judge's findings of fact at the end of the trial, neither the rule nor any analogy to it prohibits findings of fact adverse to a witness' credibility absent compliance with *Browne v. Dunn*.

[51] I would not give effect to the claim of procedural error on either basis advanced by the appellant.

Ground #2: The Scope of Warrant Review

[52] The second ground of appeal involves a complaint of substantive error. The appellant says that the trial judge exceeded the scope of permissible warrant review. To determine whether this ground of appeal should succeed or fail, it is necessary to expand upon the evidentiary and procedural background discussed earlier and make reference to critical portions of a trial judge's ruling.

The Warrant for 306 Adelaide

[53] A provincial court judge issued a s. 11 *CDSA* warrant authorizing a search of the south-facing second-floor apartment at 306 Adelaide. In the ITO, the affiant swore that he had reasonable and probable grounds to believe that controlled substances or precursors of them, offence-related property, and things that would afford evidence of offences under the *CDSA* were in the apartment. The warrant authorized a search for and seizure of controlled substances (including, but not limited to cocaine), packaging materials, debt lists, and police buy-money provided to Sadikov on earlier listed dates.

[54] The warrant was issued on October 17, 2008, and authorized execution from 12:01 a.m. to 6 p.m. on October 20, 2008.

The Information to Obtain

[55] Detective Stephen Henkel, a member of the Vice Section of the Major Crime Unit at 52 Division was the lead investigator into the drug activities at Club 338. He was the affiant in the ITO for both Club 338 and 306 Adelaide.

[56] The ITO described in detail various aspects of the undercover operation at Club 338, including rampant drug use and consumption taking place overtly in the presence of security and other club staff. The ITO described three drug purchases made by an undercover officer from a man who identified himself as "Alex" and who is alleged to be Sadikov.

[57] To link Sadikov to 306 Adelaide, the ITO made reference to several factors:

i. Alex's comments to the undercover officer that he lived or kept his drugs nearby or at home;

ii. Alex's comments to the undercover officer about having, and on one occasion, playing with his dogs, together with surveillance evidence of two pitbulls, in the window of the second-floor at 306 Adelaide and of Alex on the steps with the dogs; and

iii. Alex's agreement to sell drugs to an undercover officer shortly after 3 a.m. on October 6, 2008, his remark that "I keep it at home", observations of his leaving Club 338, walking towards and entering 306 Adelaide, and of his return to Club 338 with drugs about 50 minutes after he first left.

The Evidence on the *voir dire*

[58] On the *voir dire* on the warrantless entry and search of 302 Adelaide, Crown counsel called the officers who had participated in the warrantless entry in an attempt to demonstrate that the entry and search were reasonable because they occurred in exigent circumstances. Among the witnesses was D/C Evelyn whose assignment was conducting surveillance on the premises at 306 and 308 Adelaide on October 5-6, 2008.

[59] D/C Evelyn testified that he received information over the police radio on October 6, 2008, that a man was leaving Club 338 to obtain drugs to complete a sale to the undercover officer. D/C Evelyn made no note of the time he received this information. He then saw a man fitting Sadikov's description walking along Adelaide towards 306 Adelaide. The man entered 306 Adelaide, but D/C Evelyn did not

note the time of entry. The officer did not see the man leave 306 Adelaide, but heard a later radio report that confirmed that he (the man) was back at the Club.

[60] D/C Evelyn acknowledged uncertainty about the time of his observations of this man. He knew that it was after 1:00 a.m., the time he began his observations. He finally settled on 1:10 a.m., which he admitted was "a bit of a guess".

[61] According to the ITO, the undercover police officer did not arrive at Club 338 until 1:50 a.m. Sadikov left the Club at 3:07 a.m. and returned at 3:56 a.m.

[62] No objection was taken to the evidence of D/C Evelyn about his observations on October 6, 2008. The evidence was admitted on the warrantless entry and search *voir dire* in connection with 302 Adelaide. That entry took place two weeks later, on October 20, 2008.

The Ruling of the Trial Judge

[63] The trial judge quashed the search warrants for both 306 and 302 Adelaide. Only the decision in connection with the warrant for 306 Adelaide is an issue here.

[64] The trial judge described her task in these terms:

> My task is to determine whether the decision of the judicial officer is one she could reasonably and judicially have reached in the exercise of discretion to issue the warrant. I must not focus on isolated passages but refer to all data within the four corners of the ITO. I must not undertake a word by word dissection but rather a common sense review.

[65] The trial judge agreed with the submission of defence counsel that the ITO contained mistakes, misleading information, conclusory statements, and material non-disclosures. She noted that two factors tended to connect "Alex" to 306 Adelaide:

i. the dogs at 306 Adelaide; and

ii. the proximity of 306 Adelaide to Club 338.

Both factors were important because of what "Alex" told the undercover officer at Club 338: he had two dogs – pitbulls – and he kept his drugs at his home, which was nearby.

[66] The trial judge concluded that nothing in the ITO supported the conclusion that the dogs seen at 306 Adelaide were Sadikov's dogs, or that the dogs had been seen together on more than one occasion. The presence of Sadikov on the street with the dogs did not link him to the second-floor apartment.

[67] The trial judge rejected the reference to "lived close by" as providing a link between "Alex" and the second-floor apartment at 306 Adelaide as his drug depot. The judge pointed out:

i. the first reference to "lived close by" came from "Adam", not "Alex";

ii. there was no basis for the undercover officer's assertion that during a preliminary call to set up the second sale, "Alex" *reminded* the officer that he lived nearby;

iii. the undercover officer's initial description of "Alex" did not fit Sadikov's appearance;

iv. the delay in connection with the September 15, 2008 undercover sale is inconsistent with the assertion that "Alex" "lived close by"; and

v. the ITO omitted material facts about the surveillance observations on October 6 and left a false impression about the identity of the person seen entering 306 Adelaide and the time of the entry.

[68] The trial judge expressed her conclusion about the validity of the warrant for 306 Adelaide in these terms:

Based on the amplification evidence and the deficiencies referred to above, I am persuaded that there was no objective basis for the belief that there were reasonable grounds to associate Mr. Sadikov with the 2nd floor unit of 306 Adelaide and that narcotics would be found in that location. The warrant must therefore be quashed.

The Arguments on Appeal

[69] For the appellant, Mr. Devlin begins with a reminder that a search warrant review is a very narrow exercise. The ultimate issue is whether, after excising any information that should not have been before the issuing judge, there remains a basis upon which the warrant *could* have issued.

[70] In this case, Mr. Devlin says, the trial judge exceeded the bounds of permissible review by reweighing the evidence that was in the ITO, rejecting available inferences, and failing to apply the proper test for warrant review. The reasonably grounded belief that a search at 306 Adelaide would provide evidence of a drug offence was established when Sadikov left Club 338 to obtain drugs, walked to and entered 306 Adelaide, then returned to the Club with the drugs to complete the transaction. The ITO made it clear that more than one officer observed Sadikov en route from Club 338 to 306 Adelaide.

[71] Mr. Devlin argues further that the trial judge failed to consider D/C Evelyn's testimony about the timing of his observation on October 6, 2008, in its proper context. D/C Evelyn admitted that his estimate of the time of his observations was "a guess". What was uncontroversial was that D/C Evelyn's observations were made after "Alex" – Sadikov – left Club 338 to obtain drugs to complete a sale to the undercover officer. The undercover officer did not *arrive* at Club 338 until 1:50 a.m. and radioed Sadikov's departure at 3:07 a.m., his return at 3:56 a.m.

[72] Mr. Devlin says that the trial judge erred in discounting or rejecting the link between Sadikov and 306 Adelaide based on his comments to the undercover officer about having pitbulls and living nearby. That the pitbulls at 306 Adelaide belonged to Sadikov and that he was associated with the second-floor apartment at that address were reasonable inferences available to the authorizing judge. It was no part of the trial judge's mandate to substitute her own inferences for those available to the authorizing judge, rather her only mandate was to determine whether those drawn by the authorizing judge were reasonable.

[73] For Sadikov, Mr. Derstine says that the trial judge made no errors in her warrant review. She described and applied the proper test. That she found deficiencies in the ITO does not mean that she improperly reweighed its contents. She based her review on the record that was before the authorizing judge, less any erroneous or misleading information that was properly excised, and supplemented by any material through permissible amplification.

[74] Mr. Derstine submits that the warrant review also takes into account the affiant's obligation to make full and frank disclosure of all material facts and permits the trial judge to consider whether the authorizing judge was misled by exaggerations, half-truths, and material omissions. All were present here and were properly taken into account by the trial judge on warrant review.

[75] Mr. Derstine contends that a consideration of the ruling as a whole refutes any claim that the trial judge was unfaithful to the applicable standard of review. Neither the dogs nor the travel from Club 338 to 306 are capable of satisfying the reasonable grounds standard in connection with the second-floor apartment. No one identified the dogs at 306 Adelaide with the dogs shown to the undercover officer on Sadikov's cell phone. The reference to living nearby or keeping drugs nearby could not assist since the initial reference, of which all others were derivative, came from "Adam", a person who was not and could not be mistaken for "Alex".

[76] Mr. Derstine adds that the appellant cannot complain about the absence of amplification of the record before the authorizing judge. Crown counsel did not seek to amplify the record before the trial judge and cannot now complain that this failure to permit what was not sought reflects error. In the end, Mr. Derstine says, the appellant's complaint is with the factual findings made by the trial judge. Each finding was supported by evidence and untainted by legal error. Nothing advanced by the appellant raises a question of law alone, or, if it does, warrants appellate reversal.

[77] For Harding, who did not participate in the warrant review at trial, Mr. Harris reiterates the submissions of Mr. Derstine. He emphasizes the failure of the Crown at trial to tender evidence to amplify the record and questions whether either ground of appeal advanced by the appellant raises the question of law alone within the jurisdiction at this court under s. 676(1)(a) of the *Criminal Code*.

The Governing Principles

[78] The search at 306 Adelaide was conducted under the authority of a warrant issued under s. 11(1) of the *CDSA*. In the ITO, the affiant alleged that he had reasonable and probable grounds to believe and did believe that there was a controlled substance or precursor, a thing in which a controlled substance or precursor was contained, offence-related property, or a thing that would afford evidence of a *CDSA* offence in the second-floor, south-facing apartment at 306 Adelaide. The warrant authorized a search for:

i. controlled substances or their precursors;

ii. packaging materials and equipment;

iii. debt lists; and

iv. police buy-money.

[79] Two groups of principles control the decision on this ground of appeal. The first has to do with the standard to be met for the issuance of a *CDSA* search warrant. The second is concerned with the standard to be applied on review of the warrant.

<u>The Standard for Issuance of Section 11 *CDSA* Warrants</u>

[80] A justice to whom an ex parte application for a search warrant is made under s. 11(1) *CDSA* must be satisfied by the contents of the ITO that there are reasonable grounds to believe that:

i. a controlled substance or precursor in respect of which the *CDSA* has been contravened;

ii. anything in which a controlled substance is contained or concealed;

iii. offence-related property; or

iv. anything that will afford evidence in respect of a *CDSA* offence or a related proceeds crime

is in a place described in the warrant.

[81] The statutory standard – "reasonable grounds to believe" – does not require proof on the balance of probabilities, much less proof beyond a reasonable doubt. The statutory and constitutional standard is one of credibly-based probability: *Hunter v. Southam Inc.*, 1984 CanLII 33 (SCC), [1984] 2 S.C.R. 145, at p. 167; and *R. v. Law*, 2002 BCCA 594, 171 C.C.C. (3d) 219, at para. 7. The ITO must establish reasonable grounds to believe that an offence has been committed and that there is evidence to be found at the place of the proposed search: *Hunter*, at p. 168. If the inferences of criminal conduct and recovery of evidence are reasonable on the facts disclosed in the ITO, the warrant could be issued: *R. v. Jacobson* (2006), 2006 CanLII 12292 (ON CA), 207 C.C.C. (3d) 270 (Ont. C.A.), at para. 22.

[82] The authorizing justice makes his or her decision about whether to issue the warrant from the evidence included in the ITO as a whole, approaching the assessment on a common sense, practical, non-technical basis. The justice, like the trier of fact at a trial, is also entitled to draw reasonable inferences from the contents of the ITO: *R. v. Vu*, 2013 SCC 60, at para. 16; *R. v. Shiers*, 2003 NSCA 138, 219 N.S.R. (2d) 196, at para. 13; and *Wilson*, at para. 52.

<u>The Standard for Warrant Review</u>

[83] Warrant review begins from a premise of presumed validity: *Wilson*, at para. 63; and *R. v. Campbell*, 2010 ONCA 588, 261 C.C.C. (3d) 1, at para. 45, aff'd 2011 SCC 32, [2011] 2 S.C.R. 549. It follows from this presumption of validity that the onus of demonstrating invalidity falls on the party who asserts it, in this case, Sadikov.

[84] The scope of warrant review is narrow. The review is not a de novo hearing of the ex parte application. The reviewing judge does not substitute his or her view for that of the issuing judge: *Garofoli*, at p. 1452; *R. v. Ebanks*, 2009 ONCA 851, 97 O.R. (3d) 721, at para. 20, leave to appeal to S.C.C. refused, [2010] 1 S.C.R. ix; and *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at para. 40. The standard is whether there is sufficient credible and reliable evidence to permit a justice to find reasonable and probable grounds to believe that an offence has been committed and that evidence of that offence would be found at the specified time and place of search: *Morelli*, at para. 40. Said in another way, the test is whether there was reliable evidence that might reasonably be believed on the basis of which the warrant could – not would – have issued: *Morelli*, at para. 40; *Araujo*, at para. 54; and *Garofoli*, at p. 1452.

[85] The reviewing court does not undertake its review solely on the basis of the ITO that was before the issuing judge. The reviewing court must exclude erroneous information included in the original ITO, but may also consider, within limits, additional evidence adduced on the *voir dire* to correct minor errors in the ITO. Amplification evidence corrects good faith errors of the police in preparing the ITO, but does not extend to deliberate attempts to mislead the authorizing judge: *Morelli*, at para. 41; and *Araujo*, at

para. 58. Evidence relied upon to amplify the record must be evidence available to investigators at the time the ITO was sworn, not information acquired later: *Morelli*, at para. 43.

[86] Warrant review is an integral part – a first step – in an inquiry into admissibility of evidence proposed for reception. It is not a trial and must not take on the trappings of a trial in which the truth of the allegations contained in the indictment is explored: *Ebanks*, at para. 21. In establishing the record for the purposes of review, what is to be excised from the ITO is information that is erroneous, not information that is correct, or information that contradicts other information, or information with which the reviewing judge does not agree: *Ebanks*, at para. 21.

[87] Warrant review requires a contextual analysis. Inaccuracies in the ITO, on their own, are not a sufficient basis on which to ground a finding of bad faith or an intent to mislead, much less to provide a basis on which to set aside the warrant: Araujo, at para. 54. The existence of fraud, non-disclosure, misleading evidence, and new evidence are all relevant but are neither a prerequisite to, nor dispositive of, the review: *Garofoli*, at p. 1452; and *Ebanks*, at para. 20.

[88] It is no part of the reviewing judge's mandate to determine whether she would issue the warrant on the basis of the amplified record. Nor is it the reviewing judge's role to draw inferences, or to prefer one inference over another. The inquiry begins and ends with an assessment of whether the amplified record contains reliable evidence that might reasonably be believed on the basis of which the warrant could have issued: *Morelli*, at para. 40.

[89] A final point. An appellate court owes deference to the findings of the reviewing judge in her assessment of the record as amplified on the review and her disposition of the s. 8 application. Absent an error of law, a misapprehension of evidence, or a failure to consider relevant evidence, an appellate court should decline to interfere with the reviewing judge's decision: *Ebanks*, at para. 22; and *R. v. Grant* (1999), 1999 CanLII 3694 (ON CA), 132 C.C.C. (3d) 531 (Ont. C.A.), at para. 18, leave to appeal to S.C.C. refused, 150 C.C.C. (3d) vi.

The Principles Applied

[90] For reasons that I will develop, I would give effect to this ground of appeal. In my view, the trial judge exceeded the permitted scope of warrant review, thus erred in law in quashing the warrant, and in holding that the things seized under the warrant were obtained in a manner that breached Sadikov's rights under s. 8 of the *Charter*.

[91] The warrant review in this case required an inquiry of whether, on the amplified record, there remained reliable evidence that might reasonably be believed on the basis of which the warrant could, not would, have issued: *Morelli*, at para. 40.

[92] No real issue emerged here about the sufficiency of the ITO to establish reasonable and probable grounds for the belief that an offence involving controlled substances had been committed. The ITO included uncontradicted evidence of at least three drug sales by Sadikov to an undercover police officer.

[93] The warrant review here was reduced to a determination of whether the information contained in the amplified record, considered as a whole, could support a belief, based on reasonable and probable grounds, that evidence would be found in the second-floor, south-facing apartment at 306 Adelaide on execution of the warrant. This determination was to be made on an assessment of all the facts on the

same practical, non-technical, common sense basis that was applied by the authorizing judge. Provided the evidence in the amplified record was sufficient to support a reasonable inference of evidentiary discovery, the warrant could have issued and the application to set it aside should be dismissed. The very existence of errors or omissions in the ITO, even material errors or omissions, is not dispositive on review. The crucial issue is the capacity of what remained to satisfy the standard required.

[94] The cumulative effect of four errors satisfies me that the trial judge's decision to quash the warrant for 306 Adelaide cannot stand.

[95] First, although early in her reasons the trial judge articulated the correct test for warrant review, read as a whole, her reasons fail to demonstrate its proper application. In the end, the trial judge never did determine whether the amplified record *could* support a reasonable inference that evidence in connection with a drug offence would be found at the time and place of the proposed search.

[96] Second, the trial judge identified several "errors" in the ITO in connection with two factors that tended to link Sadikov to the address – its proximity to Club 338 and the presence of two pitbulls – but failed to consider the evidence about each factor as a whole in reaching her conclusion.

[97] Third, the trial judge considered each factor discretely, rather than, as required, in combination. At the very least, there was evidence that "Alex", who told the undercover officer that he had two dogs – pitbulls – was Sadikov, a person who was associated with two pitbulls, the same number and breed of dog seen outside and in the window of the second-floor, south-facing apartment at 306 Adelaide.

[98] The trial judge appears to have dismissed the proximity link on the basis of the discrepancy between D/C Evelyn's evidence about the time he saw a man fitting Sadikov's description walk along Adelaide and enter 306 and the time at which other officers made the same observations. What is clear from the ITO is that more than one surveillance officer made the same observation that was triggered by a telephone call from the undercover officer that "Alex" had left the Club to get the drugs for the arranged purchase. The undercover officer did not arrive at the Club until nearly 2:00 a.m. and alerted surveillance officers about "Alex's" departure at 3:07 a.m. D/C Evelyn had no notes of the time and acknowledged it was a "guess" that he made his observations at 1:10 a.m.

[99] Finally, it may also be open to question whether the evidence of D/C Evelyn, given on the *voir dire* on the warrantless search at 302 Adelaide but not, so far as I can determine, incorporated by reference into the review of the warranted search at 306 Adelaide, should even have formed part of the evidence of the latter.

[100] A *voir dire*, even a *voir dire* in a judge-alone trial, is a separate proceeding from the trial itself: Gauthier, at pp. 451-452. Evidence taken on a *voir dire* forms no part of the evidence at trial unless the parties expressly agree to its incorporation: *Erven*, at p. 932; *Darrach*, at para. 66; *Dela Cruz*, at para. 24; and *Gauthier*, at p. 454.

[101] The issues in play in each *voir dire* determine the evidence that is relevant, material, and admissible in that proceeding. But without express incorporation of the evidence adduced on one *voir dire* as evidence on another, the evidence on the first inquiry is not available for use in the later *voir dire*. It follows that reliance on evidence that has not been adduced or incorporated by a reference on a *voir* dire into admissibility may compromise the admissibility ruling. Disciplined application of Rules 30 and 31 of the *Criminal Proceedings Rules* ensures that the evidentiary predicate on each admissibility

inquiry is clearly and properly defined and rulings on admissibility are made in accordance with the correct governing principles.

[102] In the end, the reasons of the trial judge reflect a de novo reweighing and preferential ordering of inferences, an exercise that was beyond her authority.

CONCLUSION

[103] For these reasons, I would allow the appeal, set aside Sadikov's acquittal and order a new trial on the charges originating in the items seized at 306 Adelaide. The same result should follow for Harding, who did not participate in the warrant review at trial, but took advantage of the admissibility ruling that falls with the setting aside of the order finding the search unconstitutional.

Released: ("J. MacF.) January 27, 2014

"David Watt J.A."
"I agree. J. MacFarland J.A."
"I agree. Gloria Epstein J.A."

[1] Sadikov was convicted of trafficking and related proceeds counts arising out of the drug sales to the undercover officer at Club 338. Harding was not charged in those counts.

[2] It appears that the ITO for the warrant for Club 338 was the same as that for 306 Adelaide. Sadikov did not challenge the warrant for Club 338. He lacked any standing to do so.

[3] As I explain later, a consolidated *voir dire* may be held to determine the admissibility of evidence challenged on several grounds.