*R v Sanguez*, 2020 NWTSC 12 **S-1-CR-2018-000091**

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**IN THE MATTER OF:**

**HER MAJESTY THE QUEEN**

**-v-**

**BORIS BLAIR SANGUEZ**

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**Transcript of the Reasons for Decision of the Honourable Justice S.H. Smallwood, sitting in Yellowknife, in the Northwest Territories, on the 24th day of January, 2020.**

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**APPEARANCES:**

M. Fane: Counsel for the Crown

J. Major-Handsford: Counsel for the Crown

D. Tarnow: Counsel for the Defence

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Charges under s. 162(1)(b) and s. 271 of the *Criminal Code*

**There is a ban on the publication, broadcast or transmission of any information that could identify the complainant pursuant to s. 486.4 of the *Criminal Code*. Some initials have been randomized.**

There is a ban on the publication, broadcast or transmission of the evidence taken, the information given or the representations made and the reasons for decision pursuant to s. 648(1) of the Criminal Code.

**I N D E X**

**PAGE**

**DECISION** 1

**(BEGINNING OF EXCERPT)**

**(TELECONFERENCE COMMENCES)**

THE COURT: All right. So the accused Boris Blair Sanguez is facing two charges: a sexual assault contrary to section 271 of the *Criminal Code* and voyeurism contrary to section 162(1)(b) of the *Criminal Code*. The accused has brought an application for the exclusion of evidence, a memory card from a camera, seized by the police on June 4th, 2017 in Jean Marie River, Northwest Territories. The accused alleges that in seizing and searching the accused’s memory card without a search warrant that the police breached his rights under section 7 and 8 of the *Canadian Charter of Rights and Freedoms* and that the evidence should be excluded under section 24(2) of the *Charter*.

The Crown argues that there was no breach of the accused’s *Charter* rights, that the memory card was seized lawfully pursuant to the plain view doctrine or pursuant to section 489(2) of the *Criminal Code* and lawfully accessed by the police thereafter. If there is a *Charter* breach, the Crown argues that the evidence should not be excluded under section 24(2) of the *Charter*.

The evidence on the *voir dire* consisted of the testimony of Constable Jonah Candy, Constable Akira Currier, and Constable James Fogerty. There was also a search warrant, information to obtain a search warrant, general warrant, information to obtain a general warrant, and a booklet of photographs entered as exhibits.

On June 3rd, 2017, at approximately 9:00 p.m., Constable James Fogerty received a call from the Operational Communications Centre (“OCC”) regarding a sexual assault complaint in Jean Marie River. He asked Constable Candy to look into the complaint because he was dealing with another complaint at the time. Constable Fogerty was working, and Constable Candy was on call, the backup for Constable Fogerty. No one else was working that evening. Both officers were posted to Fort Simpson. The Fort Simpson detachment also polices the communities of Wrigley, Trout Lake, and Jean Marie River.

Constable Candy spoke with OCC who advised him of the details of the report which were that A.B, the sister of the victim, had reported that A.B. had been found in Boris Sanguez’ house partially clothed. A camera had also been located, and she believed from viewing the camera that a sexual assault had occurred. Constable Candy then called B.C. and spoke with her.

Following this conversation, he believed that A.B.’s boyfriend, T. F., had been looking for her, and he and B.C. had gone to Boris Sanguez’ residence to look for her. Inside the residence, they saw Boris Sanguez coming out of a room, pulling up his pants. They went into the room and found A.B. passed out with no clothes on from the waist down. B.C. found a camera with a card on it that had pictures that led her to believe that a sexual assault had occurred. They awoke A.B. and took her out of the residence and took the card from the camera.

Following the phone calls, Constable Candy spoke with Constable Fogerty and advised what he had learned. Constable Fogerty then contacted Sergeant Donovan and discussed the file with him. In order for Constable Fogerty and Constable Candy to go to Jean Marie River, they had to ensure that there was police coverage in Fort Simpson while they were gone.

Constable Candy and Constable Fogerty then drove to Jean Marie River, leaving shortly before 10 p.m. The drive to Jean Marie River from Fort Simpson takes an hour and a half and can take up to two hours. In June, there is a river that has to be crossed by a ferry which can affect how long it takes to get to the community.

The officers arrived in Jean Marie River around 11:50 p.m. and spoke with the victim’s father who they encountered on the road. Constable Fogerty testified that they spoke with G.P. and S.P. who told them that A.B. was still at the house and that they offered to point out Boris Sanguez’ residence. The officers followed them to the accused’s residence, which the P.’s pointed out, and then they went to the victim’s residence.

At the victim’s residence, there were half a dozen people in and around a black car consuming alcohol. Constable Fogerty spoke with A.B.. Ms. B. was able to speak but was quite intoxicated and was upset. Constable Fogerty asked A.B. if they could take her to the health centre to be examined, but she declined and also did not want to provide a statement that evening.

Constable Candy spoke with T.F. who was also drinking but was able to communicate. He advised that he and B.C. were looking for A.B. and went to the accused’s house and located A.B. there. A.B. was passed out, and he could not wake her up, and he had to strike her to wake her up.

At around 11:55 p.m., the officers knocked on the door and asked to speak to B.C.. Constable Candy and Constable Fogerty both observed that B.C. appeared sober. Constable Candy, Constable Fogerty, and B.C. went into the kitchen. The other people remained outside. On the kitchen table, there was a laptop. B.C. told them that she had taken a card from the camera. She showed the officers the pictures from the memory card she had taken using her laptop.

Constable Fogerty testified that he did not know she was going to show them the photographs until he saw the laptop. He also testified that neither he nor Constable Candy directed B.C. to do anything. Constable Candy took notes of what they were looking at. B.C. showed them what was on the card. Constable Candy could not remember if he operated the laptop at all but said it was possible that he may have.

Constable Candy saw a series of photos that B.C. said were of A.B. in various positions laying on a bed. There were some photographs where a woman was lying on her back with no clothing from the waist down. It looked like the female was not awake and was sleeping. There were some pictures where there was a closer-up view of the vaginal area. There were also pictures of a penis near or penetrating the vagina and pictures of a hand touching the vagina. A few of the photographs had what looked like a green sleeve or green shirt in the picture with the hand.

Constable Candy testified that he asked B.C. if there was a picture of Boris Sanguez on the card. Constable Candy wanted to see if there was a picture of him on the card and to see what he looked like. B.C. scrolled through the photographs and showed him one of him standing up in a picture. It was an unrelated photograph of the accused fully clothed. Constable Candy could not remember if he or B.C. actually scrolled through the pictures.

Constable Fogerty, however, testified that one of the first photographs that B.C. had shown them was a picture of Boris Sanguez, and it looked like it was at Banff National Park or somewhere similar. After this, Constable Fogerty testified that B.C. scrolled back on the memory card and showed them pictures of what appeared to be a past-out A.B. in various positions.

Constable Fogerty testified that B.C. operated the laptop, and that he wasn’t sure, but he might have flipped through a couple of the photographs himself. He did not recall if Constable Candy touched the laptop or not. Later, Constable Fogerty testified that he was not sure if they viewed the assault photographs first or the other photographs. Constable Fogerty testified that he did not think that they looked at a lot of the other photographs. He thought it was perhaps 10 photos that they quickly scrolled through. He recalled that there were some scenery photographs and a female with Boris Sanguez in a couple of the photographs.

Constable Fogerty testified that B.C. was distraught after viewing the photos and she said, “Take them. Take this memory card. I don’t want it.”

At 12:09 a.m., Constable Fogerty seized the memory card. Constable Fogerty said he seized the card because it was pertinent to the investigation. They had seen the photographs which in his view depicted a sexual assault, and there was an allegation of sexual assault.

Constable Fogerty estimated that they were in the kitchen for 5 to 10 minutes and no more than 10 minutes. In the kitchen, Constable Candy testified that there was also a discussion of where Boris Sanguez lived and trying to get A.B. to a health centre to get examined. This might involve A.B. going to Fort Simpson, and there were transportation issues related to doing so.

While in Jean Marie River, Constable Candy testified that he did not consider any expectation of privacy that Boris Sanguez might have had in the memory card. Constable Candy viewed the contents of the memory, the photographs, as depicting a sexual assault. Constable Fogerty testified that at the time he seized the card, he did not turn his mind to whether Boris Sanguez had an expectation of privacy in the card. Constable Fogerty described it as follows:

Question: Had you turned your mind to whether or not Boris Sanguez would have an expectation of privacy in that memory card at the time you seized it?

Answer: At the time we seized it, no. We were given the memory card. And given the situation that we were in with the allegations and -- yeah, I mean, like I say, it was handed to us. It was given to us, so we took it. We obtained it, essentially, and then took it back to Fort Simpson.

The officers attended Boris Sanguez’ residence after this as they felt they had grounds to arrest him. They were unable to locate him that evening. They returned to Fort Simpson, arriving just after 2:00 a.m. In total, they spent about an hour in Jean Marie River.

Constable Fogerty testified that Sergeant Donovan attended Jean Marie River and arrested the accused. He also took three statements there and returned to Fort Simpson with the accused. Constable Fogerty testified that the next day when he was writing his report he thumbed through the photographs again to assist him with a description of the photographs. Constable Fogerty put the memory card on the police file.

Constable Fogerty did not see the photographs again until following Mr. Sanguez’ arrest when Constable Smith was conducting an interview with the accused. Constable Smith had printed off some of the photographs for the interview. Constable Fogerty then saw the photographs again when Constable Currier was writing his information to obtain. There was a discussion at the detachment about obtaining a search warrant, and Constable Currier volunteered to write the information to obtain for the search warrant and then a general warrant. The discussion at the detachment included Sergeant Donovan, Constable Candy, Constable Currier, and Constable Fogerty. Constable Candy testified that he, other than seeing the photographs when B.C. showed him, that he did not view the photographs again.

Constable Akira Currier testified that he was the affiant for the warrants in this matter. In October 2017, he was asked by Sergeant Donovan to assist in obtaining a general warrant on the file. Constable Currier began by familiarizing himself with the investigation up to that point. He reviewed statements and accessed the memory card and viewed the photographs on the card. There were 879 photographs on the memory card, 68 of which appeared to be of evidentiary value. He then spoke with other officers and counsel. Following these conversations, he realized that Mr. Sanguez might have a reasonable expectation of privacy in the contents of the memory card, so he decided to first seek a search warrant for the contents of the card before getting a general warrant.

Constable Currier drafted an information to obtain and included an appendix entitled “Information Disclosed but Not Relied Upon.” This contained information which Constable Currier viewed as the information could be considered as having been improperly accessed, but the officer wanted to include it in the interest of being full, frank, and fair so that the issuing justice would be aware of the entire scope of the police actions, but that the information was not intended to influence the issuing justice’s decision as to whether or not the warrant should be granted.

On October 19th, 2017, the search warrant was granted. Constable Currier executed the warrant by re-accessing the memory card and copying to a disc the photographs which met the criteria in the search warrant. That disc was then seized as an exhibit and secured.

Constable Currier conducted an examination of the card and described the photographs in detail and viewed the time stamps of the photographs. Following this, he completed a Form 5.2 and forwarded it by fax to the issuing justice. Constable Currier then began working on an information to obtain a general warrant.

During Constable Currier’s review of the seized images, he observed a variety of physical characteristics captured which belonged to the offender. There were images of his penis, scrotum, left hand, parts of his thigh, and abdomen. Constable Currier identified a number of specific things which he believed if photographed on the suspect the police could gather evidence which would help to prove the identity of the offender.

Constable Currier decided he could achieve the objective by limiting the photographs to the hand which would be less intrusive than photographing the accused’s penis. Constable Currier had identified a scar which ran diagonally along the medial surface of the left index finger, and there also appeared to be a freckle on the same finger.

Constable Currier obtained a general warrant on February 13th, 2018. The information to obtain also contained an appendix similar to the search warrant information to obtain. Constable Currier included this appendix for similar reasons.

Constable Currier executed the warrant. Constable Currier approached Mr. Sanguez following Territorial Court and detained him. He transported the accused to the detachment where he provided the accused with a copy of the warrant. Constable Currier explained the warrant to the accused, and the accused was put in contact with counsel and given an opportunity to speak in private with counsel.

Constable Currier then took photographs of the accused’s left hand. Constable Currier was of the opinion that the scar on the photograph of the accused’s hand matched the scar indicated in the offence-related photograph. He also believed that the freckle on the finger was visible on the photographs he took of the accused’s hand.

Counsel agree for the purpose of the *voir dire* that B.C. took the memory card from Boris Sanguez’ bedroom from his camera without his permission. The warrant to search, general warrant, and the informations to obtain were all filed on the *voir dire*. Photographs were also filed.

The first photographs were the photographs located by B.C. on the memory card and shown to Constables Fogerty and Candy. There are approximately 68 photographs, and they are graphic. They depict photographs of a woman who appears to be unconscious, either sleeping or passed out. The woman is laying on her back and is unclothed from the waist down. She is wearing a blue shirt underneath a grey, long-sleeved shirt. The vaginal area of the woman is exposed, and the majority of the photographs are of the vaginal area.

There are several pictures of a penis near or penetrating the vagina of what appears to be the same woman. There are photographs of the hand of a person touching a vagina, and that person is wearing what appears to be different clothing than the woman. That person appears to be wearing a green, long-sleeved shirt or sweater. There are also close-up photographs of the hand spreading the labia of the woman, and there appears to be a scar on the hand as well as a freckle.

There is also a photograph of A.B. taken by Constable Candy outside her residence when the police officers first arrive there. The photograph depicts a woman wearing a sweater that appears similar to the sweater worn by the woman in the photographs located on the memory card. There are also photographs taken by Constable Currier when executing the general warrant. There are photographs of the accused’s hand which appear to depict a scar and a freckle.

The issues in this case surround the police seizure of the memory card and the subsequent searches of the memory card by the police. In addition, there are issues with respect to the information to obtain the search warrant.

The accused claims the police breached his rights under section 7 and 8 of the *Canadian Charter of Rights and Freedoms* and that the evidence should be excluded under section 24(2) of the *Charter*. The Crown argues that there was no breach of the accused’s *Charter* right, that the memory card was seized lawfully, and accessed lawfully. If there is a *Charter* breach, the Crown argues that the evidence should not be excluded under section 24(2) of the *Charter*.

Section 7 of the *Charter* states that, “Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” The application filed by the accused alleges a breach of section 7 and 8 of the *Charter*. The submissions of counsel at the *voir dire* focussed on section 8 and did not address section 7. As such, I do not intend to specifically address section 7 in this decision. I would note that section 8 addresses a specific right included in the principles of fundamental justice, and if a search is reasonable under section 8, it will invariably be consistent with the principles of fundamental justice under section 7 (*R. v. Mills*, [1999] 3 S.C.R. 668, at paragraphs 87, 88).

Section 8 of the *Charter* states that everyone has the right to be secure against unreasonable search or seizure. In this case, the police seized the memory card from B.C. at her residence. It is not in dispute that B.C. took the memory card from a camera at Boris Sanguez’ residence and that she did not have his permission to do so. Taking the memory card from the camera was an action undertaken by B.C. prior to the involvement of the police in this matter.

Section 8 of the *Charter* protects an individual’s reasonable expectation of privacy against the actions of the state and not of individuals. B.C.’s actions in taking the memory card do not engage section 8. What we are concerned about are the actions of the police once they are shown the photographs on the memory card by B.C..

The Crown argues that the memory card was seized lawfully by Constable Fogerty pursuant to the plain view doctrine or section 489(2) of the *Criminal Code*.

The starting point is that a warrantless search is *prima facie* unreasonable. When a search is conducted without a warrant, the Crown must establish on a balance of probabilities (1) that a search was authorized by law, (2) the law itself is reasonable, and (3) the manner in which the search was carried out was reasonable (*R. v. Cole*,2012 SCC 53, at paragraph 37).

The plain view doctrine operates to authorize the seizure of an item in the plain view of officers when the officers are lawfully present in the place where the search is being conducted. The requirements of the plain view doctrine were described in the *R. v. Jones*, 2011 ONCA 632, at paragraph 56:

The ‘plain view’ doctrine operates when a police or peace officers in the process of executing a warrant or an otherwise lawfully authorized search with respect to one crime and evidence of another crime falls into plain view. Resort to this common law power is subject to the following restraints, however:  
(i) The officer must be lawfully in the place where the search is being conducted ("lawfully positioned", in the language of the authorities); ii) the nature of the evidence must be immediately apparent as constituting a criminal offence;

(iii) the evidence must have been discovered inadvertently;

(iv) the plain view doctrine confers a seizure power not a search power; it is limited to those items that are visible and does not permit an exploratory search to find other evidence of other crimes.

The decision in *Jones* emphasized that the seizure power was limited to items that were visible, in plain view, and that it did not grant authority to conduct an exploratory search to find evidence of other crimes. The police officers must also be lawfully in the place and acting lawfully in the exercise of their powers when discovering the evidence (*R. v. Gill*, 2019 BCCA 260, at paragraphs 37, 38).

In *Gill*, the British Columbia Court of Appeal held that the requirement that the evidence be discovered inadvertently did not necessarily mean that the discovery of the evidence be unexpected, and stated at paragraph 52:

I accept that for the plain view doctrine to apply, the discovery of the item by the officer must be ‘inadvertent’ in the sense that it is not discovered by unauthorized search, but rather, because it is in the open where the police are lawfully in the place where it is visible, and lawfully exercising police duties.

Section 489(2) of the *Criminal Code* authorizes a peace officer to seize evidence and states:

Every peace officer, and every public officer who has been appointed or designated to administer or enforce any federal or provincial law and whose duties include the enforcement of this or any other Act of Parliament, who is lawfully present in a place pursuant to a warrant or otherwise in the execution of duties may, without without a [warrant,](http://www.criminal-code.ca/criminal-code-of-canada-section-493-definition-of-warrant/index.html) seize anything that the officer believes on reasonable grounds (a) has been obtained by the commission of an [offence](http://www.criminal-code.ca/criminal-code-of-canada-section-183-definition-of-offence/index.html) against this or any other [Act](http://www.criminal-code.ca/criminal-code-of-canada-section-2-definition-of-act/index.html) of Parliament;

(b) has been used in the commission of an [offence](http://www.criminal-code.ca/criminal-code-of-canada-section-183-definition-of-offence/index.html) against this or any other [Act](http://www.criminal-code.ca/criminal-code-of-canada-section-2-definition-of-act/index.html) of Parliament; or

(c) will afford [evidence](http://www.criminal-code.ca/criminal-code-of-canada-section-136-2-definition-of-evidence/index.html) in respect of an [offence](http://www.criminal-code.ca/criminal-code-of-canada-section-183-definition-of-offence/index.html) against this or any other [Act](http://www.criminal-code.ca/criminal-code-of-canada-section-2-definition-of-act/index.html) of Parliament.

In *Jones*,at paragraph 58, the Ontario Court of Appeal noted that the plain view doctrine in section 489 of the *Criminal Code* are “exceptions to the general rule that a warrantless search is unreasonable and therefore a violation of section 8.”

I find that there is no section 8 breach in the decision of Constable Fogerty to seize the memory card from B.C.. Constable Fogerty and Constable Candy went to Jean Marie River to investigate a complaint of sexual assault. They were aware that there were photographs which appear to depict a sexual assault. When they arrived in Jean Marie River and spoke with B.C., she showed the photographs to the officers.

Both officers described B.C. as wanting to show them the photographs and that she used her laptop to show them and scroll through the photographs. She also showed them a photograph of a male she said was the accused. Neither officer could remember if they scrolled through the photographs at all but admitted that it was possible. In my view, I do not think that matters in the circumstances of the case.

The officers were presented with a situation where they were investigating a sexual assault and viewed photographs on a computer that appeared to depict a sexual assault. Constable Fogerty had a duty to seize the evidence and not leave it in the possession of B.C.. Constable Fogerty testified that B.C. appeared upset by the photographs and told them to take the memory card, that she did not want it.

It is not clear what B.C. would have done with the memory card had Constable Fogerty not seized it. Seizing the memory card allowed the officer to preserve the evidence and prevent its loss or further dissemination to other individuals. The officers had no other realistic option but to seize the memory card at that time, and Constable Fogerty was fulfilling his responsibilities as a police office in seizing the memory card. Whether it was pursuant to section 489(2)(c) or the plain view doctrine, I find that Constable Fogerty lawfully seized the memory card from B.C..

The defence is not, as I understand it, alleging that the actions of Constable Fogerty and Constable Candy in initially viewing the photographs and seizing the memory card from B.C. resulted in a violation of the accused’s section 8 rights. In submissions, counsel for the accused took the position that having seized the memory card and returned to Fort Simpson that the police should have gotten a warrant for the card the following day. Instead, the police did not obtain a search warrant for approximately four months, and the memory card was left in the police file.

In that time period, several officers viewed the photographs. Constable Fogerty viewed the photographs again the day after he and Constable Candy returned from Jean Marie River. He viewed the photographs while preparing his report.

Constable Smith and Constable Currier also viewed the photographs. Constable Smith viewed at least some of the photographs and printed off some to use when he interviewed the accused following his arrest. Constable Currier viewed the photographs around four months later when he reviewed them as part of the process of drafting an information to obtain a search warrant.

The Crown argues that once the memory card was lawfully seized, the accused had a diminished expectation of privacy in it. Consequently, the police did not need to obtain a search warrant for the memory card and could access the card at will. The accused’s reasonable expectation of privacy was subordinate to the police’s duty to investigate crime.

The lawful seizure of a memory card without a warrant does not necessarily mean that the police are authorized to then search the memory card for evidence. As observed in *Cole* at paragraph 65 and 73, the police may be authorized to take physical control of a laptop temporarily in order to safeguard potential evidence of a crime until a search warrant can be obtained. The lawful receipt of the laptop does not, however, allow the police warrantless access to the personal information contained within it (See also *R. v. Marakah*, 2017 SCC 59, at paragraph 50).

In *Cole*, the item was a work laptop which had been turned over to the police by the school board after child pornography had been located on the device during maintenance. The Supreme Court of Canada held that the personal information in the laptop “remained subject at all relevant times to Mr. Cole’s reasonable and subsisting expectation of privacy” (*Cole,* paragraph 73).

The transfer of the accused’s memory card from B.C. to the police did not change the accused’s reasonable expectation of privacy in the memory card (*R. v. Buhay*, 2003 SCC 30, at paragraphs 33, 34).

It has been established by the Supreme Court of Canada that in the case of cell phones and computers, important privacy interests are involved when these devices are seized by the police. This was stated in *R. v. Fearon*, 2014 SCC 77, at paragraph 51:

It is well settled that the search of cell phones, like the search of computers, implicates important privacy interests which are different in both nature and extent from the search of other ‘places’. It is unrealistic to equate a cell phone with a briefcase or document found in someone’s possession at the time of arrest.  As outlined in *Vu*, computers — and I would add cell phones — may have immense storage capacity, may generate information about intimate details of the user’s interests, habits, and identity without the knowledge or intent of the user, may retain information even after the user thinks that it has been destroyed, and may provide access to information that is in no meaningful sense ‘at’ the location of the search (citations omitted).

Computers and cell phones contain the sort of private information which is at the biographical core of personal information and closely protected by section 8 of the *Charter (Cole*, at paragraphs 46 to 48).

The Crown argues that a memory card from a digital camera is different from a computer or laptop or cell phone. A memory card, they say, is more like a photo album than a computer, and the personal information that it is capable of storing is not the biographical core of information contained in cell phones and computers.

The Supreme Court of Canada has considered the seizure and search of electronic devices in a number of decisions: *Morelli, Vu, Cole, Fearon,* et cetera. The development of cell phones and laptops and the amount of personal information that can be gleaned from a search of these electronic devices has been the focus of evolving section 8 jurisprudence. However, I am not aware of a decision from the Supreme Court of Canada that addresses specifically digital cameras or memory cards.

In *R. v. Balla*, 2016 ABCA 212, the Alberta Court of Appeal considered a case which involved a camera memory card. In that case, the trial judge had considered the execution of a search warrant and whether the terms of the warrant permitted the seizure of a digital camera and then for the police to search the digital camera. The trial judge found there was no section 8 breach and viewed the contents of the digital camera as akin to documents which might contain personal information but would not contain the biographical core of personal information found in computers or smart phones.

The trial judge went on to consider section 24(2) of the *Charter* and concluded that if there was a breach, he would not exclude the evidence. On appeal, the Alberta Court of Appeal appeared to come to a different conclusion regarding section 8 but agreed with the trial judge with respect to section 24(2) and did not exclude the evidence.

The case of the *R. v. Caron*, 2011 BCCA 56 dealt with a search and seizure of a digital camera at a vehicle traffic stop for speeding. In *Caron*, the issue on appeal was not whether there had been a *Charter* breach, but essentially the trial judge’s section 24(2) analysis. Factually, the actions of the officer in *Caron* in searching the vehicle glove box, locating a digital camera, turning it on, and scrolling through the photographs to determine if there might be photographs depicting the speedometer are very different than in this case where the evidence was essentially offered to Constable Fogerty and Constable Candy by a third party. And the focus is on the actions of the police officers, in this case, once they had lawfully seized the memory card.

In *Caron,* the British Columbia Court of Appeal viewed the digital cameras as containing biographical core personal information that a person was entitled to keep private (*Caron*, paragraph 60).

In this case, the photographs were located on a memory card that Constable Currier described as a SD card. Constable Currier described a SD as follows:

Question: And what is its function when it’s inserted into a camera? What does the SD card do?

Answer: It provides memory storage.

Question: For what?

Answer: For any sort of data that you wish to put on it. The camera generally would either be images or video, but it is simply memory medium. There’s no reason why you couldn’t put other things on the card if you wished to do so.

A SD card is a storage device which can store a variety of electronic information. It is not the same as a cell phone or a computer in that it requires that it be inserted into or connected to an electronic device to place information on the card whether it be photographs, videos or documents. A memory card, because it is a storage device, does not contain its own computing or processing power, and the amount of core biographical information that it contains about a person is likely less than what would be on a smart phone or computer. However, that is not to say that it does not contain personal information. Photographs, videos, documents can all contain personal information and can reveal information about the user that may or may not be intended.

Mr. Sanguez retained a reasonable expectation of privacy in the memory card which had been taken by B.C. from his residence even after it was turned over to the police. Once the police received this item from B.C., they were required to obtain a search warrant to convert their holding from a simple seizure to an authorized power to seize the memory card and search it for evidence as contemplated by Justice Paciocco in *R. v. Barwell*, 2013 CarswellOnt 10608, at paragraph 16.

While the police were required to obtain a search warrant, I would not stipulate that it had to be done the next day, but, instead, within a reasonable amount of time. Moreover, the police were required to obtain a search warrant before further accessing the photographs on the memory card. Simply because the memory card was lawfully within the police’s possession does not mean that the police were free to access the contents of the memory card at will.

Therefore, I find that the access of the memory card by Constable Fogerty, Constable Smith, and Constable Currier prior to obtaining a search warrant was a violation of the accused’s section 8 *Charter* rights against unreasonable search or seizure.

Three other issues were raised during the *voir dire* with respect to the information to obtain a search warrant completed by Constable Currier that I also want to address briefly. The first is that the information to obtain that was presented in court shows Constable Currier’s signature affirming the information to obtain but does not include the signature of the justice of the peace indicating that the document was sworn before him.

Constable Currier explained that he had obtained the warrant by telephone and that he had sworn the ITO and forwarded it to the justice of the peace. He did not receive a signed copy back from the justice of the peace. It would be expected that the justice of the peace would forward his materials to the Court Registry, and the signed originals would be on the file. I do not have that information before me.

In any event, I do not think that this is a significant oversight. Constable Currier’s evidence was that he affirmed the ITO. There is no evidence that he presented to the justice of the peace an information to obtain that was not sworn.

The second issue that was raised was the appendix; although, it is not clear to me that defence counsel actually took issue with how Constable Currier drafted the information to obtain. The appendix that was included in the informations to obtain for both the search warrant and the general warrant were intended to provide the justice of the peace with full, frank, and fair disclosure, and to describe actions taken by the police that Constable Currier viewed as being possibly improper, but that were not being relied upon to obtain the search warrant or the general warrant. In my view, this was an appropriate method to deal with this information. Even if it were necessary to excise this information from the information to obtain, there were still reasonable grounds to grant the warrants.

The third issue is that the information to obtain a search warrant did not specifically say that Boris Sanguez did not give B.C. permission to take the memory card. The information to obtain does not specifically say this, but a review of the document demonstrates that this information would have been apparent to the justice of the peace.

Having found a breach of the accused’s *Charter* rights, the next question is whether the evidence located on the memory card should be excluded.

Section 24(2) of the *Canadian Charter of Rights and Freedoms* states:

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The Supreme Court in *R. v. Grant*, 2009 SCC 32 set out what must be considered in determining whether evidence obtained in breach of an accused *Charter* rights should be excluded. A court must assess and balance the effect of admitting the evidence on society’s confidence in the justice system, having regard to:

(1) the seriousness of the Charter-infringing state conduct;

(2) the impact of the breach on the Charter-protected interests of the accused; and

(3) society’s interest in the adjudication of the case on its merits.

Looking first at the seriousness of the breach, the court has to assess the seriousness of the police conduct that led to the breach. There is a difference between admission of evidence obtained through inadvertent or minor violations of the *Charter* and evidence obtained through a willful or reckless disregard of *Charter* rights. The admission of evidence obtained through a willful or reckless disregard of *Charter* rights will have a negative effect on public confidence in the justice system and risk bringing the administration of justice into disrepute (*Grant,* at paragraph 74).

Whether the police were operating in good faith is another consideration in assessing the seriousness of the police conduct. However, the court in *Grant* also noted the that ignorance of *Charter* standards must not be encouraged, and negligence or willful blindness does not constitute good faith. As stated in *Grant* at paragraph 75:

Willful or flagrant disregard of the *Charter* by those very persons who are charged with upholding the right in question may require that the court dissociate itself from such conduct.

The court in *Grant* refers to the spectrum of seriousness of *Charter* violations, with inadvertent or minor violations at one end and willful or reckless disregard for *Charter* rights at the other end. While the officers did not initially give any consideration to whether the accused had a reasonable expectation of privacy in the memory card and did not initially consider whether they should obtain a search warrant, erring on the side of caution, they did not knowingly disregard the requirement to obtain a search warrant. While the situation with computers and cell phones is settled, the issue of memory cards has not been specifically addressed by the Northwest Territories Court of Appeal or the Supreme Court of Canada.

The officers did have reasonable and probable grounds to obtain a warrant; although, in some circumstances that may aggravate the seriousness of the breach (*Cole*, at paragraph 89). I do not think that it does aggravate the seriousness of the breach in this case. Constable Currier sought advice from other offices and from counsel. He did turn his mind then to the accused’s reasonable expectation of privacy. He obtained a search warrant and a general warrant, and in the information to obtain, he did disclose the police actions with respect to the memory card.

There was nothing excessive or abusive in how the police officers dealt with the memory card following its seizure from B.C.. Somewhere between the extremes of bad faith and good faith is a grey zone with varying shades of grey (*Fearon*,at paragraph 94, 95).

This spectrum was described in the *R. v. Flintroy*, 2019 BCSC 213, at paragraph 45:

As I see the matter, knowingly or intentionally violating *Charter* standards represents bad faith. Moving down the spectrum is willful blindness and negligence, then carelessness and ignorance somewhere nearer to the middle. Moving closer to the good faith end is where the state of the law is ambiguous, unclear, or evolving, but the police proceeded nonetheless, i.e. not careless *per se* but also not erring on the side of caution. Finally, at the good faith end of the spectrum, is an honestly and reasonably held belief as to the legality of the action at the time the action was taken, which incorporates the consideration that the law, at the time, was either fairly settled, sufficiently ambiguous or not yet decided upon. The non-exigency of the situation may aggravate the degree of culpability; conversely, exigent circumstances may mitigate it.

I do not think that the actions of the police officers were egregious or demonstrated bad faith. This does not mean that they acted in good faith. I find that the officers’ actions fall somewhere in the middle of the spectrum.

Turning to the second factor, the court must also evaluate the extent to which the breach undermined the *Charter* protected interests of the accused. The impact of a *Charter* breach may range from fleeting and technical to profoundly intrusive. The more serious the impact on the accused’s interest, the greater the risk that omission of the evidence will bring the administration of justice into disrepute (*Grant*, at paragraph 76).

The focus on a section 8 breach is “on the magnitude or intensity of the individual’s reasonable expectation of privacy and on whether the search demeaned his or her dignity” (*Cole*,at paragraph 91).

In *Fearon*, which dealt with a search of a cell phone incidental to arrest, the Supreme Court of Canada considered the second factor. While noting that a search of a cell phone has the potential to be a significant invasion of a person’s privacy, the court viewed that Mr. Fearon’s privacy interests were going to be impacted in any event. Even after excising the details of the section 8 breach, there were still reasonable and probable grounds to obtain a search warrant. As such, the breach of Mr. Fearon’s section 8 rights did not significantly change the nature of that impact (*Fearon*, at paragraph 96).

This was the situation in *Cole* as well where the Supreme Court stated at paragraph 93:

[T]he courts below failed to consider the impact of the ‘discoverability’ of the computer evidence on the second *Grant* inquiry.  As earlier noted, the officer had reasonable and probable grounds to obtain a warrant.  Had he complied with the applicable constitutional requirements, the evidence would necessarily have been discovered.  This further attenuated the impact of the breach on Mr. Cole’s *Charter*-protected interests.

As with cell phones, cameras can contain biographical core information of an individual, and the search of a memory card from a camera has the potential for a significant invasion of a person’s privacy interests. In this case, the police officers were aware of the evidence prior to the breach. They were shown the photographs by B.C. and lawfully seized the memory card.

While the accused retained a reasonable expectation of privacy in the memory card, and there is the potential for a significant invasion of his privacy, in the circumstances, the accused’s privacy interests were going to be impacted in any event. The police had reasonable and probable grounds to obtain a warrant prior to the section 8 breach, and the breach did not significantly change the nature of the impact on the accused’s privacy interests. As in *Fearon*, I conclude that the impact of the breach on the accused’s *Charter*-protected interest weakly favours exclusion.

Looking at society’s interests in adjudication on the merits, society generally expects that criminal charges will be determined on their merits, and there is a collective interest in ensuring that those who violate the law are brought to trial and dealt with according to the law. In considering this factor, the court must be careful not to allow it to overwhelm the section 24(2) analysis (*Cole*, at paragraph 95).

The reliability of the evidence is an important factor to consider. As stated in *Grant* at paragraph 81:

If a breach...undermines the reliability of the evidence, this points in the direction of exclusion of the evidence.  The admission of unreliable evidence serves neither the accused’s interest in a fair trial nor the public interest in uncovering the truth.  Conversely, exclusion of relevant and reliable evidence may undermine the truth-seeking function of the justice system and render the trial unfair from the public perspective, thus bringing the administration of justice into disrepute.

Reliability issues with physical evidence will generally not be related to the *Charter* breach (*Grant*, at paragraph 115). Other factors to consider include the importance of the evidence to the prosecution’s case and the seriousness of the offence in issue.

The evidence obtained in this case is critical evidence to the Crown’s case. The evidence is highly reliable and probative physical evidence. The charges the accused face are serious. Sexual assault is a significant issue in this jurisdiction, and there is a significant interest in having these types of charges determined on their merits in the Northwest Territories.

In conclusion, the administration of the contents of the memory card into evidence would not bring the administration of justice into disrepute. The breach was in the middle of the spectrum of seriousness, and the impact of the breach was attenuated by the discoverability of the evidence. The evidence is highly probative and reliable.

Society has a significant interest in having serious matters like this determined on its merits. In my view, balancing these factors weighs in favour of admission, and the admission of the evidence would not bring the administration of justice into disrepute. Exclusion of this evidence would, however, risk bringing the administration of justice into disrepute.

For these reasons, I find that the memory card and its contents are admissible in evidence.

**(END OF EXCERPT)**

**CERTIFICATE OF TRANSCRIPT**

Neesons, the undersigned, hereby certify that the foregoing pages are a complete and accurate transcript of the proceedings transcribed from the audio recording to the best of our skill and ability. Judicial amendments have been applied to this transcript.

Dated at the City of Toronto, in the Province of Ontario, this 24th day of March, 2020.



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Kim Neeson

Principal