IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *R. v. Phagura*,
2019 BCSC 1638

Date: 20190107
Docket: X080616-2
Registry: New Westminster

Regina

v.

Sukhdev Singh Phagura

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Corrected Judgment: The text of the judgment was corrected on the front page on November 27, 2019.

Before: The Honourable Mr. Justice Crabtree

Oral Ruling on s. 8 and s. 24(2) *Charter* Application

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Counsel for the Accused:	B. Mohan D. Parker, Articled Student
Place and Dates of Hearing:	New Westminster, B.C. November 28-30, 2018
Date of Ruling/Result provided to Parties with Reasons to follow:	December 4, 2018
Place and Date of Reasons:	New Westminster, B.C. January 7, 2019

[1] **THE COURT:** These are the reasons relating to Mr. Phagura's application pursuant to s. 8 and s. 24(2) of the *Charter of Rights and Freedoms* [*Charter*] seeking to excluded evidence obtained in the course of the investigation.

[2] The evidence in question was obtained by Constable Naidu of the RCMP, on June 11, 2017. On that date, the officer took three photographs of text messages that were located on Ms. M.K.'s cellular phone. The evidentiary record consists of the following:

- three photographs capturing screenshots of a text message exchange between Mr. Phagura and Ms. M.K., on Ms. M.K's phone;
- the transcript of the preliminary inquiry dated March 26 and 27, 2018; and
- a one-page document setting out the details of the *WhatsApp* app.

[3] A brief summary of the circumstances giving rise to the application is as follows. Mr. Phagura is charged with the sexual assault of Ms. M.K., on or about June 11, 2017. Shortly before and following the time the alleged incident took place, Mr. Phagura and Ms. M.K. engaged in text messaging, through what has been referred to as the *WhatsApp* program.

[4] On June 11, 2017, Ms. M.K. reported that she had been assaulted to the RCMP. The police attended later that morning, at which time Ms. M.K. was interviewed and provided a statement to Cst. Naidu. During the interview, the officer took photographs of what she understood to be the text message exchange between the two individuals that appeared on Ms. M.K.'s cellphone.

[5] The Crown seeks to introduce the photographs at the trial, as evidence of an admission by Mr. Phagura, as an opposing party and corroborating Ms. M.K.'s account of events. Mr. Phagura submits that the photographs of the text message exchange should be excluded, as they were obtained in breach of his s. 8 *Charter* rights.

[6] In determining whether the photographs should be excluded due to the breach of the defendant's s. 8 *Charter* rights, there are potentially four issues that need to be addressed. They are:

1) Did the defendant have a reasonable expectation of privacy in the relevant text messages such that s. 8 is engaged?

2) Does the defendant have standing to challenge the search and admissibility of the messages?

3) In the event that the defendant establishes, on a balance of probabilities, a reasonable expectation of privacy, was the search reasonable as defined or contemplated in *R. v. Collins*, [1987] 1 S.C.R. 265 [*Collins*]?

4) In the event the search is found to be unreasonable, will the admission of the evidence at the trial bring the administration of justice into disrepute?

[7] Section 8 applies "where a person has a reasonable privacy interest in the object or subject matter of the state action": *R. v. Cole*, 2012 SCC 53 [*Cole*] at para. 34. For s. 8 of the *Charter* to be engaged, Mr. Phagura, must first establish a reasonable expectation of privacy in the subject matter of the search. In other words, does the person subjectively expect that the subject matter would be private and is the expectation objectively reasonable?

[8] In *R. v. Marakah*, 2017 SCC 59 [*Marakah*] Chief Justice McLachlin concluded that an assessment of the circumstances will determine whether the sender of text messages sent to and located on a recipient's phone has a reasonable expectation of privacy, in accordance with the principles enumerated in s. 8 of the *Charter.*

[9] Whether a claimant has a reasonable expectation of privacy is to be assessed in the totality of the circumstances, as set out in *R. v. Edwards,* [1996] 1 S.C.R. 128 [*Edwards*]. *Cole* sets out the following factors to be considered:

1) What was the subject matter of the alleged search?

2) Did Mr. Phagura have a direct interest in the subject matter?

3) Did Mr. Phagura have a subjective expectation of privacy in the subject matter?

4) If so, was Mr. Phagura's subjective expectation of privacy objectively reasonable?

[10] In the event the foregoing factors are satisfied, Mr. Phagura has established standing and can assert that his s. 8 *Charter* right has been infringed, the focus moves to a consideration of the factors outlined in *Collins*:

(1) Is the search authorized by law?

(2) Is the law reasonable?

(3) Was the search carried out in a reasonable manner?

[11] However, in the event Mr. Phagura does not establish he has standing, it will conclude this matter.

[12] In summary, I conclude as follows. The subject matter of the alleged search was the electronic conversation between Mr. Phagura and Ms. M.K., which was located on Ms. M.K.'s phone. Mr. Phagura had a direct interest in that subject matter. Mr. Phagura subjectively expected it to remain private. However, I do not find that the subjective expectation was objectively reasonable. As a result, Mr. Phagura does not have standing to challenge the search and, on this basis, the application is dismissed.

[13] I will now review the reasons for coming to this conclusion.

[14] In the course of submissions, there was no issue taken with respect to the first two elements as outlined in para. 9: the subject matter of the search and whether the defendant has a direct interest in the electronic conversation.

[15] The subject of the search was the text messaging or the electronic communications through the electronic tool known as *WhatsApp*. This program transmits text messages and calls from one mobile phone user to another. The defendant's interest was as one of two participants in the electronic conversation between the parties and he was the author of the particular text messages that the Crown seeks to introduce at the trial.

[16] The first and second elements were both established, as they were in *Marakah*. I will adopt paras. 13 to 20 of that decision, as the basis for the finding in this case.

[17] Third, did the defendant have a subjective expectation of privacy in the subject matter? The defendant submits that he had a subjective expectation of privacy in these messages based on the fact the conversation was between himself and the complainant, and he asked the complainant to delete the messages and not to tell anyone about them.

[18] The Crown's position was that the defendant has failed to establish an evidentiary foundation on which a subjective expectation of privacy can be found.

[19] While Mr. Phagura bears the burden to establish that he had a subjective expectation of privacy, this is not a particularly "high hurdle" to overcome (*Marakah,* para. 22.)

[20] In *R. v. Pelucco*, 2015 BCCA 370 [*Pelucco*] a decision of our Court of Appeal, at para. 53, Justice Groberman stated:

> [53] I agree with the trial judge's conclusion that Mr. Pelucco had a subjective expectation that his text conversation with Mr. Guray was private. Although the defence called no evidence to establish that expectation, the circumstances leave little room for any other conclusion. It would strain credulity to suggest that a reasonable person would have engaged in such a conversation if they thought that the messages would be shared with others.

[21] In *R. v. Jones*, [2017] 2 S.C.R. 696 [*Jones*] a subjective expectation of privacy was established in circumstances where the defendant relied upon the Crown's

theory that he was the author of the text messages. At para. 33, the Court in *Jones* stated:

> [33] ... Mr. Jones is entitled to rely on this exception because, as explained above ... Crown counsel tendered the Text Messages to prove that he was the author of their inculpatory contents, and admitted in the *voir dire* that the evidence was "very clear" in that respect. ...

[22] In the case at bar, the Crown's theory is similar to that in *Jones.* Mr. Phagura is the author of the text messages sent to Ms. M.K. on June 10 and 11, 2017.

[23] In the circumstances of this case, the defendant initially requested Ms. M.K. to delete a message prior to the alleged incident taking place. At 12:13 a.m., Mr. Phagura texted Ms. M.K. asking her not to tell anyone, stating, "Please don't".

[24] In these circumstances, the defendant clearly intended the message to be private and I find Mr. Phagura had a subjective expectation of privacy in the subject matter of the search.

[25] Fourth, is Mr. Phagura's subjective expectation of privacy objectively reasonable? In this case, this is the crux of the matter to be determined. Given Mr. Phagura's subjective expectation of privacy, once the message has been transmitted to a third party, is it objectively reasonable?

[26] In the *Marakah* decision, the court outlined a number of factors to assist in informing the objective assessment.

[27] While the court is not limited solely to these factors, the following were identified in *Marakah*:

a) the place of the search;

b) the nature of the subject matter of the search; and

c) the ability to regulate, control, and historical use.

[28] Mr. Phagura submits that the expectation is objectively reasonable and that all three factors support this finding.

[29] Place can be helpful in determining whether a conversation is expected to remain private. Here, the electronic conversation takes place on the *WhatsApp* program, between Mr. Phagura and Ms. M.K. The electronic messages sent are encrypted, which reduces the ability for anyone, other than the two participants to the chat or to observe the messages. Furthermore, the information contained in Exhibit 6 supports the position that even the operators of the program or application do not have access to the messages that flow through the *WhatsApp* program.

[30] Based on the purposive approach to s. 8, privacy interests fall within the protection afforded by this right, which includes informational or information privacy. In other words, s. 8 protects a biographical core of personal information which individuals in a free and democratic society would wish to maintain and control from dissemination to the state without lawful authorization.

[31] As noted in *Marakah*, it is not the actual message or what is contained in the electronic conversation, rather it is the potential for such information in such conversations to reveal intimate details of the lifestyle and personal choices of the individual that this particular component seeks to address (*Marakah,* para. 32). Electronic conversations have the ability to reveal a great deal of personal information. Because of this, the court in *Marakah* speaks of the preservation of a zone of privacy which can include conversation that one shares with others.

[32] Based on a review of the three factors – place, capacity to reveal personal information, and control – the court in *Marakah*, determined that the defendant had standing to challenge the search and the admissibility of the evidence.

[33] In this case, the defendant submits that the nature of the alleged conversations between the complainant and the defendant ought to attract a high degree of privacy, as such conversations are capable of revealing a great deal of personal information. The defendant further submits it is reasonable to assume that

messages between a married man and a young woman are, by definition, very private in nature.

[34] Further, the defendant submits that a person does not lose control of information due to the fact another person possesses or can access the information.

[35] Based on the totality of circumstances, the defendant says that he has a subjective expectation of privacy which is objectively reasonable. On this basis, he has met the onus to establish standing and to argue that there has been an unlawful search of the information obtained by the police and that it should be excluded.

[36] The court in *Marakah* at para. 55, stated that "not ... every communication occurring through an electronic medium will attract a reasonable expectation of privacy and ... grant an accused standing to make arguments regarding s. 8 protection." They note that "different facts may well lead to a different result."

[37] This is the point of departure in determining whether the circumstances of this case attract the protection of s. 8 of the *Charter* or not. Is this one of those cases where communications through the electronic medium does not attract a reasonable expectation of privacy?

[38] A helpful starting point for the analysis is the *Pelucco* decision. While the decision predates *Marakah*, due to subsequent judicial comment, it is of assistance given the circumstances of this case.

[39] Mr. Pelucco arranged to sell one kilogram of cocaine to Mr. Guray. To make the necessary arrangements for the exchange, Mr. Pelucco communicated with Mr. Guray by text. Mr. Guray was arrested by the police while communicating with Mr. Pelucco, via texting. The police seized Mr. Guray's cellphone and learned of the proposed meeting. As a result, the police attended the meeting site and arrested Mr. Pelucco.

[40] Here, there was an exchange of text messages between two willing participants and the court held that Mr. Pelucco had a reasonable expectation of

privacy in the text messages and excluded the evidence pursuant to s. 24(2) of the *Charter*.

[41] Mr. Justice Groberman stated at paras. 68-70:

> [68] The Crown's position on this appeal – effectively that a sender never has a reasonable expectation that a message will remain private after delivered to a recipient's device – does not, in my view, comport with social or legal norms. A sender will ordinarily have a reasonable expectation that a text message will remain private in the hands of its recipient.
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> [69] The text conversation between Mr. Pelucco and Mr. Guray was for a criminal purpose, but that ... does not, by itself, affect the reasonable expectation of privacy. In *Spencer*, Cromwell J. speaking for a unanimous Court, said:
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> > [36] The nature of the privacy interest does not depend on whether, in the particular case, privacy shelters legal or illegal activity. The analysis turns on the privacy of the area or the thing being searched and the impact of the search on its target, not the legal or illegal nature of the items sought. To paraphrase Binnie J. in Patrick, the issue is not whether Mr. Spencer had a legitimate privacy interest in concealing his use of the Internet for the purpose of accessing child pornography, but whether people generally have a privacy interest in subscriber information with respect to computers which they use in their home for private purposes ...
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> [70] Apart from criminality, there is nothing remarkable about the content or circumstances of the text conversation at issue in the case before us. Nothing in the situation suggests that the ordinary expectation that a text message exchange will remain private was displaced.

[42] However, in coming to its conclusion in *Pelucco*, the Court drew a distinction between the exchange of texts relating to illegal activity between two willing participants and exchanges that occur in the context of other types of relationships. In doing so, Mr. Justice Groberman referred to the trial decision of *R. v. Sandhu*, 2014 BCSC 303 [*Sandhu*]. In *Sandhu*, the defendant sent a threatening message via his cellphone to the cellphone of the individual who was the subject of the threat. The police obtained the message from the recipient's phone. The Crown attempted to introduce the message at trial and the court held that the defendant's s. 8 right had been violated.

[43] In *Pelucco*, the Court commented on *Sandhu*, stating that the trial judge erred in finding that the threatening message would be kept private was objectively reasonable. Groberman J. at para. 61 states:

> [61] It is because the objective reasonableness of an expectation of privacy includes normative elements that I am of the view that the analysis in *Sandhu* cannot be sustained. In that case, the judge found that the sender of a threatening text message had an objectively reasonable expectation that the recipient would not turn the message over to police. If objective reasonableness were merely a measure of probability, it could be said that the sender had an objectively reasonable expectation of privacy – he could reasonably expect that the threat would be sufficient to silence the victim and his message would, therefore, remain private. Once normative elements of reasonableness are recognized, however, it becomes clear that a person who threatens another has no right to expect that the person who has been threatened will keep the threat private.

[44] In *R. v. Vickerson*, 2018 BCCA 358 [*Vickerson*], the Court had the opportunity to consider *Marakah.* In *Vickerson*, the Court held that the sender's reasonable expectation of privacy of a text message is not absolute. Referencing *Pelucco* and *Marakah*, the Court confirmed that whether or not a sender has a reasonable expectation of privacy of a message in the hands of the recipient depends on the totality of the circumstances: (*Vickerson*, at paras. 53-55).

[45] On this basis, I am of the view that the comments of Groberman J. in *Pelucco* continue to be persuasive authority in the determination of the issue in this case. The text exchange in the present case involves an exchange between an adult in whose home the complainant was residing while attending university. The relevant messages were sent between June 10 at 11:44 p.m. and June 11 at 12:15 a.m. The exchanges occurred both before and following the alleged assault. The text messages record the time that each message was exchanged. In addition, the words attributed to Mr. Phagura by Ms. M.K. constitute an admission by an opposing party.

[46] Following the alleged assault, while still in the presence of Ms. M.K. in the basement and prior to the resumption of the texting at 12:13 a.m., Mr. Phagura said

words to the effect: "Don't tell anyone. Your honour will be ruined"; and also, "I will pay your college fees."

[47] Following these comments, two text messages were sent by Mr. Phagura which the Crown submits are evidence relevant to the proceedings. The first text message reads: "Please don't tell anything to anyone"; and the second message reads, "Am so sorry."

[48] The Crown submits that in the present circumstances, there is nothing private or biographical in nature that is revealed in the exchanges between an alleged perpetrator of a crime and the victim. The purpose or intent of the unsolicited exchange is an effort to secure the silence of the victim. This should be contrasted with the exchange in *Marakah*, which is between two willing participants freely engaged in a criminal enterprise or activity.

[49] The circumstances of how the electronic messages were obtained is also different. In *Marakah*, the police seized the phone; here, the complainant willingly turned the phone over to the police in the course of the sexual assault investigation. She also consented to the photographing of the images displayed on her cellular phone, which were of the text message exchange.

[50] In these circumstances, what is the reasonable expectation of Mr. Phagura? The relationship between the two was one of a close family friend providing a place to live for Ms. M.K., the daughter of a friend, while she was studying in Canada. In light of the allegation before the court, it is also one of perpetrator of the alleged offence and the victim.

[51] The content of Mr. Phagura's text messages, both before and following the alleged events, supports the defendant's subjective expectation of privacy. However, it is only one factor to consider when determining whether the expectation of privacy was objectively reasonable. While it is open to infer that Mr. Phagura wished the messages to remain private, there is no evidentiary basis to support that both Mr. Phagura and Ms. M.K. had similar interests in keeping the messages private. On

this basis, there is no ability to evaluate whether Mr. Phagura's asserted expectation of privacy was in fact reasonable.

[52] As Justice Groberman stated in *Pelucco* at para. 56:

> [56] ... [T]the court ought to have placed itself in Mr. Pelucco's shoes, and analysed the issue from the standpoint of the information that was available to him at the time [of the] messages.

[53] Here, there is no information to assess whether Mr. Phagura's wish to have the message remain private was similar to Ms. M.K.'s. This is an important factor in determining whether Mr. Phagura's belief was objectively reasonable. In *Pelucco*, Groberman J. stated the determination of objective reasonableness is a normative assessment. At para. 61, he further states: "it becomes clear that a person who threatens another has no right to expect that the person who has been threatened will keep the threat private."

[54] While the social norm is that a text message between a sender and a recipient will remain private, there are exceptions, as have been noted. In other words, the sender does not or cannot have absolute confidence that a text message will remain private. There is much that depends on the circumstances.

[55] In my view, the reasoning in *Pelucco* applies in the circumstances before me. This is one of those exceptions contemplated by the comments of then Chief Justice McLachlin in *Marakah*, where she stated at para. 55:

> [55] ... This is not to say ... that every communication occurring through an electronic medium will attract a reasonable expectation of privacy and hence grant an accused standing to make arguments regarding s. 8 [*Charter*] protection.

[56] In conclusion, Mr. Phagura has failed to establish a reasonable expectation of privacy in the text messages sent to Ms. M.K.; and, as a result, has failed to establish standing in order to challenge the admissibility of the photographs on the basis of an alleged breach of his s. 8 *Charter* right.

[57] In the alternative, and in the event I am incorrect in the preceding analysis, the onus shifts to the Crown to establish, on a balance of probabilities, that the search was authorized by law, the law is reasonable, and the search was carried out in a reasonable fashion. No judicial authorization was obtained by the police prior to the officer taking the photographs.

[58] The photographs were taken once Ms. M.K. identified and volunteered the information contained on her cellphone. The Crown submits the search was authorized by law on the basis that Ms. M.K. consented to the search of her cellphone by the officer. The Crown submits that, similar to a residence with a shared privacy interest, the recipient of the text messages has an equal or overlapping privacy interest in the conversation; relying upon: *R. v. Clarke,* [2017] B.C.J. No. 2647 (C.A.); *R. v. Reeves*, 2017 ONCA 365 [*Reeves*].

[59] In *Reeves*, the Ontario Court of Appeal applied the law of consent to searches in the context of digital devices; although in *Reeves*, the focus was on securing the device, not on searching and securing the information contained on the device. In *Reeves*, the police, having seized the device, obtained judicial authorization prior to actually searching the device or the device's hard drive to retrieve the information stored on it. Clearly, that is not the circumstance in the present case.

[60] Here, the question is whether or not Ms. M.K. can consent to the search of her cellphone for electronic information sent by Mr. Phagura.

[61] Both *Marakah* and *Pelucco* recognize that once the electronic information is sent to the recipient, the information is no longer under the exclusive control of the sender. Once sent, it is the recipient who will be in a position to keep it private or to distribute it further.

[62] By extension, Ms. M.K. could have disclosed the details of the text messages between Mr. Phagura and herself, without the intervention of the police officer taking the photographs. In this particular case, the only information that Ms. M.K. provided

access to was that which Mr. Phagura shared with her. Ms. M.K.'s consent does not operate to permit the police to obtain the electronic information stored on Mr. Phagura's device, only what was sent to her. It only operates to provide information to which both Ms. M.K. and Mr. Phagura have an overlapping interest. In this context, it is not reasonable for Mr. Phagura to think or expect that Ms. M.K. would not be able to consent to provide such information to the police. In my view, the consent provided by Ms. M.K. was valid and sufficient for the police to obtain copies of the text message exchange between the two parties.

[63] Finally and in the event the foregoing is found to be incorrect and it is determined that Mr. Phagura's s. 8 right has been violated, should the evidence be excluded pursuant to s. 24(2) of the *Charter*? Here, the burden is upon the defendant to establish, on a balance of probabilities, the admission of the evidence from Ms. M.K.'s cellphone, on the basis that it would bring the administration of justice into disrepute.

[64] Since the Supreme Court of Canada decision in *R. v. Grant*, 2009 SCC 32 [*Grant*], the consideration of whether the *Charter* breach will bring the administration of justice into disrepute has undergone a shift. The focus is now on the overall repute of the justice system, with a long-term view. This inquiry is objective and asks if a reasonable person, informed of all the relevant circumstances and values, would conclude that the *Charter* breach would bring the administration of justice into disrepute. It is a societal focus and not aimed at punishing the police.

[65] *Grant* sets out a three-part test to be applied that must be assessed and balanced, and those factors or three parts of the test are:

a) the seriousness of the *Charter*-infringing state conduct;

b) the impact of the breach on the *Charter*-protected interests of the defendant; and

c) society's interest in adjudication of the merits.

[66] In the final analysis, the court must consider all of the circumstances of the case, in undertaking this assessment.

[67] In *R. v. McGuffie*, 2016 ONCA 365 [*McGuffie*], a decision of the Ontario Court of Appeal, Doherty J.A. outlined the assessment in the following terms, referenced at paras. 62-64:

> [62] The first two inquiries work in tandem in the sense that both pull toward exclusion of the evidence. The more serious the state-infringing conduct and the greater the impact on the *Charter*-protected interests, the stronger the pull for exclusion. The strength of the claim for exclusion under s. 24(2) equals the sum of the first two inquiries identified in *Grant*. The third inquiry, society's interests in an adjudication on the merits, pulls in the opposite direction toward the inclusion of evidence. That pull is particularly strong where the evidence is reliable and critical to the Crown's case: see *R. v. Harrison*, 2009 SCC 34, [2009] 2 S.C.R. 494, at paras. 33-34.
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> [63] In practical terms, the third inquiry becomes important when one, but not both, of the first two inquiries pushes strongly toward the exclusion of the evidence: see e.g. *Harrison*, at paras. 35-42; *Spencer*, at paras. 75-80; *R. v. Jones*, 2011 ONCA 632, 107 O.R. (3d) 241, at paras. 75-103; *Aucoin*, at paras. 45-55. If the first and second inquiries make a strong case for exclusion, the third inquiry will seldom, if ever, tip the balance in favour of admissibility: see e.g. *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at paras. 81-89; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253, at paras. 98-112. Similarly, if both of the first two inquiries provide weaker support for exclusion of the evidence, the third inquiry will almost certainly confirm the admissibility of the evidence: see e.g. *Grant*, at para. 140.
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> [64] The three inquiries identified in *Grant* require both fact-finding and the weighing of various, often competing interests. Appellate review of either task on a correctness standard is neither practical, nor beneficial to the overall administration of justice. A trial judge's decision to admit or exclude evidence under s. 24(2) is entitled to deference on appeal, absent an error in principle, palpable and overriding factual error, or an unreasonable determination: see *Grant*, at paras. 86, 127; *Côté*, at para. 44; *R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34, at para. 82; *Jones*, at para. 79; *R. v. Ansari*, 2015 ONCA 575, 330 C.C.C. (3d) 105, at para. 72.

[68] The first consideration involves the seriousness of the state conduct and the court must consider whether the admission of the evidence would send a message to the public that courts condone deviations from the rule of law by failing to disassociate themselves from the results of the unlawful conduct. It is fair to say that the more severe or deliberate the state misconduct, the greater the need for the court to disassociate itself from the misconduct. The examination of Ms. M.K.'s

cellphone; and, in particular, the text messages, occurred prior to the release of the Supreme Court of Canada's decision in *Marakah*. Here, the police officer was acting in good faith and only once permission was received from Ms. M.K., to review and photograph the text message conversations, did she do so.

[69] It was reasonable for the officer to proceed in the fashion she did in the circumstances, given the state of the law at the time of the investigation. There was nothing in the jurisprudence to suggest to the police generally that they knew or ought to have known that their actions in photographing the messages would be contrary to the *Charter*.

[70] In this context, lack of a prior judicial authorization is not, in my view, a serious breach of Mr. Phagura's constitutional rights under s. 8., as the police were acting in good faith: *R. v. Paterson*, 2017 SCC 15.

[71] Turning to the second factor and the extent to which the *Charter* breach undermined the *Charter*-protected interests of the defendant, the more serious the impact on the protected interest, the greater the risk that admitting the evidence may signal to the public that *Charter* rights have little value to its citizens. To what degree did the violation impact the interests engaged by the infringed right?

[72] In the context of this search, Ms. M.K. provided the information to the police. She was entitled to do so. The information contained in the text message is evidence that Ms. M.K. could also provide as an admission against interest by an opposing party, even if the photographs were not introduced. In my view, this further reduces the impact of the *Charter*-protected interest in this circumstance.

[73] In addition, this is not a situation where Mr. Phagura was compelled to conscript himself or where the rights of a third party were trampled in order to obtain the evidence. The evidence could have been discovered without the participation of the defendant. However, I do note here that no thought was given to obtaining a search warrant; and, as a result, it cannot be said that the evidence would have been discovered in any event, without the infringing conduct.

[74] Turning to the third inquiry, which involves the consideration as to whether the truth-seeking function of the trial is better served by admission of the evidence, or by its exclusion. The text messages offer probative evidence in the prosecution of the serious criminal offence. The messages outline an admission of an opposing party and corroborate a witness's account of what transpired on the evening in question. Society has a significant interest in the adjudication of this type of offence on its merits.

[75] On that basis, I conclude that the exclusion of this evidence would result in greater harm to society's confidence in the administration of justice than would its admission into evidence.

[76] That concludes my reasons on the s. 8 application.

"T.J. Crabtree J."