

CANADA / JUDGMENT

R. v. Al-Maliki

2005 BCCA 157

COURT

British Columbia Court of Appeal

DECIDED

21 March 2005

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2005 BCCA 157 R. v. Al-Maliki COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Al-Maliki, 2005 BCCA 157 Date: 20050321 Docket: CA031306 Between: Regina Respondent And Abbas Al-Maliki Appellant Before: The Honourable Madam Justice Rowles The Honourable Madam Justice Levine The Honourable Mr. Justice Smith G.D. McKinnon, Q.C. Counsel for the Appellant M.K. Levitz Counsel for the Respondent Place and Date of Hearing: Vancouver, British Columbia 24 November 2004 Place and Date of Judgment: Vancouver, British Columbia 21 March 2005 Written Reasons by: The Honourable Madam Justice Rowles Concurred in by: The Honourable Madam Justice Levine The Honourable Mr. Justice Smith Reasons for Judgment of the Honourable Madam Justice Rowles: I. Overview

- [1] The appellant was convicted by a Supreme Court judge sitting without a jury on 21 March 2003 of five counts of counselling to commit the indictable offences of assault causing bodily harm (counts 1 and 2), assault (count 3), assault with a weapon (count 4) and robbery (count 5), and one count of assault (count 6). The case against the appellant on counts 1 to 5 was based on conversations between an undercover police officer and the appellant during which the appellant offered to pay the undercover officer to assault and rob specific individuals, including his former girlfriend. The conversations were recorded pursuant to a one-party wiretap authorization issued under s. 184.2 of the Criminal Code.
- [2] On his appeal from conviction, the main ground of appeal put forward by the appellant, as set out in his factum, is this: A. The trial judge erred in law in finding that:
- (i) the Crown's amplification saved the Authorization under s. 184.2 of the Criminal Code, and
 - (ii) R. v. Araujo, [2000] 2 S.C.R. 992 did not overrule, or limit the scope of, R. v. Madrid, [1994] B.C.J. No. 1786.
- [3] While the appellant states that the first issue on the appeal is amplification, the respondent disagrees. The respondent asserts that the first issue is the sufficiency of the affidavit without amplification.
- [4] The respondent's position is that the errors alleged by the appellant are moot because the trial judge erred in finding that amplification was necessary to support the issuance of the authorization.

- [5] While I agree with the result reached by the trial judge, I am of the opinion that the trial judge took too narrow a view of the test to be applied by a reviewing judge, and that the affidavit used to obtain the authorization in this case was sufficient without amplification. It is therefore unnecessary to express an opinion on the important issues the appellant has raised in his grounds of appeal.
- [6] For the reasons which follow, I would dismiss the appeal. II. Background
- [7] The police received information which led them to believe that the appellant was looking to hire someone to assault Stephanie Dan, his former girlfriend and mother of his daughter, and to kill Salim Al-Sharadi who the appellant believed had stolen his girlfriend from him. The police subsequently obtained a one-party consent authorization and commenced an undercover operation. The undercover officer, posing as a hit man, met with the appellant on three occasions, in two of which the conversations were intercepted. The appellant hired the "hit man" to assault Ms. Dan, Mr. Al-Sharadi and two others. This was evidenced in the intercepts and the viva voce testimony of the undercover officer.
- [8] The affidavit filed in support of the one-party consent authorization was based on information provided by an informant and the resulting follow-up investigation. According to the informant, the appellant, a barbershop owner, offered the informant money to cut up his ex-girlfriend's face and to kill the man who had stolen the ex-girlfriend from him. The police followed up on the informant's information and ascertained that: (1) the appellant was a barbershop owner; (2) his ex-girlfriend was Ms. Dan; (3) Mr. Al-Sharadi was her friend; (4) the appellant had recently assaulted Ms. Dan and had threatened to take away their daughter; and (5) the appellant had recently threatened to kill Mr. Al-Sharadi.
- [9] At trial, the appellant challenged the authorization under s. 8 of the Charter on the basis that the information provided by the informant was not sufficiently reliable to justify its issuance. A voir dire was conducted, and Detective Cst. Matsumoto, who had sworn the affidavit in support of an authorization under s. 184.2 of the Criminal Code, testified. During his testimony Detective Cst. Matsumoto stated that another police officer had informed him that he had used the informant successfully in the past, that the informant had provided information which the investigator had followed up, and that it had ultimately led to arrests.
- [10] At the conclusion of the voir dire the trial judge found that the information in the affidavit which had been obtained from the follow-up investigation did not confirm the informant's assertion that the intended target was seeking someone to carry out a murder. Because of this and the fact that the affidavit did not deal with the "testimonial" reliability of the informant, the trial judge found that the information in the affidavit was insufficient to support the issuance of the authorization. However, he considered the evidence of the affiant on the voir dire as amplification evidence that the informant was reliable. With the information set out in the affidavit - together with the amplified evidence - the trial judge was satisfied that the authorization could have been granted and that the appellant had therefore failed to establish that the interceptions were obtained in a manner that infringed

the appellant's rights under s. 8 of the Charter.

- [11] In rejecting the submissions of defence counsel, the trial judge said, in part:
- [11] There is nothing in the affidavit that lets the reader of the affidavit get at the testimonial reliability, so to speak, of the informer.
- [12] That which is extraneous to the informer's assertions tends to confirm or support what the informer had to say with respect to the parties involved and other details, but in no way tends to confirm or support the informer's bottom assertion, i.e. that the intended target was actively seeking a mechanic to carry out a murder.
- [13] I say, as the reviewing judge, that absent taking into account evidence that came before me on the review - but was not before the authorizing judge - it is a case for removing all assertions in the affidavit that reflect what the informer had to say. I also say, as the reviewing judge, that in my judgment at that point there would no longer continue to be any basis for the decision of the authorizing judge.
- [14] But fresh evidence favourable to the Crown on the narrow point under discussion - the informer and the informer's reliability - did come before me on the review. It is evidence of things known to the affiant when the affiant swore the affidavit.
- [15] I say that if that evidence - evidence of Officer Matsumoto - is taken into account by me, it provides a solid platform for a conclusion by me that what was known of the informer's track record as an informer was entirely favourable to his reliability. In the result, I say that if properly considered by me that evidence of the informer's track record swings the pendulum the other way and results in my not striking out assertions in the affidavit as to what the informer had to say on the essential point, i.e., the target's alleged present intention, state of mind and conduct. At that point of the analysis, the accused's attack must fall to the ground because there is no doubt that on that approach my conclusion must be, at the end of the review, that there definitely continues to be a basis for the decision of the Provincial Court judge. [Underlining added.] III. Discussion
- [12] Section 184.2 of the Criminal Code permits the interception of private communications with the consent of one participant in the communication. Subsection (2) sets out the circumstances in which a peace officer may apply ex parte for an order authorizing interception of this sort:
- (2) An application for an authorization under this section shall be made by a peace officer, or a 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, ex parte and in writing to a provincial court judge, a judge of a superior court of criminal jurisdiction or a judge as defined in section 552, and shall be accompanied by an affidavit, which may be sworn on the information and belief of that peace officer or public officer or of any other peace officer or public officer, deposing to the following matters:

- (a) that there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed;
 - (b) the particulars of the offence;
 - (c) the name of the person who has consented to the interception;
 - (d) the period for which the authorization is requested; and
 - (e) in the case of an application for an authorization where an authorization has previously been granted under this section or section 186, the particulars of the authorization.
- Subsection (3) sets out the circumstances in which the authorization may be granted:
- (3) An authorization may be given under this section if the judge to whom the application is made is satisfied that
 - (a) there are reasonable grounds to believe that an offence against this or any other Act of Parliament has been or will be committed;
 - (b) either the originator of the private communication or the person intended by the originator to receive it has consented to the interception; and
 - (c) there are reasonable grounds to believe that information concerning the offence referred to in paragraph (a) will be obtained through the interception sought.

[13] In *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, the Supreme Court of Canada referred to *R. v. Garofoli*, [1990] 2 S.C.R. 1421, 60 C.C.C. (3d) 161, in setting out the test that must be applied by the reviewing court in determining whether the authorization for the interception of communications was properly given. In *Araujo*, supra, Mr. Justice LeBel, for the Court, stated, at para. 51: The reviewing judge does not stand in the same place and function as the authorizing judge. He or she does not conduct a rehearing of the application for the wiretap. This is the starting place for any reviewing judge, as our Court stated in *Garofoli*, supra, at p. 1452: The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge. [Emphasis added by Lebel J.] As I noted as a judge at the Quebec Court of Appeal in *Hiscock* [*R. v. Hiscock*, [1992] R.J.Q. 895, 72 C.C.C. (3d) 303] at p. 326 C.C.C., even a basis that is schematic in nature may suffice. However, as our Court has recognized, it must be a basis founded on reliable information. In *R. v. Bisson*, [1994] 3 S.C.R. 1097, at p. 1098, the requirement was described as "sufficient reliable information to support an authorization" (emphasis added). The Court concluded that this requirement had still been met despite the excision of retracted testimony. In looking for reliable information on which the authorizing judge could have granted the

authorization, the question is simply whether there was at least some evidence that might reasonably be believed on the basis of which the authorization could have issued.
[Underlining in original.]

- [14] There is no requirement that the affiant expressly refer to the testimonial reliability of the informant; instead, what is required is "some evidence that might reasonably be believed on the basis of which the authorization could have issued." This approach is reiterated in Araujo, supra, at para. 40, in which the Court stated that "the question is whether the factual circumstances revealed in the affidavit could have provided a sufficient basis of the issuance of the authorization." In Araujo, supra, the Supreme Court declined to apply a standard of perfection. In finding that the affidavit before it was sufficient to support an authorization, the Supreme Court noted: "[I]t is clear that the affidavit was not perfect, even on its face" (at para. 45). Sufficiency, then, does not require flawlessness.
- [15] The Court in Araujo, supra, also held that the correct approach to the review of authorizations of this nature requires the reviewing judge to take a global view of the information contained in the supporting affidavit. The Court stated at para. 54: An approach based on looking for sufficient reliable information in the totality of the circumstances appropriately balances the need for judicial finality and the need to protect prior authorization systems. Again, the test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge. [Underlining in original; italics added.]
- [16] In view of what was said in Araujo, supra, it seems to me that the absence of a statement from the affiant attesting to his perception of or belief in the informer's reliability is not necessarily fatal to the authorization. IV. Was there reliable evidence that might reasonably be believed on the basis of which the authorization could have issued?
- [17] What follows is a summary of Detective Cst. Matsumoto's eleven-page affidavit sworn in support of the application for the one-party wiretap authorization:
1. On 24 May 2002 Detective Cst. Matsumoto spoke with an informant who said he was contacted by an Iranian barbershop owner who offered him money to kill a male who had stolen his girlfriend.
 2. On 27 May 2002 at 13:00 hours he spoke with the same informant who:
 - (a) said the appellant also wanted him to cut up his ex-girlfriend's face;
 - (b) directed the police to 529 10th Street, New Westminster and pointed out a red car bearing British Columbia licence plate CVA 725; and to 1102 5th Ave, New Westminster;
 - (c) referred to "Marood" as another person the appellant wanted killed; and

- (d) directed the police to the Attention Barber Shop at 409 8th Street and stated that the appellant was the owner/operator of the business.
- 3. On 27 May 2002, the affiant gathered further intelligence to locate the potential victims and to corroborate the informant's information in locating the victims and interviewing them about their relationship with the appellant, such as:
 - (a) a copy of a CPIC search for British Columbia licence plate CVA 725 which indicated the vehicle is a 1987 red Nissan registered to Stephanie Marla Dan of #208-529 10th Street, New Westminster;
 - (b) PIRS showed that the appellant had been arrested for assaulting Stephanie Dan and a friend; and
 - (c) A person from the New Westminster licensing department stated that the business licence for the Attention Barber Shop located at 409 8th Street was registered to Abbas Al-Maliki (the appellant).
- 4. Stephanie Dan was interviewed twice on 27 May 2002 and said:
 - (a) the appellant threatened her in the past;
 - (b) he attended her apartment in the last few days and assaulted her;
 - (c) she has a friend Salim who lives on 5th Ave. and who has also been threatened by the appellant;
 - (d) she had a relationship with the appellant who is the father of her 2 ½ year old daughter;
 - (e) she had another child with Marood Raisi;
 - (f) she described the appellant as violent;
 - (g) she last saw the appellant on Monday when he was "flipping out" over not being able to see his daughter and was getting "physical" with her;
 - (h) the appellant had punched her on Sunday;
 - (i) the appellant said "I'm going to take my daughter and you'll never see her again";
 - (j) the appellant is jealous of everyone; and
 - (k) the appellant told her that he would never hurt Mr. Al-Sharadi but his facial expressions showed otherwise.
- 5. The affiant then interviewed Mr. Al-Sharadi on 27 May 2002 at #2-1102 5th Ave. Mr. Al-Sharadi said:
 - (a) the appellant had threatened him in the past;

- (b) on Friday the appellant had driven by Mr. Al-Sharadi's residence and stuck out both middle fingers and yelled, "I will kill you"; and
 - (c) he fears for his life.
6. On May 27, 2002 Mr. Al-Sharadi was interviewed a second time and said:
- (a) A week and a half ago the appellant drove by Mr. Al-Sharadi's house and said "I will kill you". He also fingered him and stated "I will find you somewhere and kill you";
 - (b) The next day the appellant drove by again; (c) On Friday the appellant drove by Mr. Al-Sharadi's house at night;
 - (d) Stephanie Dan would come over after fighting with the appellant, and the appellant would punch her;
 - (e) Mr. Al-Sharadi does not talk with Ms. Dan because of the appellant;
 - (f) Last month the appellant saw Mr. Al-Sharadi and Ms. Dan walking together, and the appellant fingered them;
 - (g) Mr. Al-Sharadi heard from Ms. Dan that the appellant told others (unknown) that he was going to kill Mr. Al-Sharadi;
 - (h) The appellant told Ms. Dan that he was going to kill Mr. Al-Sharadi;
 - (i) Mr. Al-Sharadi is scared and is afraid of the appellant;
 - (j) Mr. Al-Sharadi has seen the appellant driving around looking for him; and
 - (k) Mr. Al-Sharadi believes the appellant is capable of killing him.
8. On 27 May 2002 at 17:15 the affiant spoke again with the informant who said:
- (a) he met the appellant in 2002, when the appellant asked him if he would do a contract murder;
 - (b) the appellant told the informant he would pay him;
 - (c) the informant said he would do it and wanted to make preparations;
 - (d) the appellant then drove the informant to 1102 5th Ave, pointed out a male, saying he was the one to be killed and provided his name, which was something like "Salash" or "Salem" (the affiant stated that Mr. Al-Sharadi's first name is Salim);
 - (e) the appellant then drove the informant to 520 10th Street and pointed out a red car, saying "it's the girl's car" (which the informant understood to mean Mr. Al-Maliki's ex-girlfriend);
 - (f) the appellant said if Mr. Al-Sharadi was not home, he would find him here (at 529 10th Street);

- (g) the appellant then drove the informant to the Alvarez Market in the 600 block of 8th Street and stated that Mr. Al-Sharadi and Ms. Dan often frequented the Market; and
 - (h) the appellant told the informant to cut up Ms. Dan's face.
9. On 27 May 2002 the informant told the affiant that he would become a police agent and was then paid money by the police.
10. On 27 May 2002 at 18:00 the informant was instructed that his role as agent was to introduce the appellant to a police undercover operator who would play the role of a hit man. The informant attended the appellant's business to inform him that he had an associate who could fulfill the contract, but the appellant was not there. The informant was instructed to contact the affiant on 28 May 2002 for further instructions but failed to do so.
11. The operational plan was to have the informant introduce an undercover officer, Cst. Kramer, to the appellant so he would believe the undercover officer to be a hit man. The intention was to intercept the communications between the undercover officer, who consented to having his communications intercepted, and the appellant.
- [18] The respondent has appended to its factum a helpful table setting out, in three columns, the information provided by the informant, a person or party who confirmed the specific information provided by the informant, and the corroborative evidence of each element of the informant's information. The table is reproduced below. Information provided by Informant Confirmed by Corroborative evidence Appellant is the owner of the Attention Barbershop in New Westminster police Appellant is the owner of the Attention Barber Shop at 409 8th Street, New Westminster Appellant contacted him to commit a contract murder. The Appellant offered him money to kill a male that had stolen his girlfriend. The Appellant told informant he also wanted him to cut up his ex-girlfriends face Stephanie Dan Salim Al-Shardi Dan said she had a relationship with the Appellant who is the father of her 2 1/2 year old daughter, that the Appellant had threatened her in the past and recently assaulted her, that he threatened to take their daughter away from her, that he is violent. Dan stated she has a friend named Salim who lives on 5th Avenue and that Salim had been threatened by the Appellant. Al-Sharadi stated that the Appellant had recently driven by Al-Sharadi's residence and stuck out both middle fingers and yelled "I will find you somewhere and kill you". Dan would come over after fighting with the Appellant. The Appellant, seeing Al-Sharadi and Dan walking together, fingered them. Al-Sharadi heard from Dan that the Appellant told others (unknown) that he was going to kill AL-Sharadi. The Appellant told Dan that he was going to kill Al-Sharadi. Al-Sharadi told the police he was scared and afraid of the Appellant, and had seen the Appellant driving around looking for him and believed the Appellant was capable of killing him. The informant directed police to 1102 5th Ave, New Westminster, stating the male he was to kill - whom he thought was named Salash or Salem - lived at that residence. police Police obtained information that Salim Al-Sharadi resided at 1102 5th Ave. and interviewed him there The Appellant said he wanted another male "Marod" killed because Marod had a baby with the Appellant's girlfriend Stephanie Dan Dan

stated she has another child who is six, whose father is Marood Raisi. The Appellant drove the informant to 529 10th Street who pointed out a red car in the rear parking lot, stating that was the "girl's" car, which the informant understood to mean the Appellant's ex-girlfriend. Informant directed police to this address, pointing out a red car with B.C. license CVA 725 police The police obtained information that the Appellant has an ex-girlfriend Stephanie Dan who resided at #208 - 529 10th Street, New Westminster and was the registered owner of a red Nissan Sentra with B.C. license plate CVA 725.

- [19] In my opinion, the narrow approach the trial judge took upon his review of the authorization in this case does not accord with Araujo, supra. The test is whether there was reliable evidence that might reasonably be believed on the basis of which the authorization could have issued, not whether, in the opinion of the reviewing judge, the application should have been granted at all by the authorizing judge.
- [20] The trial judge's assessment that the affidavit in this case was lacking an explicit deposition as to the "testimonial reliability" of the informant does not render it incapable of providing the basis on which the authorization could properly be made. In my view, the numerous corroborated statements provided by the informant, viewed in the totality of the circumstances, provide ample support for the issuance of the authorization.
- [21] I would dismiss the appeal. "The Honourable Madam Justice Rowles" I Agree: "The Honourable Madam Justice Levine" I Agree: "The Honourable Mr. Justice Smith"

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