
CANADA / JUDGMENT

R. v. Ali

2008 BCSC 657

COURT

Supreme Court of British Columbia

DECIDED

15 February 2008

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2008 BCSC 657 R. v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali,

2008 BCSC 657

Date: 20080215

Docket: X068917

Registry: New Westminster

Regina

v.

Mohammed Sayiad Ali

Scott Douglas Osborne

Before: The Honourable Madam Justice Morrison

Oral Reasons for Sentence

(re Accused Mohammed Ali)

February 15, 2008

Counsel for the Federal Crown:

E. Laurie

Counsel for the Accused:

T. Zipp

Place of Trial/Hearing:

Vancouver, B.C.

- [1] THE COURT: Mr. Ali has been found guilty of Counts 1 and 2 on the indictment before the court. Count 1 is that on or about August 27, 2004, at or near the City of Surrey, in British Columbia, he did unlawfully traffic in a controlled substance, cocaine, contrary to s. 5(1) of the Controlled Drugs and Substances Act; Count 2 is that on or about the 27th day of August, 2004, in Surrey, British Columbia, he did unlawfully possess a controlled substance, cocaine, for the purpose of trafficking, and that is contrary to s. 5(2) of the Controlled Drugs and Substances Act. In both those counts, he was charged along with a co-accused, Scott Douglas Osborne, who was tried separately; he pled guilty shortly before this trial and was heard before my sister judge, Madam Justice Bennett.
- [2] The Crown is seeking a number of terms. First of all, the Crown seeks a nine month prison term for Mr. Ali, and has cited a number of authorities where similar sentences have been imposed in dial-a-dope operations, which is the method of trafficking in this case. The defence, on the other hand, seeks a conditional sentence, and has obtained a technical suitability report which indicates Mr. Ali could be a candidate for electronic monitoring.
- [3] Secondly, the Crown also seeks a DNA order, and that order is opposed by the defence.
- [4] Third, the Crown seeks forfeiture of a number of items: the drugs that were seized, cocaine, a cell phone, the amount of \$1,580 which was found on the person of Mr. Ali, which included \$30 of marked bills from the drug buy in the dial-a-dope operation, plus \$3,000 in cash and car transfer documents which were seized from the home of Mr. Ali after his arrest. The defence objects to all forfeitures with the exception of the \$30 in marked bills, the drugs, and the cell phone.
- [5] Finally, the Crown submits that there should be the mandatory ten year prohibition with regard to weapons and ammunition under s. 109 of the Criminal Code; I did not hear any opposition to that idea.
- [6] MR. ZIPP: That's correct, My Lady.
- [7] THE COURT: It is not a factor --
- [8] MR. ZIPP: No.
- [9] THE COURT: I will deal with the last items first and work my way back. There will be the order pursuant to s. 109 of the Criminal Code, that Mr. Ali be prohibited for a period of ten years from owning or being in possession of any of those weapons and ammunition named under that section.

- [10] As to the forfeiture, there will be forfeiture of all the drugs seized and the score sheets that were seized. The cell phone will also be forfeited. The amount of \$1,580, which includes the \$30 for the drug buy, will also be forfeited. However, the \$3,000 in cash and the car transfer documents seized from the home of Mr. Ali will not be subject to forfeiture; they will be returned to him following any appeal period.
- [11] Dealing with the DNA application, counsel spent some time with regard to this, whether or not this order should be implemented, and I have spent some time going over their arguments and their authorities. The Crown seeks an order pursuant to s. 487.051 of the Criminal Code, that the accused, Mr. Ali, provide a sample of bodily substances for forensic DNA analysis, according to Form 5.04 of the Criminal Code. The Criminal Code authorizes the court to make such an order where there has been a conviction under certain serious offences referred to as primary designated offences.
- [12] The court also has the discretion to make such an order under a recently expanded list of offences defined as secondary designated offences. On November 9, 2007, Mr. Ali was convicted by me of unlawfully trafficking in a controlled substance, contrary to s. 5(1) of the Controlled Drugs and Substances Act, and then also of the second count, which I have already mentioned. Both of these offences are now within the defined category of secondary designated offences. Under s. 487.051(3), the court has a discretion. That section reads in part:

The court may, on application by the prosecutor and if it is satisfied that it is in the best interests of the administration of justice to do so, make such an order in Form 5.04 in relation to...

- (b) a person who is convicted . . . if that offence is a secondary designated offence.

The section further goes on to say:

In deciding whether to make the order, the court shall consider the person's criminal record, whether they were previously found not criminally responsible on account of mental disorder for a designated offence, the nature of the offence, the circumstances surrounding its commission and the impact such an order would have on the person's privacy and security of the person and shall give reasons for its decision.

- [13] The Crown submits it would be in the best interests of the administration of justice to make such an order here. Ms. Laurie, counsel for the Crown, has cited four authorities in support of her application. They are *R. v. Hendry* (2001), 161 C.C.C. (3d) 275 (Ont. C.A.), a decision of Mr. Justice Rosenberg of the Ontario Court of Appeal; *R. v. Ku*, 2002 BCCA 559, a decision of Mr. Justice Donald of our Court of Appeal; *R. v. N.J.G.*, 2006 BCPC 137, a Provincial Court decision by Judge Dyer; and *R. v. Durham* (2007), 221 C.C.C. (3d) 304 (B.C.C.A.), a decision of our Court of Appeal by Mr. Justice Low.

[14] In Hendry, the secondary designated offences were involved. Five offenders were involved in offences including sexual interference with a 12-year-old girl and two break and enter charges. There were six counts of sexual interference with another, and there were priors. There were lengthy records, including violence.

[15] In that case, the trial judge refused the orders, and the Court of Appeal allowed Crown appeals. The burden of proof was discussed in the Hendry case, at paragraph 1(3):

Burden of proof: Strictly speaking there is no burden on either Crown or defence under s. 487.051(1)(b) or s. 487.052. However, as the party seeking the order, the Crown bears an evidential burden to produce sufficient information to raise the issue. The trial judge must then be satisfied after weighing and balancing all the relevant considerations that the order should be made.

Mr. Justice Rosenberg went on to say, at paragraph 1(6):

Best interests of the administration of justice: In cases falling under s. 487.051(1)(b) and s. 487.052, the trial judge is to make the order sought if satisfied that it is in the best interests of the administration of justice to do so. The court is instructed to consider the offender's criminal record, the nature of the offence and the circumstances surrounding its commission, and the impact on the person's privacy and security of the person. Many of the concerns relating to the interpretation of that phrase in the DNA data bank context have been resolved by this court's decision in *R. v. Briggs*, (2001), 157 C.C.C. (3d) 38. In my view, given an adult offender's diminished expectation of privacy following conviction, the minimal intrusion into the security of the person in the ordinary case and the important interests served by the DNA data bank, it will usually be in the best interests of the administration of justice for the judge to make the order.

And then at paragraph 14 of the same case, Justice Rosenberg spoke of the purpose of the DNA Identification Act. He said at paragraph 14:

[14] It may also be useful to take into account s. 3 of the DNA Identification Act:

3. The purpose of this Act is to establish a national DNA data bank to help law enforcement agencies identify persons alleged to have committed designated offences, including those committed before the coming into force of this Act.

[16] The Ontario Court of Appeal also dealt with some of the issues or factors to be considered in determining what would constitute in the best interests of the administration of justice. Beginning at paragraph 17 and going on through paragraph 20 of the Hendry decision, the court listed a number of factors, and they have been repeated in subsequent cases, and in the interests of time, I will not repeat paragraphs 17 to 20. But to summarize, that term, the best interests of the administration of justice, does not necessarily act as a prerequisite to making the order that there be reasonable and probable grounds to believe a further offence would be committed. I will say that in this case I have no reason to believe that further offences are going to be committed.

[17] Hendry also says that the state interest in obtaining a DNA profile from an offender is not simply law enforcement by making it possible to detect further crimes, but there are broader purposes. Those include to deter repeat offenders, promote the safety of the community, detect if there is a serial offender at work, deal with cold crimes, et cetera. It also acts, as Crown has pointed out, to exclude the innocent at an early stage of an investigation, and to try and exonerate those who are wrongfully convicted (Paragraph 17).

[18] At paragraph 17(5), it states:

(5) The procedures for seizures of bodily substances authorized by the provisions are of short duration and involve no, or minimal, discomfort. There is a minimal intrusion with no unacceptable affront to human dignity.

And then at subparagraph (6),

(6) A person convicted of a crime has a lesser expectation of privacy.

[19] Mr. Justice Rosenberg, at paragraph 18, says that in balancing the offender's right to privacy and the security of the person against the state interest in obtaining those profiles for a databank, that the court consider a number of things; in effect, that having been convicted of a designated offence, the offender already has a reduced expectation of privacy.

[20] At paragraph 20, there is an acknowledgment that a DNA profile is capable of providing the most intimate details of the person, because it can show a person's genetic make-up. The court should consider if there is a criminal record. If so, what impact on the decision. The nature of the offence, the circumstances surrounding the commission of the offence, and the impact that an order may have on an accused's privacy and the security of his person, are all to be considered. And the court must give reasons for the decision to order a DNA sample, or not order one.

[21] Of the Crown's authorities, Hendry gives a most useful review of considerations when a court is asked to make a DNA order. But the offenders and the offences in the Hendry case differ substantially from this case.

[22] R. v. Ku involved an aggravated assault, plus two counts of assault with a weapon. There were serious injuries to a victim. There was no record for that accused, and DNA was ordered and upheld.

[23] R. v. N.J.G. involved a domestic assault with a breach of probation having occurred on two occasions. It was also a case where the parties' relationship was likely to continue in the future. There, the accused had a considerable criminal record, problems with the drug alcohol, and a history of domestic violence. The court there said these orders should be made when sought, in all but very insignificant cases. I am not sure that that is an accurate assessment of the discretion to be exercised by the court in each individual case. However, in that particular case, N.J.G., given those circumstances, I would agree that it was in the best interests of the administration of justice to grant the DNA order as was done by that

court.

- [24] Defence counsel, Mr. Zipp, has cited four authorities in arguing against the DNA order. Those cases are *R. v. R.C.*, [2005] S.C.J. No. 62, a decision in the Supreme Court of Canada by Mr. Justice Fish; *R. v. D.P.* (2006), 212 C.C.C. (3d) 237 (B.C.C.A.), a decision of our Court of Appeal rendered by Madam Justice Ryan; *R. v. Adamson*, [2007] B.C.J. No. 1143 (S.C.), a decision of our trial division by Madam Justice Loo; and *R. v. Abaroa-Martinez*, [2007] B.C.J. No. 843 (S.C.), a decision of Mr. Justice Hood of our court.
- [25] The cases of R.C. and D.P. both deal with young offenders, and I really found them not too applicable to the case before me, although the courts seemed careful to stress privacy concerns in those cases, and I agree that those concerns must be looked at carefully. But the overriding concern in these two cases of R.C. and D.P. was the age and the background of the young offenders.
- [26] In *Adamson*, it was a dangerous driving case, and in the *Abaroa-Martinez* case, the charges were break, enter, and theft. In those last two cases, no reasons were given other than that the court was satisfied that it was not in the best interests of the administration of justice to order a DNA sample to be produced.
- [27] In the case before me, defence counsel points to the present immigration problems that Mr. Ali is having. Mr. Ali is from Fiji and subject to a removal order. He has counsel representing him on his immigration problems and status. He has a concern with regard to a DNA sample for health and/or genetic reasons, as I understand it. He is a diabetic, and one of the questions is will a DNA sample reveal any other health problems to Immigration? Is Immigration entitled to such information? I do not know the answer to that, and counsel were unable to provide me with any certain information either; but I agree with the defence that it could represent a serious issue of privacy to this particular accused. Would his DNA profile uncover other medical problems and thus impact on his privacy and chances to become a permanent resident in this county? It is a possibility in this case and something that should be considered.
- [28] The Crown's case for seeking a DNA order is that it is in the best interests of the administration of justice, and basically does no harm to the accused.
- [29] I think Hendry places some evidentiary burden on the Crown that has not been met here. There is no criminal record for Mr. Ali. The offence is serious, but the surrounding circumstances would not necessarily tip the balance in favour of a DNA order.
- [30] The order, however, may have a serious impact on this accused, who is already a diabetic. I am not satisfied that the Crown has presented sufficient information to raise the issue for justifying a DNA order, other than the offence itself. I think it is appropriate to exercise my discretion in favour of the accused in these particular circumstances, with regard to this particular accused and his problems.

- [31] Finally, what is the most appropriate sentence for Mr. Ali? Mr. Ali is 31 years of age. He was born June 16, 1976, in Fiji. He came to Canada, to British Columbia, in 1996, on a student visa. Later he returned to Fiji after a relationship broke up here. He then entered Canada illegally, and one day after his entry he went to see a lawyer. With the lawyer's assistance, he reported forthwith to immigration authorities, and he has been reporting to those authorities since that time on a biweekly basis. He is still trying to obtain a residency status in Canada.
- [32] The education for Mr. Ali is Grade 12, that he obtained in Fiji, and then a diploma in business management from Kingston College in Burnaby, British Columbia. Mr. Ali's father died in Fiji approximately eight years ago. The accused does not want to return to live in Fiji, a country that he deems unstable at this time due to military coups and problems with the rule of law.
- [33] Due to his immigration status, he cannot be an employee here in British Columbia and Canada, but he can own and run his own business apparently, which he is doing. He is in the business of repairing and selling automobiles, and he employs up to three employees. He is the sole support of his wife, also of his widowed mother and four children, two very young children and two stepchildren who are somewhat older, all of whom live with him.
- [34] There are a number of mitigating factors with regard to Mr. Ali which I must take into consideration. He has no criminal record whatsoever. He appears to be a respected businessman and hardworking. He began his own business in car sales and repairs of vehicles.
- [35] He is clearly a family man. He has the support of his mother and his wife and children. He supports his four children, two stepdaughters who are age 19 and 13, and a son age five and a daughter age three whom he has with his present wife. He is the sole financial support of this family, and he supports them emotionally as well. His 19-year-old stepdaughter has written a compelling letter on his behalf to the court.
- [36] He is active in his Muslim faith. He has chosen life in Canada for better opportunities and living standards, rather than staying in his native Fiji. Two Muslim priests from the mosque that Mr. Ali attends have been in attendance in court, and two letters have been filed in this sentencing, one from an Imam, another from a Muslim priest. His mother and his wife have been in court in support of him.
- [37] His mother has been a widow for eight years. She is diabetic and has written also a letter to the court. Her son Mr. Ali is her sole support.
- [38] Mr. Ali has an impressive record of reporting almost every second week since January 2002 to Immigration, and that record has now been filed in these sentencing proceedings.

- [39] With regard to the aggravating factors, this is trafficking in cocaine. In my view, very serious charges. Possession for the purpose of trafficking in a substance that is a drug that can only be described as poison, poison particularly to our youth and certainly for anybody.
- [40] It was a dial-a-dope form of trafficking. It involved a cell phone. It involved a rental car, and that is significant, because according to the police evidence before me, those engaged in dial-a-dope operations significantly use rental cars to avoid forfeiture of their own vehicles. The dial-a-dope operations spread the drug problem. It is harder to detect and more accessible for those who seek those drugs. Motivation here was greed. There is no indication whatsoever that Mr. Ali is a user, and certainly no indication he is an addict. He is an entrepreneur with his own business.
- [41] His co-accused, Mr. Osborne, was clearly an addict. There was evidence of active and heavy trafficking by the number of telephone calls that came to the cell phone after the two were apprehended by the police. The money was found on Mr. Ali. There was no money found on Mr. Osborne. The \$30 in marked bills was found on Mr. Ali. There was a significant amount of drugs found on Mr. Osborne, 20 grams of cocaine in 54 small packages. There is an inference that this was not an isolated transaction, as I say, because of the telephone calls that kept coming in to the apprehended cell phone. This type of operation, a dial-a-dope operation, is to avoid detection and forfeiture.
- [42] Following the deal going down, there was the driving and an attempt to apprehend the two accused; the manner of driving by Mr. Ali was such as to evade police. There were seven RCMP officers in this operation and also involved in the court appearance. All seven gave evidence. This was a time-consuming and costly operation.
- [43] The age of the accused Mr. Ali is also a factor, because he is not a youth of 19 or 22. He is an adult with very adult responsibilities. Finally, there has been no remorse that I can detect.
- [44] Counsel have cited a number of authorities with regard to sentencing, and I will list those authorities. The Crown authorities are *R. v. Franklin*, [2001] B.C.J. No. 1084 (S.C.), a decision of Mr. Justice Henderson in 2001; *R. v. Tran*, 2007 BCCA 613, a decision of our Court of Appeal given by Madam Justice Saunders; *R. v. Manhas*, [2001] B.C.J. No. 1398 (S.C.), a decision in 2001 by Mr. Justice Parrett, of our court; *R. v. Nguyen*, [2003] B.C.J. No. 2927 (C.A.), a decision by Madam Justice Saunders; *R. v. Charlie*, 2008 BCCA 44, a decision of our Court of Appeal this year by Mr. Justice Frankel; and *R. v. Lever*, 2006 BCSC 979, a decision of Mr. Justice Meiklem of our court in 2006. Defence authorities cited in support of a conditional sentence are *R. v. Burkart* (2006), 214 C.C.C. (3d) 226 (B.C.C.A.), a decision of Mr. Justice Thackray, Court of Appeal; *R. v. Sidhu*, [2007] B.C.J. No. 1317 (S.C.), a decision of 2007 by Mr. Justice Smart; *R. v. Schneider*, [2007] B.C.J. No. 2543 (C.A.), a decision of our Court of Appeal, Madam Justice Kirkpatrick; the Provincial Court decision of *R. v. Charlie*, [2007] B.C.J. No. 1993 (P.C.) by Judge Gulbransen in 2007; and *R. v. Clough*, [2001] B.C.J. No. 2336 (C.A.) by our Court of Appeal, the decision rendered by Mr. Justice Donald.

- [45] The Crown cases involved dial-a-dope operations, in the main part, and nine months' imprisonment has been a typical sentence in those cases. The courts have rejected conditional sentences in most of those cases.
- [46] In Franklin, at paragraphs 17 to 21, the dial-a-dope procedure was addressed. I will repeat those paragraphs, as I think it is important that the courts recognize fully what dial-a-dope operations mean. Paragraphs 17 to 21 of the Franklin decision state as follows:
- [17] Some explanation of Dial-A-Dope operations is relevant.
- [18] Traditionally, drugs were disseminated at the street level by purchasers going to certain areas of town and taking the initiative to seek out those who sold the drugs on street corners and in back alleys. This, to some extent, constrained the dissemination of the product. A Dial-A-Dope operation is different. Anyone, anywhere in the Lower Mainland, can place a telephone call to a vendor of narcotics and, after establishing his or her credibility by satisfying the vendor that he or she is not an undercover officer, make an arrangement to have the drugs delivered to wherever the purchaser happens to be. Typically, the drugs are delivered within fifteen or twenty minutes and handed over in exchange for cash.
- [19] This has several significant results.
- [20] First, it makes these drugs, and I refer primarily to cocaine and heroin, more readily accessible throughout the Lower Mainland than they have been in the past. It makes them accessible with less effort on the part of the purchasers. Purchasers, and here I think of adolescents, who might feel intimidated at the thought of seeking out a drug dealer in the recesses of the Main and Hastings area may nevertheless, in the relative comfort and safety of suburban locations, easily purchase cocaine and heroin as long as Dial-A-Dope operators are willing to oblige them.
- [21] I infer also that Dial-A-Dope operations are profitable. There is no evidence before me as to how much a typical Dial-A-Dope dealer makes in the course of a day or a week but, having sat as the trial judge on a number of these cases, I am aware that it is a profitable way to make easy money.
- [47] In the Tran case cited by the Crown, at paragraph 14 I note the court said this:
- [Nor,] in my view, is the sentence imposed demonstrably unfit. Mr. Tran was not a drug user. He involved himself in the drug trade for financial gain. His behaviour was part of a "dial-a-dope" drug trafficking scheme - a mode of trafficking which this Court has observed in the past plays on the addiction and weakness of habitual drug users, and the degradation of the community. The drugs in question are hard drugs and are known to be highly addictive. In the circumstances, I see no error which would permit this Court to interfere with the sentence imposed.
- I quote that because I think it is similar to the situation of Mr. Ali.

[48] The defence encourages this court to follow their authorities and impose a conditional sentence, but the fact situations in most of the authorities by the defence differ a great deal from the case before me. In Burkart, this was a bank employee who stole \$81,400 to cover gambling debts. In the Sidhu case, Mr. Justice Smart at paragraph 44 summarized the offender and consequences this way:

Before me, I have a first offender who had just turned 22 years of age at the time of the offence. The offence occurred during a difficult time in his life. It appears that he was assisting others, not running the business himself. The total amount of drugs in the vehicle was approximately \$460 in street value. He has ended his connection with drug trafficking and those who traffic in drugs. He has a supportive family, is employed, lives at home with his family and is recently married. His family was present at the sentencing, which demonstrates their concern and support. He has a positive psychological report, which is consistent with his conduct since the offence. He has taken steps to rehabilitate himself. Jail will only interfere with that rehabilitation. He is remorseful and ashamed of his conduct. He has admitted his guilt.

This differs again substantially in a number of aspects from Mr. Ali who is before me.

[49] The Charlie case involved an aboriginal offender with some special considerations there, but there again, there had been demonstrated considerable efforts at rehabilitation, which obviously influenced the court a great deal. And again in the Clough case, rehabilitation was a major key factor. In paragraph 12 of the Clough case, the court referred to the steps that the accused had taken. Since her arrest she had overcome her drug dependency and had returned home to live with her mother and had maintained steady employment. Her employer had recently promoted her to a position of branch manager; she had accomplished this rehabilitation prior to sentencing.

[50] Mr. Ali does not want to live in a country where the rule of law is not paramount, nor, let me guess, does he want drug dealers peddling poison to his young children. But that is what he has been involved in, trafficking in cocaine.

[51] Our police are criticized daily for not doing enough to curb lawless drug dealers. The public are seldom aware of the efforts typically shown in a case like this, where there were seven trained and experienced police officers involved in the planning and the execution of apprehending a dial-a-dope operation involving cocaine.

[52] I agree with the submissions by the Crown that a term of imprisonment is appropriate in this case and a conditional sentence is not. Taking all of the sentencing factors into consideration, I believe that deterrence both general and individual is paramount here. I would ordinarily impose a term of imprisonment of 9 to 12 months as an appropriate sentence in such circumstances, but I am taking Mr. Ali's family obligations, his lack of criminal record, and other mitigating factors into account, and therefore imposing a sentence of six months' imprisonment, on each charge, to be served concurrently.

[53] MR. ZIPP: The victim fine surcharges, My Lady, given his incarceration. He's made --

[54] THE COURT: I will waive. No, those are waived.

[55] MR. ZIPP: Thank you.

[56] THE COURT: Anything further?

[57] MS. LAURIE: No, My Lady. Thank you.

[58] THE COURT: All right. Mr. Ali, I hope that your efforts to remain in Canada will be successful, in the same way that I hope that you will never ever appear before a court again. I wish you good luck and that you will never appear involved with anything like this again.

"Morrison J."

Madam Justice Morrison

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Prepared on 28 October 2026 · Esheria