
CANADA / JUDGMENT

R. v. Ali

2014 BCSC 1876

COURT

Supreme Court of British Columbia

DECIDED

16 September 2014

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2014 BCSC 1876 R. v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali,

2014 BCSC 1876

Date: 20140916

Docket: 25656

Registry: Vancouver

Regina

v.

Aram Ali

Before: The Honourable Madam Justice H. Holmes

Oral Ruling on Application to Expand Scope of Cross-Examination of Sgt. Kim on Affidavit
Supporting Wiretap Authorization P03/2009

Counsel for the Crown:

Sandra Dworkin

Michael Barrenger

Simone McCallum

Counsel for the Accused:

John S. Stowe

Roger Thirkell

Veen Aldosky

Place and Date of Trial:

Vancouver, B.C.

Dates ongoing

Place and Date of Judgment:

Vancouver, B.C.

September 16, 2014

THE COURT:

Introduction

- [1] These reasons and the application to which they relate follow from and rely on reasons I gave on April 25 (2014 BCSC 724) concerning Mr. Ali's application to cross-examine Sgt. Michael Kim on the affidavit he swore in support of Wiretap Authorization P3/2009.
- [2] In that ruling, I granted leave to cross-examine about some of the proposed topics, and denied leave to cross-examine about others.
- [3] In this application, Mr. Ali seeks to cross-examine about two additional topics, both relating to the use of a telephone given to the police agent for communication with his police handlers. That telephone was not mentioned in Sgt. Kim's affidavit.

Discussion

- [4] I will not repeat from my previous reasons the outline of the context of the application to cross-examine Sgt. Kim, or of the positions the parties took, and my conclusions, concerning the legal principles which govern. All of those remain the same in this application.
- [5] In his affidavit, Sgt. Kim set out the numbers of various telephones the agent used, but did not mention or include the number of the telephone to which this application relates. Mr. Ali now seeks leave to cross-examine on, specifically:
 - (a) whether the justice who authorized Wiretap Authorization P3/2009 was intentionally misled by Sgt. Kim's failure to reveal that the police agent was or was to be using the telephone; and
 - (b) whether the police intercepted the agent's communications, on that telephone, with people other than the agent's police handlers.

- [6] It is common ground that the telephone was a BlackBerry given by the police to the agent for communicating with his police handlers, the three of whom also had similar telephones for those communications, and that the agent and the handlers did use those telephones to communicate with each other by voice calls, text messages, and PIN messages. I am told that PIN messages are akin to messages on the BlackBerry Messenger or BBM system.
- [7] It is also common ground that the agent and the handlers knew that communications on these telephones would be monitored or intercepted, and gave their consent.
- [8] Monitoring or interception took place in two ways.
- [9] First, some of the telephones -- and there is an issue concerning which ones, which I will discuss shortly -- were intercepted by a "JSI system" involving the assistance of Rogers Communications.
- [10] Interception by way of the JSI system ran from November 10 to December 18 or 19, 2008, and, in relation to the telephones subject to this form of interception, captured the following: all incoming and outgoing text messages; the content of all incoming and outgoing phone calls; and the dates and times of those communications.
- [11] Second, for some of the telephones -- and I will address also in a moment the issue of which telephones -- information about communications made to or from those telephones was captured and stored on the BlackBerry Enterprise Server (BES) owned and operated by the police Combined Forces Special Enforcement Unit (CFSEU). CFSEU is the agency which provided the telephones for the agent's and the handlers' use.
- [12] For this second form of interception or monitoring of a telephone to take place, the telephone had to be "activated" on the BES. When a telephone was so activated, the server then recorded the following for the period of activation: details about voice calls, though not their content; and the details and content of text and PIN messages, incoming and outgoing. In relation to this case, the period of activation was November 10, 2008, through to approximately January 14, 2009.
- [13] Mr. Ali's counsel have examined the ordinary billing invoices for the agent's telephone -- and throughout these reasons I am referring to the telephone described at the outset -- and have compared the total number of communications shown in those invoices with the number of communications shown in the invoices as having been between that telephone and the telephones of the agent's handlers. Over the period of approximately November 2008 through early January 2009, it appears that the agent used the telephone to send or receive approximately 500-800 text messages[1] to or from people who were not his handlers, as well as approximately 500 or so text messages to or from his handlers. The identity of the people who were not his handlers cannot be determined on the information available thus far.

- [14] Mr. Ali submits that the justice who authorized P3/2009 was necessarily misled by Sgt. Kim's failure to mention the telephone in his supporting affidavit, and that the omission could affect whether the Authorization could have issued.
- [15] Mr. Ali submits also that on the approach taken in *R. v. Pickton*, 2006 BCSC 434 -- and I note that the Crown disputes the validity of the principles there articulated (as I discussed in my previous reasons at para. 11) -- the omission gives rise to a reasonable possibility that cross-examination will reveal a subversion of the authorization process. This, Mr. Ali submits, is because the agent's involvement in the investigation was key at that stage, and the affidavit placed great weight on the need to intercept his communications with the targets of the investigation.
- [16] Mr. Ali submits that Sgt. Kim's failure to indicate in the affidavit that the agent had this additional telephone must be viewed as intentional, because Corporal Lee, who swore an affidavit supporting two of the previous authorizations to intercept, had telephoned the agent at the number of the telephone three times on December 17, 2008, and yet omitted that information from his task action report, a document on which Sgt. Kim relied in swearing his affidavit on January 7, 2009.
- [17] Mr. Ali submits that the failure to mention the telephone as a potential vehicle for interception of the agent's communications ran fundamentally counter to the various requirements in the authorization process. He submits that the interception of communications between the agent and people other than his handlers likely also constituted a violation of the prohibitions in Part VI of the Criminal Code, and thus serious wrongful conduct which should have been brought to the authorizing justice's attention.
- [18] The difficulty with much of Mr. Ali's position is that Crown counsel advises the Court that the agent's telephone was not itself monitored or intercepted under either the JSI system or the BES. Crown counsel advises that only the telephones of two of the police handlers were intercepted through the JSI system, and that only the three handlers' telephones were activated on the BES for the recording of the information I described earlier.
- [19] Crown counsel advises further that information concerning the agent's communications to or from handlers' telephones, the latter of which were subject to interception or monitoring via the JSI or BES systems, was disclosed to Mr. Ali's counsel in April and early June, 2014.
- [20] Mr. Ali does not doubt Crown counsel, but is unable to accept that, as Crown counsel has been advised, the agent's telephone was not itself subject to JSI or BES interception or monitoring. This is because when his counsel made a different request for information earlier in these proceedings, Crown counsel received and passed on inaccurate information. That information failed to reveal certain police monitoring of the agent and consequently of other people with him, and inaccurately asserted that body pack monitoring equipment had been unavailable at the period of time to which the inquiry related.

- [21] The previous exchange and the transmission of inaccurate information to the defence were most unfortunate, but the problems were quickly identified and corrected.
- [22] Moreover, it was other material disclosed to the defence which indicated that the information in question could not be accurate. Such is not the situation here.
- [23] Furthermore, the previous unfortunate incident appears, if anything, to have heightened the Crown's concern to ensure, through double-checking and indeed triple-checking, that disclosure inquiries are properly and reliably addressed.
- [24] I am satisfied, from Mr. Barrenger's statements as Crown counsel, that he has directed his inquiries about the agent's telephone appropriately, pointedly, and, in an abundance of caution, repeatedly. There is simply no basis on which to conclude that the agent's telephone was directly subject to monitoring or interception by way of either the JSI system or the CFSEU's BES.
- [25] Mr. Ali submits, then, that if it was unimportant for the investigation to intercept the agent's communications on the telephone in question, that itself was an improperly undisclosed fact, because it runs counter to the thrust of the affidavit. The affidavit emphasizes the importance of the agent's involvement in the investigation, and of the police being able to intercept his communications with the targets.
- [26] To this, the Crown responds that since the Authorization provided broadly for interception of the targets' communications, any communications they had with the agent on the telephone in question would have been intercepted in any event. However, as Mr. Ali notes, it is not clear that all of the targets' communications would necessarily have been successfully intercepted under the Authorization, because, as the affidavit makes clear, the targets changed telephone numbers frequently, sometimes as often as every day.
- [27] In my view, in all the circumstances Mr. Ali puts forward an adequate basis for leave to cross-examine in this area within a limited scope that I will describe shortly.

Conclusion

- [28] I am determining this application on the basis of Crown counsel's statement that the telephone the police gave the agent was not directly subject to monitoring or interception by way of the JSI or BES systems.
- [29] Proposed cross-examination topic (b) therefore has no basis at all.
- [30] As to proposed cross-examination topic (a), it is stated in very broad terms that would encompass matters well beyond the scope of those which properly relate to the validity of the Authorization. However, I am satisfied that Mr. Ali has made the case for leave to cross-examine on the much narrower sub-topic of why it was that Sgt. Kim made no mention in his affidavit of the telephone the police gave the agent.

[31] Mr. Ali also sought leave to cross-examine sub-affiants, but counsel did not directly address this aspect of his application in their submissions. It is not clear to me who those sub-affiants are, or why they should be cross-examined, or even whether Mr. Ali continues to seek leave to cross-examine them given the limited scope for further cross-examination for which I have given leave. This portion of Mr. Ali's application may be addressed later, if necessary.

"H. Holmes, J."

The Honourable Madam Justice H. Holmes

[1] On November 19, 2014, while making their submissions concerning the validity of Wiretap Authorization P3/2009, counsel advised the Court that the number of text messages sent by the agent to people other than his handlers was not between 500 and 800, as counsel had indicated in their submissions concerning this application, but rather was approximately 20. Counsel advised that the error resulted from an analysis that did not take account of certain characteristics of one of the two record-keeping systems for text messages sent from the telephone.

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