

CANADA / JUDGMENT

R. v. Ali

2014 BCSC 686

COURT

Supreme Court of British Columbia

DECIDED

3 March 2014

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2014 BCSC 686 R. v. Ali IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Ali, 2014 BCSC 686 Date: 20140303 Docket: 25656 Registry: Vancouver Regina v. Aram Ali NOTIFICATION: There are a number of Publication Bans in this proceeding; this Redacted Version complies with all those existing Publication Bans. Before: The Honourable Madam Justice H. Holmes Redacted Version of Oral Ruling on Defence Application to Adjourn Voir dire Counsel for the Crown: Sandra Dworkin Michael Barrenger Simone McCallum Counsel for the Accused: John Stowe Roger Thirkell Veen Aldosky Place and Date of Hearing: Vancouver, B.C. March 3, 2014 Place and Date of Ruling: Vancouver, B.C. March 3, 2014

- [1] THE COURT: The defence applies to adjourn the voir dire proceedings for approximately one week and a half, in order to consider its position, in further consultation with senior counsel, and to prepare to pursue one or more of what the defence identifies as the three available courses of action: namely, (1) to seek to withdraw as counsel; (2) to try to arrange for different counsel to represent Mr. Ali in the voir dire proceedings, with the present defence team maintaining conduct of the trial proper; and (3) to apply on Mr. Ali's behalf for a stay of proceedings based on abuse of process.
- [2] Defence counsel consider themselves limited to these potential courses of action because they feel unable to continue to represent Mr. Ali in the voir dire proceedings as a result of insurmountable or insoluble ethical conflict arising from the effects of inadvertent disclosure by the Crown of material over which the Crown asserts a public interest privilege. The asserted privilege relates to the identity of a person who acted as an agent for the police, whose involvement in the investigation is described in the affidavit supporting wiretap authorization P03/2009, but with redactions to conceal the agent's identity. The interception of private communications under that authorization generated much of the evidence the Crown proposes to lead in Mr. Ali's trial.
- [3] Some of the material disclosed to defence counsel, whether appropriately or inadvertently, led defence counsel to conclude that they had identified the agent. The Crown has now confirmed that defence counsel's conclusion was not correct.

- [4] Sometime after these proceedings began in early February 2014, the Crown sought and obtained, and the defence did not oppose, an order requiring the return of a substantial amount of improperly disclosed material in relation to which the Crown asserts privilege, and requiring the defence to destroy all copies of that material in its possession. The defence immediately took steps to begin the substantial task of complying with the order, a task made more challenging for the defence by the fact that the defence had "filed" much of the information in multiple databases.
- [5] The defence now contends, essentially, that the sheer volume of the material in question, and the extent to which the defence team reviewed and digested it before it was withdrawn, leave the defence team unable to represent Mr. Ali free of the risks and constraints described in *R v. Basi*, 2009 SCC 52, and *R. v. G.*, [2004] EWCA Crim. 1368, [2004] 2 Cr. App. R. 37, particularly in view of the importance of the agent's role to the defence challenge to the wiretap authorization. The defence position is set out in much greater detail in the written memorandum which is Exhibit 9, submitted this morning.
- [6] The Crown takes issue with the defence position on most of the points in the logic that leads to this application, and submits that the proceedings should continue as scheduled, at least to the point at which the Court will be asked to determine whether information identifying the agent should be disclosed. The Crown takes the position that, as I have mentioned, a public interest privilege protects the confidentiality of the information identifying the agent, and also that the privilege should not yield because the agent's identity is not relevant in these proceedings. The Crown reasons that if the Court were to reject this position and conclude that the agent's identity should be disclosed, then the ethical difficulty defence counsel face would be overcome.
- [7] However, defence counsel respond that they cannot make the applications for the disclosure of information identifying the agent, because they cannot seek proper instructions from Mr. Ali concerning that application, while also respecting the privilege the Crown asserts, as they are required to do.
- [8] Defence counsel also raise a concern, based on information disclosed but now withdrawn, that their application for disclosure of information identifying the agent would be bound to fail, because, .
- [9] The investigation in this case was complex and the Crown disclosure voluminous. At this point, at the outset of the proceedings -- and I note that although the voir dres were to have begun in early February, they were delayed because of the issues relating to the defence conclusion that it had identified the agent, and to the inadvertent Crown disclosure of material said to be privileged -- it appears that the agent's role has some significance in relation to the grant of the Authorization P03/2009. I do not doubt defence counsel's assertion that they feel fettered in their ability to maintain the necessary relationship with their client, in his challenge to the Authorization, while also respecting the constraints that flow from the Crown's position that the agent's identity is subject to a public interest

privilege.

- [10] At the same time, I foresee a risk -- and I cannot estimate its size at this stage -- of Mr. Ali's chosen counsel withdrawing and his trial being seriously delayed, both needlessly, if it is ultimately determined that the agent's identity should be disclosed to the defence and, as I have noted, the ethical difficulties faced by the defence removed as a result. Given the length of time scheduled for this case, which is two months for the voir dire proceedings and 100 days for the trial before a jury, and given the likelihood that many senior members of the criminal Bar would face client-related conflicts preventing their retainer, it is reasonable to suppose that suitable new counsel could not be retained and prepared for some considerable time, even for the voir dire proceedings alone.
- [11] To break free from what I see as somewhat of a partial "Catch-22" situation, which has the potential to jeopardize Mr. Ali's and the public's right to have the trial take place within a reasonable time, I am going to direct the following course of action.
- [12] The applications for disclosure of information identifying the agent will proceed, subject to the following restrictions flowing from the Crown's position that the agent's identity is protected by a public interest privilege. Defence counsel will not be able to make use of the information over which the Crown has claimed privilege, and will be accordingly constrained in their ability to take instructions from Mr. Ali.
- [13] Accordingly, if those applications fail, and the identity of the agent is not ordered to be disclosed, there will then be liberty to the defence to reapply at the appropriate time. If, on the other hand, the applications succeed, the Crown will disclose the identity of the agent and the ethical difficulties the defence face in relation to the information identifying the agent should no longer apply.
- [14] While at this stage of the proceedings, I cannot estimate the likelihood of the applications, restricted as I have outlined, succeeding or failing, there is obviously some chance that they will succeed. In my view, in the overall circumstances of this case, it is a chance that the interests of justice require be pursued. "The Honourable Madam Justice H. Holmes"

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