
CANADA / JUDGMENT

R. v. Ali

2014 BCSC 724

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 724 R. v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali,

2014 BCSC 724

Date: 20140425

Docket: 25656

Registry: Vancouver

Regina

v.

Aram Ali

Corrected Judgment: Restriction on Publication removed November 3, 2015.

Before: The Honourable Madam Justice H. Holmes

Ruling on Application to Cross-Examine Sgt. Kim

on Affidavit Supporting Wiretap Authorization P03/2009

Counsel for the Crown:

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Place and Dates of Trial:

Vancouver, B.C.

Dates ongoing

Place and Date of Ruling:

Vancouver, B.C.

April 25, 2014

INTRODUCTION

- [1] The defence seeks leave to cross-examine Sgt. Michael Kim, who (as a police constable at that time) swore the affidavit in support of wiretap authorization P03/2009. Under that Authorization, the police intercepted numerous communications which are said to be Mr. Ali's, evidence of which the Crown proposes to lead as a substantial part of its case in the trial. Mr. Ali is charged with two counts of attempted murder and one count of discharging a firearm with intent to wound, all in relation to shots fired shortly after midnight on February 16, 2009, at a Range Rover vehicle occupied by four people.
- [2] In support of his challenge to the validity of the Authorization, Mr. Ali seeks leave to cross-examine Sgt. Kim about various matters I will describe below. The Crown agrees that Mr. Ali should have leave to cross-examine Sgt. Kim about one of those matters, but submits that cross-examination about the other matters should not be permitted because it would not help the Court determine whether the Authorization is valid.
- [3] These are my reasons for giving leave to cross-examine concerning some of the matters and denying leave to cross-examine concerning others.

THE LEGAL CONTEXT OF THE APPLICATION

- [4] Mr. Ali's application to cross-examine must be assessed in the light of his challenge to the validity of the Authorization, because that challenge frames the issues which may be considered relevant in a cross-examination conducted to support it.
- [5] The validity of an authorization to intercept private communications is determined according to the well-known test set out in *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at para. 56:

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.

[6] Donald J.A. restated that test as follows in *R. v. Bacon*, 2010 BCCA 135 at para. 25:

The trial judge's role in reviewing the validity of a search warrant is to consider whether the material filed in support of the warrant, as amplified on review, could support the issuance of the warrant. While evidence of fraud, material non-disclosure, or misleading information are all relevant to this enquiry, their sole impact is to determine whether there is a continuing basis to support the warrant [citations omitted].

[7] Frankel J.A., in *R. v. Wilson*, 2011 BCCA 252, referred to that expression of the test, and noted that "it is clear from *Garofoli* and its progeny that a trial judge's task is to consider whether a warrant could (not would) have issued on the basis of the amplified record" (para. 40).

[8] In his challenge according to the *Garofoli* analysis, Mr. Ali expects to contend that the affidavit supporting the Authorization failed in two ways: (a) by not providing reasonable and probable grounds to believe that the proposed interceptions would afford evidence of the offences under investigation, as required by s. 186(1)(a) of the Criminal Code, as interpreted by *R. v. Duarte*, [1990] 1 S.C.R. 30; and (b) by failing to indicate the investigative necessity of the Authorization, as required by s. 186(1)(b) of the Code.

[9] Mr. Ali wishes to challenge the Authorization on an additional basis recognized by Williams J. in *R. v. Pickton*, 2006 BCSC 434, when the defence acknowledged that the Court could not, on the evidence, find the authorization invalid according to the *Garofoli* analysis. Williams J. viewed the additional basis as arising where the process for judicial authorization has been abused to the point of being subverted, and as involving the exercise of the Court's supervisory function over the integrity of the authorization process:

27 Having considered the authorities, I accept that there may be circumstances in which significant deficiencies in the affidavit material could justify a court striking down a warrant or authorization. In my view, the deficiencies would have to be sufficiently substantial as to cause the court to find that either (a) the prior authorization process had been abused to such a degree that it could be characterized as a subversion, or (b) the integrity/veracity of the affiant was so dubious that the reliability of the affidavit, globally or with respect to one or more of the necessary preconditions for issuance of the warrant or authorization, was uncertain.

[10] Williams J. also concluded that applications to cross-examine in support of this additional basis should face a lower threshold than those resting on the *Garofoli* analysis:

31 With these concerns in mind, I conclude that, in the context of this application, I must be satisfied of two conditions in order to permit the cross-examination to proceed:

1. On the evidence before the court, there is a reasonable possibility that there has been misrepresentation and/or omission of the nature and magnitude that could lead to a finding that the prior authorization process has been subverted; and
2. The proposed cross-examination is likely to assist in the determination of this issue.

32 It will be noted that I have set the standard for the first of the conditions as one of reasonable possibility, not reasonable likelihood as prescribed in *R. v. Garofoli*, supra, and *R. v. Pires*, Lising, supra. I have also set the bar at "could" lead to a finding of subversion, not "would" or "will". I have chosen this standard both in consideration of the fact that the issue is slightly different from that considered in those cases, and to ensure that this test is appropriately fair to the defence position.

- [11] The Crown submits that both the additional basis Williams J. recognized in *Pickton*, and the lower threshold for cross-examination Williams J. applied to it, have no foundation in law or principle, and should play no part in the present application.
- [12] In my view, the dispute in this case concerning whether the Court may rely on the *Pickton* basis for finding an authorization invalid is best addressed at the later stage when Mr. Ali applies for such a finding. At this stage, Mr. Ali contends that the police subverted the authorization process in three main ways: (1) by unlawfully intercepting private communications in the course of the investigation that produced the grounds set out in the affidavit; (2) by knowingly failing to disclose that two previous authorizations targeting the same individuals had failed to produce any direct evidence; and (3) by falsely suggesting that the authorization was needed because the police operational plan underlying the previous authorizations had not been carried through to completion. These are all allegations in relation to which the bases for and usefulness of cross-examination can be assessed according to the *Garofoli* analysis. In the circumstances of this case, the determination of whether the basis recognized in *Pickton* for setting aside an authorization may be available to Mr. Ali does not affect the analysis of whether Mr. Ali should have leave to cross-examine Sgt. Kim.
- [13] There is no absolute or unrestricted right to cross-examine the person whose affidavit supports an authorization. In *R. v. Pires*, 2005 SCC 66, Charron J. pointed out that cross-examination of the affiant will advance the inquiry only if it is relevant to a material issue concerning the validity of an authorization. Since the *Garofoli* review inquires only into whether the statutory conditions for an authorization were met, cross-examination will also have a correspondingly narrow scope:

30 The reviewing judge on a *Garofoli* hearing only inquires into whether there was any basis upon which the authorizing judge could be satisfied that the relevant statutory preconditions existed. For example, in this case, where the authorization relates to participant or consent surveillance, the reviewing judge must determine whether there was a basis for the authorizing judge to be satisfied that:

- (a) there are reasonable grounds to believe that an offence has been or will be committed;
- (b) either the originator or the intended recipient of the private communication has consented to the interception; and
- (c) there are reasonable grounds to believe that information concerning the offence will be obtained by the interception.

Hence, there is a relatively narrow basis for exclusion. Even if it is established that information contained within the affidavit is inaccurate, or that a material fact was not disclosed, this will not necessarily detract from the existence of the statutory pre-conditions. The likelihood that the proposed challenge will have an impact on the admissibility of the evidence will depend on the particular factual context. In the end analysis, the admissibility of the wiretap evidence will not be impacted under s. 8 if there remains a sufficient basis for issuance of the authorization.

31 It is in this narrower context that the right to cross-examine, as an adjunct to the right to make full answer and defence, must be considered. There is no point in permitting cross-examination if there is no reasonable likelihood that it will impact on the question of the admissibility of the evidence. The Garofoli threshold test is all about relevancy. If the proposed cross-examination is not relevant to a material issue, within the narrow scope of the review on admissibility, there is no reason to permit it.

- [14] An accused is not required to demonstrate that the proposed cross-examination will result in a finding that one or more of the statutory prerequisites to an authorization were absent. The accused must show only a reasonable likelihood that the cross-examination will assist the court in determining a material issue (Pires, para. 40). Moreover, the affiant's own credibility may be material to whether the statutory preconditions are established (Pires, para. 43).

THE FACTUAL CONTEXT OF THE APPLICATION

- [15] I do not propose to set out the background to the Authorization. The excellent written submissions provided by defence and Crown counsel (voir dire exhibits A, B, and D for identification) set out the history of investigations E-Prada and E-Patroon into serious offences different from those with which Mr. Ali is now charged, focussed on other suspects. The general background is not in dispute.
- [16] The Authorization was the fourth in a series granted during the course of the investigation. The third authorization (P51/2008) was a "one-party consent" authorization, while the first two authorizations (P34/2008 and P42/2008) and this Authorization were "full Part VI" authorizations.
- [17] During the currency of the second authorization (P42/2008), a person emerged who later agreed to act as an agent for the police in the investigation. The parties agree that the agent's involvement was important, at least, to the information outlined in support of this Authorization; however, the Crown disagrees with the defence position that his involvement

was "crucial". The agent was expected to ingratiate himself with some of the people targeted by the Authorization, and to stimulate inculpatory conversations among those and other people, in his presence and elsewhere, where their communications could be intercepted.

THE PROPOSED CROSS-EXAMINATION

[18] I described earlier the general bases on which Mr. Ali seeks to cross-examine Sgt. Kim. More specifically, Mr. Ali sets out nine topics for which, he submits, cross-examination will assist the Court in determining the issues engaged in his challenge to the Authorization's validity.

[19] I will discuss these topics in turn, addressing them in a different order than counsel did in their submissions, and grouping some of them.

The Reasonable Prospects for the Agent's Involvement in the Investigation

(Defence bases #4 and #6; Crown describes as 3(a) and 3(b))

[20] The Crown concedes that Mr. Ali should have leave to cross-examine Sgt. Kim about the grounds to believe that using the agent in the investigation would succeed in producing evidence. Initially, the Crown limited its concession to those grounds based on events on or after December 15, 2008, when, it appears, one of the targets indicated distrust of the agent. However, the Crown then expanded its concession for reasons based on pragmatism and fairness, after it learned of a failure to disclose a body of information relating to the agent, without which, the Crown is concerned, the defence may be disadvantaged in this application.

[21] On the evidence in this application, I agree that Mr. Ali should have leave to cross-examine Sgt. Kim about the grounds to believe that using the agent would produce evidence. The evidence in this application indicates several occasions when, in the two or three weeks before the Authorization issued, the targets or their associates expressed suspicion about the agent, and indicates some occasions when the agent himself failed to do what the police expected of him. Indeed -- although this, of course, post-dates the affidavit and the grant of the Authorization -- the police ended the relationship with the agent only three days after the Authorization issued.

[22] Since none of this information suggesting potential concerns about the agent's ability to perform as the operational plan contemplated appears in the affidavit, I agree that Mr. Ali should also have leave to cross-examine Sgt. Kim about the reasons for the absence. In the context of the affidavit as a whole, the absence appears at this stage to amount to a material non-disclosure.

[23] Mr. Ali has leave to cross-examine on the bases he lists as #4 and #6, and which, in its own analysis of the proposed bases, the Crown numbers 3(a) and 3(b).

The Effect of the One Party Consent Authorization (P51/2008) on the Investigative Necessity of P03/2009

(Defence basis #5; Crown describes as 2(c))

- [24] The one-party consent authorization (P51/2008) allowed for interception of communications the agent made or received between December 19, 2008 and February 15, 2009. The Authorization now in issue was granted on January 9, 2009. Mr. Ali submits that the agent's involvement in the investigation was the only meaningful development in the investigation in late 2008 and early 2009, and he questions the investigative necessity of the Authorization during the currency of the one-party consent authorization when all of the agent's communications were in any event subject to interception. He therefore wishes to cross-examine Sgt. Kim about the investigative necessity of the Authorization some five weeks before the expiry of the one-party consent.
- [25] The Crown responds that Mr. Ali can make his point, as summarized above, in his submissions challenging the validity of the Authorization, and that for Mr. Ali to cross-examine Sgt. Kim on the matter would not advance his cause or assist the Court.
- [26] I agree to this extent only. Sgt. Kim is not to be confronted with argument about the investigative necessity of the Authorization in light of the one-party consent authorization: that is properly a matter for submissions. However, Mr. Ali may cross-examine Sgt. Kim about the facts which led him to depose that interception more extensive than by way of the one-party consent authorization was necessary.
- [27] Mr. Ali has leave to cross-examine about the facts relating to the basis he lists as #5, which the Crown numbers 2(c).

Misleading Statements about the Status of the Operational Plan

(Defence basis #3; Crown describes as 2(b) and 2(c))

- [28] Mr. Ali submits that, to help establish the investigative necessity of a further authorization, Sgt. Kim's affidavit gave the clear impression that the previous authorization had expired before the police were able to give full effect to their operational plan. The affidavit explained that because the target group was alert to investigative techniques, the police had been unable to install listening devices in three previously authorized locations, including at the residence of one of the main targets.
- [29] Mr. Ali submits that a document disclosed by the Crown indicates that listening devices were installed at the residence on September 23, 2008, well within the currency of the previous authorization. He submits that Sgt. Kim's misrepresentation about that installation may have given false weight to his statement that the foremost objective of the original operational plan had yet to be achieved.

- [30] Mr. Ali submits also that material disclosed by the Crown indicates that well before Sgt. Kim swore his affidavit, the police abandoned their plan to use "stimulation tactics" (techniques to stimulate conversations among the targets that could then be intercepted). He submits that this therefore further weakened the investigative necessity of an authorization aimed at allowing the police to give effect to their operational plan.
- [31] The Crown responds that other material indicates that Mr. Ali's interpretation of the document concerning the installation of devices at the residence is not correct. The Crown also disputes on many bases the defence suggestion that the police had abandoned the plan to use stimulation tactics by the time the affidavit was sworn.
- [32] Some of the Crown's submissions on these points rest on interpretations of documents, including the affidavit, which are not self-evident. At this stage, and on the material in this application, the defence sets out a cogent basis for further inquiry concerning these matters.
- [33] The Crown submits also that cross-examination would be of no assistance because the overall goal of the investigation was plainly to gain admissible evidence, not to put the police operational plan into effect. However, the police operational plan is central to the reasonable grounds to believe that the Authorization would produce evidence. In my view, the documents to which the defence refer provide a foundation for further inquiry into that matter on this basis too.
- [34] Mr. Ali therefore has leave to cross-examine Sgt. Kim on the basis he lists as #3, which the Crown numbers 2(b) and 2(c).

Allegedly Unlawful Interceptions

(Defence bases #1 and #2; Crown describes as 1(a) and 1(b))

- [35] Mr. Ali advises that recently disclosed material reveals that the police intercepted numerous private communications between the agent and others between November 7, 2008 and December 18, 2008, interceptions which, he submits, were both unlawful and undisclosed in Sgt. Kim's affidavit. He seeks leave to cross-examine on both points. He notes that the one-party consent authorization applied as of December 19, 2008, and the "full Part VI" authorization (P42/2008), which was in effect at the time of these interceptions, allowed for interceptions at certain of the locations involved, but only when at least one of the principal targets were present, and they were not.
- [36] The Crown responds that the interceptions are more appropriately characterized as live monitoring, conducted for the purposes of maintaining the agent's safety under the authority of s. 184.1 of the Code. Section 184.1 allows for the interception of private communications, without prior authorization, for the purpose of preventing bodily harm when one of the parties to the communications consent and any recording or transcript of the communications is destroyed afterwards, if no bodily harm was actually inflicted, attempted, or threatened. Also, the Crown submits that the agent became a "known person"

for the purposes of authorization P42/2008, and during its currency the interceptions of his communications were therefore authorized under the basket clause in that authorization. The Crown submits that in that situation any interceptions of the private communications of other people at the same time could have had no effect on the validity of the Authorization. The Crown submits that at most the defence identifies non-disclosure of a matter which, if disclosed, could not have affected the Authorization's issuance. The Crown suggests the excision of a portion of paragraph 86.d.i of the affidavit, which includes the statement, "the scenarios were not audio or video recorded for the following reasons".

- [37] Given the highly intrusive nature of police interception of private communications, I cannot agree with the Crown's submission that disclosure of these interceptions, even if they were unlawful, could have had no effect on the Authorization's issuance. Mr. Ali should therefore be permitted to cross-examine Sgt. Kim concerning the factual underpinnings of the analysis of whether the interceptions were lawful or not.
- [38] However, I agree with the Crown that many of the points Mr. Ali raises concerning the lawfulness or otherwise of the interceptions can be argued on the basis of the evidence already available. Some of those points relate, for example, to the interpretation of s. 184.1 and the determination of whether it applies to the facts known from the disclosed materials.
- [39] Mr. Ali therefore has leave to cross-examine concerning the non-disclosure of the live monitoring interceptions, and concerning the factual basis for the authority under which Sgt. Kim may have believed the monitoring to be lawful.
- [40] For similar reasons, Mr. Ali has leave also to cross-examine about statements in the affidavit that the necessary body pack recording device was not available in time for these scenarios, and that no scenarios were conducted for which listening devices had been installed.
- [41] These bases, for which leave is given, Mr. Ali lists as #1 and #2, and the Crown numbers 1(a) and 1(b).

The Secondary Offences

(Defence bases #7 and #8; Crown describes as 2(d) and 3(d))

- [42] Mr. Ali wishes to cross-examine Sgt. Kim about the sufficiency of the grounds indicating the investigative necessity of the Authorization in relation to the secondary offences, and the grounds supporting a belief that the Authorization would provide evidence of those offences.
- [43] However, he puts forward no basis for doing so beyond what appears on the face of the affidavit. Mr. Ali can properly make his submissions about the sufficiency of these grounds when he challenges the Authorization in the Garofoli hearing. There is nothing to indicate how cross-examination of Sgt. Kim about the sufficiency of the grounds would assist.

- [44] This is the type of situation Dambrot J. described in *R. v. Riley* (2008), 182 C.R.R. (2d) 89 (Ont. S.C.J.), where, after referring to the Garofoli analysis and noting that the applicants appeared "to conflate the basis for cross-examination with the test on the Garofoli application itself" (para. 13), he said the following:
14. my task is to consider the sufficiency of the affidavits placed before the authorizing judges. I will not be assisted in this task by a cross-examination of Det. Comeau with respect to these aspects of his affidavits. Whatever he could have said, but failed to say in his affidavits to justify the conclusion that the interception of any of the private communications of any of the persons named in the authorization three months after the murder would assist the investigation, and whatever he could say now with the benefit of the passage of time, is of no moment. It is the information within the four corners of the affidavits that informs this issue. Any views that might be elicited from Det. Comeau under cross-examination about how the inference could be drawn from the information in his affidavits that the interception of private communications pursuant to the authorizations would assist the investigation of the offences are entirely irrelevant. It was for the authorizing judges, and not Det. Comeau, to decide whether or not to draw that inference. It is my simple task to determine if the affidavits provided them with a basis for doing so. I will not be assisted by any opinion Det. Comeau may have to offer about the sufficiency of the affidavits. Accordingly, this ground provides no basis for cross-examination.
- [45] There will be no leave to cross-examine on the sufficiency of the grounds relating to the secondary offences (Mr. Ali's bases #7 and #8; numbered 2(d) and 3(d) by the Crown) unless Sgt. Kim's responses in cross-examination on the matters for which leave is given elsewhere in these reasons take him to these topics.

Failure to State that Previous Authorizations Produced No Direct Evidence

(Defence basis #9; Crown describes as 3(c))

- [46] Sgt. Kim's failure to state expressly in his affidavit that the previous authorizations failed to produce any direct evidence is similarly a matter for argument in the challenge to the Authorization, where submissions can be made about the effect of the omission.
- [47] At this stage, I see no basis for an inquiry into Sgt. Kim's reasons for omitting such an express statement.
- [48] However, if during cross-examination concerning the matters for which leave has been given elsewhere in these reasons, a basis arises for a conclusion that Sgt. Kim strategically omitted material information from the affidavit, in conscious avoidance of his full disclosure obligation, then the application to cross-examine on this point may be renewed.
- [49] At this stage, leave to cross-examine is denied on defence basis #9, which the Crown numbers 3(c), but the application may be renewed in the circumstances I have outlined.

SUMMARY

- [50] Mr. Ali has leave to cross-examine Sgt. Kim about the grounds to believe that using the agent would produce evidence, and about the absence, from the affidavit, of some information suggesting potential concerns about the agent's ability to perform as the operational plan contemplated (defence bases #4 and #6; Crown describes as 3(a) and 3(b)).
- [51] Mr. Ali may cross-examine Sgt. Kim about the facts which led him to depose that interception more extensive than by way of the one-party consent authorization was necessary (defence basis #5; Crown describes as 2(c)).
- [52] Mr. Ali may cross-examine Sgt. Kim about the status of the police operational plan (defence basis #3; Crown describes as 2(b) and 2(c)).
- [53] Mr. Ali may cross-examine Sgt. Kim concerning the non-disclosure of the live monitoring interceptions, and concerning the factual basis for the authority under which Sgt. Kim may have believed the monitoring to be lawful. He also has leave to cross-examine Sgt. Kim about statements in the affidavit that the necessary body pack recording device was not available in time for the scenarios, and that no scenarios were conducted for which listening devices had been installed (defence bases #1 and #2; Crown describes as 1(a) and 1(b)).
- [54] Mr. Ali may not cross-examine Sgt. Kim on the sufficiency of the grounds relating to the secondary offences (defence bases #7 and #8; Crown describes as 2(d) and 3(d)) unless Sgt. Kim's responses in cross-examination on the matters for which leave is given elsewhere in these reasons take him to these topics.
- [55] Mr. Ali may not cross-examine Sgt. Kim concerning his failure to state expressly that the previous authorizations failed to produce any direct evidence (defence basis #9; Crown describes as 3(c)), but the application to cross-examine on this point may be renewed in the circumstances outlined above.

"The Honourable Madam Justice H. Holmes"

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