

CANADA / JUDGMENT

R. v. Ali

2015 BCCA 333

COURT

British Columbia Court of Appeal

DECIDED

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2015 BCCA 333 R. v. Ali COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Ali, 2015 BCCA 333 Date: 20150722 Docket: CA41724 Between: Regina Respondent And Mohammed Saiyad Sam Ali Appellant Before: The Honourable Madam Justice Newbury The Honourable Mr. Justice Chiasson The Honourable Madam Justice Stromberg-Stein On appeal from: An order of the Provincial Court of British Columbia, dated March 25, 2014 (R. v. Ali, Surrey Docket No. 180124). Counsel for the Appellant: M. Klein Counsel for the Respondent: M. Brundrett Place and Date of Hearing: Vancouver, British Columbia May 13, 2015 Place and Date of Judgment: Vancouver, British Columbia July 22, 2015 Written Reasons by: The Honourable Madam Justice Stromberg-Stein Concurred in by: The Honourable Madam Justice Newbury The Honourable Mr. Justice Chiasson Summary: Mr. Ali was convicted of 19 counts of violating the conditions of his recognizance, 18 of which related to a house-arrest condition. He argues on appeal that the judge erred: in failing to particularize his analysis of the identification evidence to each count; in failing to individually analyze whether the Crown had proven each count beyond a reasonable doubt; and in providing insufficient reasons. The Crown argues that the judge incorrectly placed the burden of proving the inapplicability of the exceptions to the house-arrest condition on the Crown. Held: Appeal dismissed. The judge adequately analyzed the eyewitness identification evidence and considered whether the Crown had proven each count beyond a reasonable doubt, and his reasons were sufficient. The judge erred in concluding that the Crown bore the burden of proving the inapplicability of exceptions to the conditions of Mr. Ali's recognizance. This error did not affect the result. Reasons for Judgment of the Honourable Madam Justice Stromberg-Stein: I. INTRODUCTION

- [1] Mr. Ali was released on a recognizance of bail for eight charges of assault, extortion, and unlawful confinement. His recognizance specified 11 exceptions to a house-arrest condition described by the trial judge as follows (R. v. Ali (25 March 2014), Surrey 180124-8AC (B.C. Prov. Ct.)):
- [22] There were [eleven] exceptions in all. Mr. Ali was permitted to be outside his home for the purpose of travelling directly to and from these activities. They were reporting to a bail supervisor or Immigration Canada; consulting with his lawyer; going to court appearances and Immigration hearings; attending medical or dental appointments made in advance for himself or his children; shopping for groceries and other personal necessities, either for

himself or his children, one time per week for no more than two hours; all of these activities had to be performed between 7:00 a.m. and 6:00 p.m.

- [23] The next condition was attending his children's school or recreational activities. These could be done between 7:00 a.m. and 11:00 p.m. Next, attending motor vehicle auctions to purchase motor vehicles one time per week; transporting vehicles which he had purchased from auction to his rented warehouse at #205, 12745 - 78 Avenue in Surrey; transporting repaired vehicles for inspection one time per week, and finally, going to auto wreckers and automotive parts outlets to buy parts needed for the repair of vehicles, one time per month.
- [2] Following his release, Mr. Ali was the subject of a surveillance operation conducted by members of the Combined Forces Special Enforcement Unit (CFSEU) between June 18, 2013, and October 30, 2013. A team of police officers followed Mr. Ali as he engaged in activities alleged to be in violation of the no-contact and house-arrest conditions of his recognizance.
- [3] Mr. Ali did not testify at trial and his only evidence was by way of an admission that he resided with his children, including three daughters. Mr. Ali contested the sufficiency of the identification evidence and further argued the Crown had not proven beyond a reasonable doubt that he had violated the conditions of his recognizance.
- [4] Mr. Ali was convicted of 19 of 21 counts of failing to comply with his recognizance of bail. He was sentenced to one day on each count concurrent in addition to time served (four months and 11 days). He does not dispute that he violated the no-contact condition but appeals the 18 convictions relating to violations of the house-arrest condition. II. ISSUES
- [5] The following issues are raised on appeal:
1. Did the judge err by failing to analyze each count separately with respect to the sufficiency of the evidence of identification?
 2. Were the judge's reasons sufficient on the evidence of identification?
 3. Did the judge err in concluding there was sufficient evidence of violations of the recognizance?
 4. Did the judge err by holding the Crown bore the burden of disproving the applicability of exceptions beyond a reasonable doubt? III. DISCUSSION
1. Sufficiency of Identification Evidence
- [6] The judge concluded identification had been established in relation to each count, commenting:

- [35] Having considered the evidence of the officers, including their answers in cross-examination, I find that their evidence should be given considerable weight. There is no need to review the evidence of each count individually. In some counts, more than one officer identified the accused, in other counts, only one did. I am satisfied that each identification was made carefully and in accordance with the procedures which these officers are required to follow.
- [36] It is also significant that on most of the counts, the target was operating a motor vehicle registered to the accused. As I have said, that alone does not allow an inference that the accused was the driver, but it does provide some corroborative evidence of the identification. Thus, although one must always be aware of a possibility of a mistaken eyewitness identification, I am satisfied that the evidence as gathered by the surveillance officers was not tainted in the ways that other eyewitness identification might have been.
- [37] I am therefore satisfied that the Crown has proven beyond any reasonable doubt that the person observed by the officers doing surveillance on each count was the accused.
- [7] Mr. Ali submits the judge erred by making general findings about identification and applying them to all counts instead of analyzing each count individually. He argues the fact that the eyewitness identification in this case was that of recognition rather than first-time identification did not relieve the judge of his obligation to consider each count separately. He says the judge erred by failing to analyze the strengths and weaknesses of identification on each count. He submits general conclusions could not have applied to all counts as there was significant cross-examination and submissions in relation to the differing conditions and degree of observation on each count.
- [8] The Crown argues the evidence of identification was overwhelming. On all but one count, Mr. Ali was seen at an address or in a specific vehicle associated with him by specialized surveillance officers who were trained to make effective and accurate observations, were acutely interested in the subject matter of their observations, and could refresh their memories from their contemporaneous notes. These officers had his photograph for reference when observing him as well as a detailed description. The Crown submits this was a case not of eyewitness identification by a stranger but of recognition, which does not attract the same strict safeguards.
- [9] The judge's assessment of the sufficiency of identification evidence on each count is entitled to deference on appeal. In my view, the judge adequately individualized his analysis to each count through his summary of the evidence relating to each count and his general analysis of the identification issue.
- [10] I would not accede to this ground of appeal.

2. Sufficiency of Reasons of Identification

- [11] The judge said he did not need to review each count individually: para. 35. He rejected Mr. Ali's argument that the surveillance officers' identifications were inherently unreliable because they observed him from a considerable distance and for a brief time, they expected to see him, and they assumed it was him. He acknowledged the frailties of eyewitness identification evidence but found the officers' evidence was nevertheless reliable.
- [12] Mr. Ali submits that the judge gave mere "boilerplate reasons", as he did not adequately set out how his general findings related to each count or how he addressed the varying conditions between the counts.
- [13] The judge is not required to record the entirety of his or her analysis, answer every argument, reconcile every frailty in the evidence, refer to all the conflicting evidence, and set out every finding made in reaching a verdict: *R. v. M. E-H.*, 2015 BCCA 54 at para. 68, citing *R. v. J.M.H.*, 2011 SCC 45, and *R. v. R.E.M.*, 2008 SCC 51. In this case, the judge described the evidence on each count and set out why he accepted the police identifications, thus "establishing a logical connection between the evidence and the law on the one hand, and the verdict on the other" and providing a sufficient degree of detail so that Mr. Ali could appreciate why he was convicted: *R.E.M.* at para. 41. The reasons were not simply "boilerplate" but served to demonstrate to Mr. Ali that he was convicted because the trial judge accepted the police identification evidence.
- [14] The Supreme Court of Canada in *R. v. Braich*, 2002 SCC 27, and the companion decision *R. v. Sheppard*, 2002 SCC 26, considered the issue of sufficiency of reasons in the context of identification evidence. Mr. Justice Binnie observed at para. 25 that despite the brevity, "[e]nough was said in the trial judge's reasons to show that he came to grips with the issues thus defined by the defence." He further observed at para. 26 that "[t]here is no doubt about the basis of his decision. ... The trial judge accepted his identification as both credible and reliable. The trial judge was alive to the possibility of collusion but in the end simply rejected it."
- [15] Mr. Ali did not testify. There was no conflict with respect to the identification evidence. I agree with the Crown that a contextual examination of the trial judge's reasons reveals that he came to grips with the reliability of the identification evidence and fulfilled his duty to explain why he decided as he did: *R.E.M.* at para. 17; *R. v. Miazga*, 2014 BCCA 312 at para. 37.
- [16] Overall, I agree with the Crown that the judge's reasons were adequate. He addressed Mr. Ali's concerns about the frailties of the identification evidence and the danger of the officers assuming identification due to associations with Mr. Ali to vehicles and locations. He provided a summary of the evidence on each count. He found as fact that the police officers had properly identified Mr. Ali. He noted that on some counts more than one officer had identified Mr. Ali. He acknowledged corroborating evidence such as police observations of vehicles and locations associated with Mr. Ali. In my view, this constituted an adequate explanation of his pathway to conviction.

[17] I would not accede to this ground of appeal.

3. Sufficiency of Evidence of Violation of Recognizance

[18] The judge briefly reviewed the evidence relating to each of the remaining 18 counts. He noted that on some counts, Mr. Ali was in the company of an unidentified woman who the officers believed to be an adult. As well, on "a couple of the counts", Mr. Ali was seen entering an office with a sign reading "Dr. Bernstein". The judge noted that Mr. Ali argued it was plausible that Dr. Bernstein was a medical doctor and it was equally plausible that the woman was his daughter and he was taking her to a school or recreational activity, all of which were exceptions to his house-arrest condition.

[19] The judge found that none of the exceptions to the house-arrest condition applied. He noted that the medical exception in the conditions covered visits by appointment to physicians and dentists, and that there was no evidence that Dr. Bernstein was a licensed physician in British Columbia. Based on his personal experience, the judge mused that Dr. Bernstein was likely the American doctor who had written a book on the treatment of diabetes and that the business attended by Mr. Ali was therefore likely a weight-loss clinic, but said that was "neither here nor there, because there is no evidence whatsoever that this premise was the place where a physician licenced in British Columbia was carrying on his practice": para. 64. Regarding Mr. Ali's assertion that the woman seen with him in his vehicle could have been his daughter, the judge held that this was immaterial because none of the places visited "could conceivably be considered to be an adult's or child's recreational activity or a school activity": para. 65. The judge concluded:

[66] The evidence establishes conclusively that none of the places to which the accused went were for the purposes permitted by the recognizance. That is, it is clear that he was not reporting to a bail supervisor or Immigration officer, he was not outside his house for the purpose of consulting legal counsel, he was not seen going to court or to an Immigration hearing, he was not seen going to a medical or a dental facility. On the one occasion when he was seen shopping, it was at a time which was beyond the timeframe in which he could do any shopping. He was not seen going anywhere which could remotely be connected to a child's recreation or school activities, he was not seen to transport any motor vehicle from an auction sale, and he was not seen to go to a place where motor vehicles are auctioned. He was not seen transporting repaired motor vehicles to a place where they could be inspected, and he was not seen going to an automotive parts shop or auto wrecker to buy parts for cars that he was repairing. None of the places to which the accused travelled, none of the activities which he was observed doing, could reasonably be regarded as being within the terms of those exceptions in the condition of the recognizance.

[67] I find, therefore, that the Crown has proven beyond a reasonable doubt that the accused failed to comply with the conditions of his recognizance that he remain inside his home at all times unless he was engaged in the activities specified in that condition.

- [20] Mr. Ali submits the judge erred by failing to analyze whether the Crown had proven each count beyond a reasonable doubt. He says certain portions of the recognizance were vague and confusing. In particular, Mr. Ali argues that the judge misstated the evidence regarding the "woman" who was seen travelling with him in relation to several counts when, in fact, the evidence was that Mr. Ali was with a "female" and there was no evidence regarding her age. (A fact stated for the purpose of this appeal, without an application to adduce fresh evidence, is that Mr. Ali's daughters are apparently 9, 19, and 25 years old). Second, it is argued the term "recreational activity" was not defined in the recognizance and so it was unclear whether he breached the condition. With respect to Count 18, which related to Mr. Ali's visit to the "Dr. Bernstein" building, Mr. Ali submits the judge erred by relying on his personal belief as to the nature of that clinic, without notice to counsel and without evidence on that point.
- [21] The Crown highlights the judge's finding that none of the destinations visited by Mr. Ali and the female suggested that they had been participating in school or recreational activity. The lack of knowledge of the identity of the female did not undermine this finding. The Crown argues the wording of the exception was not so vague as to suggest that any time Mr. Ali was in the company of a female, he could be attending recreational activity. With respect to Mr. Ali's attendance at the "Dr. Bernstein" building, there was no evidence the business was that of a doctor licensed in British Columbia or that Mr. Ali had made an appointment in advance as required under the exception. Further, he did not proceed directly to the building as required. The judge did not actually rely on his personal knowledge of Dr. Bernstein's reputation in deciding whether the exception applied.
- [22] In my view, the judge considered whether the Crown had proven each count beyond a reasonable doubt. Beginning with the breach of the no-contact condition, he found that Mr. Ali had been in contact with an individual in violation of a condition of his recognizance, based on CFSEU officers' evidence that they observed the individual attend at Mr. Ali's workplace, enter it, and then step outside with Mr. Ali and speak with him for at least one minute. The officers took a photograph of Mr. Ali during this encounter.
- [23] Mr. Ali led no evidence to support the applicability of a lawful exception as described in the recognizance. The judge inferred that none of the places that Mr. Ali visited were for permitted purposes described in the recognizance.
- [24] I conclude the trial judge's assessment of the evidence and inferences drawn from the evidence - namely, that Mr. Ali's activities did not fall within the exceptions to his house-arrest condition - are reasonable and entitled to deference.
- [25] I would not accede to this ground of appeal.

4. Burden of Proof

- [26] The judge held that Mr. Ali was not required to establish on a balance of probabilities that his actions fell within an exception to the house-arrest condition. Put another way, in his analysis, the Crown was required to prove the inapplicability of the 11 exceptions to the house-arrest condition beyond a reasonable doubt. The Crown contends this was erroneous.
- [27] Section 145(3) of the Criminal Code provides: 145 (3) Every person who is at large on an undertaking or recognizance given to or entered into before a justice or judge and is bound to comply with a condition of that undertaking or recognizance, and every person who is bound to comply with a direction under subsection 515(12) or 522(2.1) or an order under subsection 516(2), and who fails, without lawful excuse, the proof of which lies on them, to comply with the condition, direction or order is guilty of
- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
 - (b) an offence punishable on summary conviction. [Emphasis added.]
- [28] In my view, the judge's conclusion is inconsistent with *R. v. Holmes*, [1988] 1 S.C.R. 914 at 924-25, where, in the context of an analysis of the constitutionality of the offence of possession of break-in instruments, the majority held that "the opening words of s. 309(1), namely, 'without lawful excuse, the proof of which lies upon him', place a persuasive burden on the accused to establish on a balance of probabilities an excuse in circumstances where he or she seeks to justify his or her actions despite an intention to use an instrument for house-breaking purposes." I agree with the Crown that where there are numerous exceptions to a condition, it would be impractical to require that the Crown negate each in establishing that a breach occurred, especially since evidence supporting the application of an exception would be in the exclusive purview of the accused.
- [29] In fact, Mr. Ali's counsel on this appeal concedes that the judge's assumption concerning the burden of proof is inconsistent with *R. v. Goleski*, 2014 BCCA 80 (affirmed, 2015 SCC 6, for the reasons of this Court). In *Goleski*, which addressed the offence of refusing to provide a breath sample without lawful excuse, this Court held the accused bore the burden of proving a reasonable excuse on a balance of probabilities. *Goleski* was concerned with s. 794(2) of the Criminal Code, the statutory codification of the burden of proof for exceptions in summary offences.
- [30] In this case, the Crown proceeded by indictment with respect to Mr. Ali's offences and thus s. 794(2) does not apply. However, *Goleski* establishes that s. 794(2) reflects common law principles that the burden falls on the accused to prove an exception or excuse on a balance of probabilities: para. 75. In my view, the same common law principles establish that a person charged with an offence under s. 145(3) of the Criminal Code must prove an exception or an excuse on a balance of probabilities. The trial judge's error, however, was favourable to Mr. Ali and did not affect the outcome in this case. IV. CONCLUSION
- [31] I would dismiss the appeal. "The Honourable Madam Justice Stromberg-Stein" I agree: "The Honourable Madam Justice Newbury" I agree: "The Honourable Mr. Justice Chiasson"

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