

CANADA / JUDGMENT

R. v. Ali

2020 BCSC 2011

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Supreme Court of British Columbia

DECIDED

23 November 2020

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2020 BCSC 2011 R. v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali,

2020 BCSC 2011

Date: 20201123

Docket: 29405-1; 29405-8

Registry: Vancouver

Regina

v.

Ibrahim Ali

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Corrected Judgment: The cover page and text of the judgment was corrected throughout on December 3, 2024

Before: The Honourable Mr. Justice L.W. Bernard

Oral Ruling on Voir Dire

re Disclosure

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Place and Dates of Trial:

Vancouver, B.C.

October 26-28, 2020

November 2, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 23, 2020

- [1] THE COURT: The defence seeks disclosure of "all dealings between the RCMP and Mustafa Ahmad, including copies of employment contracts". The application is opposed by the Crown and the Attorney-General on behalf of the RCMP.
- [2] Mustafa Ahmad did not attend the hearing. His position, as related by the Crown, is that he, too, is opposed "unless the records pertain to this specific investigation".
- [3] In brief overview, Mr. Ahmad works at Mosaic - a service for newcomers to Canada - as a settlement worker. He also provides interpreter/translation services for the police on an ad hoc basis.

When Ibrahim Ali was arrested for the murder of MS, it was Mr. Ahmad who provided the name of the lawyer whom Mr. Ali initially consulted. He also acted as the Arabic/English interpreter for that private consultation. It is this involvement by Mr. Ahmad in the investigation which has given rise to this application, based on the defence theory that Mr. Ahmad may have been acting as a police agent at the time.

- [4] It is not contentious that if Mr. Ahmad was acting as an agent of the police, that agency might reasonably bear on issues related to the voluntariness of Mr. Ali's post-arrest statements and Mr. Ali's ss. 7 and 10 Charter rights. However, the Crown and Attorney-General's submission is that the defence theory rests on speculation rather than on reasonable inferences that might be drawn from the evidence; therefore, the defence has not shown that the records sought have likely relevance.
- [5] As for the applicable test for disclosure in this application, the defence's first position is that the records they seek fall within the ambit of first party disclosure, but its application has been advanced under both first-party and third-party disclosure regimes. In this regard, I am satisfied that the records sought are not reasonably characterized as either fruits of the investigation or as obviously relevant records in the hands of the police. Accordingly, the third-party *R. v. O'Connor*, [1995] 4 S.C.R. 411, 130 D.L.R. (4th) 235 [O'Connor] regime applies, and the defence bears the burden of showing likely relevance: see *R. v. Gubbins*, 2018 SCC 44 [Gubbins], at paras. 24-28:

24 These qualifiers are significant, as they contemplate that not all police records will be subject to first party disclosure. For example, as this Court noted in *McNeil*, "not every finding of police misconduct by an officer involved in the investigation will be of relevance to an accused's case": para. 59. Similarly, as the Alberta Court of Appeal stated in *R. v. Black*, 2011 ABCA 349, 286 C.C.C. (3d) 432, at paras. 37-38:

All *McNeil* established is that disclosure of police misconduct records where they are obviously relevant is a matter of first party disclosure. In reaching that conclusion, the Supreme Court likened those types of records to records relating to convictions for perjury for Crown witnesses. Only records of misconduct that are obviously relevant form a part of first party disclosure. If the record of police misconduct is not obviously relevant, an accused person can still gain access to it relying on the *O'Connor* process for third party disclosure.

For all other records held by a public body, including the police, the *Stinchcombe-O'Connor* distinction continues to be the rule. The police are required to disclose the investigative file as first party *Stinchcombe* disclosure and other files or records in the hands of the police are subject to the *O'Connor* process. This would include files relating to complaints of criminal activity by Crown witnesses and the operational records of the police force or government body from whom records are sought. [Emphasis added.]

From the foregoing, it is evident that there is an important role for third party disclosure where the records are neither part of the investigative file nor obviously relevant, therefore not part of first party disclosure: McNeil, at para. 60.

25 Third party disclosure is dealt with in O'Connor. To obtain disclosure of such records, an accused must make a court application. First, the burden is on the accused to show that the record is likely relevant. Second, where the accused discharges this burden, the judge will examine the record to determine whether, and to what extent, it should be produced to the accused.

26 Information will be "likely relevant" where there is "a reasonable possibility that the information is logically probative to an issue at trial or to the competence of a witness to testify": O'Connor, at para. 22 (emphasis deleted). The "likely relevant" threshold has been described as significant, but not onerous: O'Connor, at para. 24; McNeil, at para. 29. The reason that the relevance threshold is "significant" is to allow the courts to act as gatekeepers, preventing "speculative, fanciful, disruptive, unmeritorious, obstructive, and time consuming" requests for production: O'Connor, at para. 24, quoting R. v. Chaplin, [1995] 1 S.C.R. 727, at para. 32.

27 Nevertheless, the burden on the accused is not onerous. "Likely relevance" is a lower threshold than "true relevance", and has a "wide and generous connotation" that "includes information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence": McNeil, at para. 44; see also O'Connor, at para. 21. Only after information has been shown to be likely relevant will the courts assess the actual relevance of the record sought. The courts then consider competing interests at the second stage of an O'Connor application: McNeil, at para. 39. It may be apparent "upon inspection by the court that the claim of likely relevance established at the first stage of the O'Connor application is simply not borne out": McNeil, at para. 40.

28 There are two reasons why the threshold in an O'Connor application is not onerous. First, the only issue at this stage is likely relevance. The application judge is not determining the admissibility of records, nor has the judge reached the point at which he or she considers competing interests: O'Connor, at para. 24. Second, the accused at this stage is in the difficult position of having to make submissions without knowing the contents of the records being sought: O'Connor, at para. 25. The likely relevance threshold is a first-step inquiry designed to prevent fishing expeditions, but nothing more.

[6] The recent case of R. v. Moazami, 2020 BCCA 3 [Moazami], is also instructive. The court cautioned at para. 42 that the R. v. McNeil, 2009 SCC 3 [McNeil] decision requiring the disclosure of obviously relevant records in the hands of the police must not be evoked as a guise for disclosure requests that are properly subject to the O'Connor regime. At paras. 41-42 of Moazami, Mr. Justice Harris for the court said:

[41] The Court in McNeil and in Gubbins has been careful to explain that the duty on the police to produce to the Crown "obviously relevant" material outside of the "fruits of the investigation" into the accused, so that the material can then be disclosed to the accused as

first party disclosure, is an exception to the general rule that police records are third party records. At para. 25, the McNeil Court reminds us: "production of criminal investigation files involving third parties, and that of police disciplinary records, usually falls to be determined in the context of an O'Connor application." In Gubbins, at para. 24, the Court approved of the Alberta Court of Appeal's reasons in *R. v. Black*, 2011 ABCA 349 at paras. 37-38, where the court said:

... Only records of misconduct that are obviously relevant form a part of first party disclosure. ...

For all other records held by a public body, including the police, the Stinchcombe-O'Connor distinction continues to be the rule. The police are required to disclose the investigative file as first party Stinchcombe disclosure and other files or records in the hands of the police are subject to the O'Connor process. This would include files relating to complaints of criminal activity by Crown witnesses and the operational records of the police force or government body from whom records are sought.

[Emphasis added in Gubbins.]

[42] It is important for this Court to ensure that McNeil is not evoked as a guise for disclosure requests that ought to be subject to an O'Connor application.

[7] To establish likely relevance, the defence relies upon various portions of the existing Crown disclosure as its evidence in the application. It has been bound and tendered as exhibits.

In relation to Mr. Ahmad's role upon the arrest of Mr. Ali, this disclosure shows:

- a) that the police contacted Mr. Ali's brother, Chamdin, on Mr. Ali's behalf because Mr. Ali said Chamdin would have the name of the lawyer he wished to consult in the exercise of his right to speak to legal counsel;
 - b) that Chamdin, in turn, contacted Mustafa Ahmad, who provided him with the name of criminal lawyer DM as the first name that came to his mind;
 - c) that Chamdin then provided DM's name to the police;
 - d) that Chamdin attended to Mosaic and asked Mr. Ahmad to speak to DM;
 - e) that DM called Mr. Ahmad;
 - f) that the police facilitated a private telephone consultation between Mr. Ali and DM; and
 - g) that for that consultation, Mustafa Ahmad acted as the Arabic/English interpreter.
- [8] The disclosure also reveals that Mustafa Ahmad is a Kurd from Syria who has lived in Canada for 30 years and, in his role as a settlement worker, works mostly with newcomers of Kurdish ethnicity. He knew Ibrahim Ali, his parents, and his brother Chamdin, as newcomer Kurds from Syria whom he had assisted. In Mr. Ahmad's will-say statement, he said he recalled receiving a call from Chamdin informing him that Ibrahim "was in jail and they

needed a lawyer." He said he gave Chamdin the name and number of DM, "a lawyer with whom he had had some dealings." He said, "DM was the first name that came to mind and [he] would have provided other lawyer names if Chamdin had so requested."

He also said that he did not know what Mr. Ali was charged with. Mr. Ahmad said Chamdin attended to Mr. Ahmad's office and asked Mr. Ahmad to speak to DM. Mr. Ahmad said DM called him and Mr. Ahmad "assisted with interpreting a conversation between DM and Mr. Ali."

- [9] Mr. Ahmad said that he turned down a later request to provide translation services to the investigators. (Police emails in the post-arrest period indicate that Mr. Ahmad did so because of a conflict of interest.)
- [10] Other disclosure shows that in August 2017, the investigators began to focus on Kurdish men, as a result of a genetic profile of the DNA sample from sperm found in the deceased body of MS. This genetic profile suggested their suspect was likely of Kurdish descent.
- [11] In November 2017, the investigators approached Mustafa Ahmad at Mosaic for information about the Kurdish culture and the local Kurdish community. They noted that Mr. Ahmad was already "security cleared", and the investigators believed he would understand the sensitivities in an outstanding investigation. In relation to that first meeting, Sergeant Lew said:

There was initially no information about the [MS] investigation shared with Mustafa Ahmad. During the first meeting, it was explained by Staff Sergeant Gander and Staff Sergeant Turner that IHIT was working on an investigation and were seeking more information about the Kurdish culture, in particular at the local level. For example, did a large number of them meet at one particular venue (for example, a cultural centre or church), where did they live in the Lower Mainland, was the group fractured, etc.

- [12] In February 2018, Mr. Ahmad held a Kurdish "cultural awareness workshop" for the investigators, answered questions, and provided information on upcoming local Kurdish Newroz celebrations. At this time, the police disclosed to Mustafa Ahmad, for the first time, that they were investigating the murder of MS and that they believed their suspect was Kurdish. Disclosure from the police indicates that the investigators wanted to ensure that they were respectful of the Kurdish community as they reached out to them in the investigation.
- [13] In relation to Mr. Ahmad's role in the investigation in November 2017 and February 2018, Sergeant Lew said:

Mr. Ahmad was not involved in the capacity of a Special I employee or a Mosaic worker. We only sought his knowledge because we knew he was security cleared and would understand the sensitivity of an investigation. We only spoke to him as a member of the Kurdish community . . . there was no financial remuneration offered for these discussions . . . no documents were signed as the information was very general.

- [14] On March 25, 2018, the police conducted an undercover operation at a Newroz celebration in Burnaby. In this operation, they surreptitiously obtained DNA samples (with corresponding names) from approximately 150 male attendees. In the subsequent analysis of these samples, one sample was remarkably similar - but not a match - to the questioned sample. This DNA sample was linked to the name Chamdin Ali from the undercover operation, and in a kinship analysis it was identified as DNA from a full sibling of the man whose sperm was found in MS.
- [15] Based principally on the foregoing, the defence position is that it is no mere coincidence that the man who conducted a workshop for the investigators in February 2018 was the same man who provided the name of the lawyer with whom Mr. Ali consulted upon his arrest in September 2018, and then acted as an interpreter for that consultation.
- [16] The defence argues that the disclosure shows that prior to the arrest of Mr. Ali, Mustafa Ahmad was "assisting the police in a material manner" by providing operational and/or tactical advice to the police (including helping them find a Newroz event for their undercover operation), and that the police sought advice from him on "how to further their investigative objectives".
- [17] The defence also relies upon Mr. Ahmad's security clearance, although there was no evidence tendered as to its meaning.
- [18] In relation to Mr. Ali's arrest, the defence says "the police had resources in place to ensure that Mr. Ali could have his access to counsel in Arabic"; however, it argues that the police "abandoned that plan when they realized that Mr. Ali's family had unwittingly arranged for a sympathetic police agent involved in the investigation to facilitate this crucial process." The defence also says "the police's subsequent assertions that they did not make any efforts in respect of same amount to an attempt to obscure the fact that they intended to retain Mustafa Ahmad." (These "subsequent assertions" appear to be those of Corporal Lali, the officer who was overseeing the Arabic-speaking Constable Alam in his arrest of Mr. Ali. She said that while the police were alive to the potential need for an interpreter, they did not make an arrangement to provide for that interpreter; if Mr. Ali had chosen to speak to a Legal Aid lawyer, then the police intended to inform Legal Aid that Mr. Ali would need an interpreter.)
- [19] The defence submits that the foregoing establishes an air of reality to the defence theory that Mustafa Ahmad was acting as a police agent and, therefore, it shows the likely relevance of all RCMP dealings with Mustafa Ali, including copies of any of his employment contracts with the RCMP. It says that the disclosure of these records will allow the Court to assess the true nature of the relationship between Mr. Ahmad and the police, including the degree and frequency of contact, and the kind of work that Mr. Ahmad did with the police.

- [20] As already observed, the Crown submits that the defence theory that Mustafa Ahmad was acting as a police agent is based on speculation rather than evidence. It says the inferences the defence asks the Court to draw from the disclosure relied upon in support of the application are not reasonable ones, particularly when the evidence is examined as a whole. More specifically, it says, *inter alia*, that the evidence does not support a reasonable inference that:
- a) the police were responsible for Mustafa Ahmad's involvement in Mr. Ali's exercise of his rights to counsel; to the contrary, transcripts of post-arrest audio recordings show that it was Chamdin Ali who was responsible for Mr. Ahmad's involvement; and,
 - b) Mr. Ahmad provided operational and tactical advice to the police, given the evidence that the reason the investigators approached Mr. Ahmad, who was a Syrian Kurd working for Mosaic, was to understand and approach the Kurdish community in a culturally-sensitive way.
- [21] The Crown says the evidence does not establish anything other than the mere coincidence of Mustafa Ahmad's earlier involvement (as a result of an approach by the investigators to learn more about the Kurdish culture) and his later involvement (as a result of being contacted by Chamdin Ali). It says the defence theory of a police conspiracy to undermine Mr. Ali's rights to counsel upon arrest by Mr. Ahmad's intentional interference as an agent of the police, rests on nothing more than speculation.
- [22] Similarly, the Attorney General submits that the defence application rests on speculation rather than on evidence and any reasonable inferences that might be drawn from that evidence. It says, *inter alia*:

There is no common sense connection, based on an evidentiary foundation, between, for example, the employment records sought or Mr. Ahmad's PRIME history, and the claims the Applicant seeks to establish through their introduction, including that Mr. Ahmad was involved in a scheme of "police trickery" or that he improperly inserted himself in the Applicant's solicitor-client relationship. The material sought is not logically probative to an issue at trial.

- [23] Parenthetically, the Attorney General is also concerned with the breadth of the disclosure requested, which is not narrowed either by time or by geographic area in relation to a police agency serving the public across Canada. To assist in narrowing any production order made, should this matter get to the second stage of the O'Connor analysis, it tendered an affidavit dated November 2, 2020, from an RCMP member of the Confidential Informer and Agent Unit (CIAU), the central repository for all information related to police agents. This member deposed:
- a) that any record of an individual being utilized as an RCMP agent from 2013 to the present would be held by CIAU; and

- b) that in a search of the electronic dataset containing the names of all individuals who have acted as police agents for the RCMP since at least 2010, there was no reference to either a Mustafa Ahmad or a Mike Ahmad having been, or currently being, used as a police agent.

It must be noted that due to the late disclosure of this affidavit, it was agreed that this affidavit evidence would be for consideration only at the second stage of the O'Connor analysis.

- [24] With the foregoing in mind, I turn to the "likely relevance" of the records sought to the defence theory that Mustafa Ahmad was acting as a police agent in the investigation into the murder of MS.
- [25] As earlier stated, O'Connor is the applicable disclosure regime for these third-party records. The first step of that regime obliges the applicant to show the likely relevance of these records. The purpose of this threshold burden is instructive, and is explained in McNeil at paras. 28 and 29:
- [28] The first step in any contested application for production of non-privileged documents in the possession of a third party is for the person seeking production -- in this case the accused -- to satisfy the court that the documents are likely relevant to the proceedings. This threshold burden simply reflects the fact that the context in which third party records are sought is different from the context of first party disclosure. We have already seen that the presumptive duty on Crown counsel to disclose the fruits of the investigation in their possession under Stinchcombe is premised on the assumptions that the information is relevant and that it will likely comprise the case against the accused. No such assumptions can be made in respect of documents in the hands of a third party who is a stranger to the litigation. The applicant must therefore justify to the court the use of state power to compel their production -- hence the initial onus on the person seeking production to show "likely relevance". In addition, it is important for the effective administration of justice that criminal trials remain focussed on the issues to be tried and that scarce judicial resources not be squandered in "fishing expeditions" for irrelevant evidence. The likely relevance threshold reflects this gate-keeper function.
- [29] It is important to repeat here, as this Court emphasized in O'Connor, that while the likely relevance threshold is "a significant burden, it should not be interpreted as an onerous burden upon the accused" (para. 24). On the one hand, the likely relevance threshold is "significant" because the court must play a meaningful role in screening applications "to prevent the defence from engaging in 'speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming' requests for production" (O'Connor, at para. 24, quoting from *R. v. Chaplin*, [1995] 1 S.C.R. 727, at para. 32). The importance of preventing unnecessary applications for production from consuming scarce judicial resources cannot be overstated; however, the undue protraction of criminal proceedings remains a pressing concern, more than a decade after O'Connor. On the other hand, the relevance threshold should not, and indeed cannot, be an onerous test to meet because accused persons cannot be required, as a condition to accessing information that may assist in making full answer

and defence, "to demonstrate the specific use to which they might put information which they have not even seen" (O'Connor, at para. 25, quoting from *R. v. Durette*, [1994] 1 S.C.R. 469, at p. 499).

[26] For the application of this threshold to the case at bar, I adopt the following words of Mr. Justice Hill in *R. v. D.M.*, [2000] O.J. No. 3114, 37 C.R. (5th) 80, (S.C.J.):

37 The initial stage, whether production should be ordered to the court for review, calls for the trial judge to apply a likely relevant standard. While the burden is not to be overly onerous, at the same time the requirement is not to be reduced to an altogether standardless process. Relevance is contextual, a case specific application of logic and experience to determine whether the evidence assists in proving a fact in issue. Whether or not the evidence in question has some tendency to make the proposition for which it is advanced more likely than were the evidence absent requires the court to assess an evidentiary or informational foundation grounded in the circumstances of the case at hand [citations omitted].

[27] Upon careful consideration of all the evidence tendered in this disclosure application, I am not persuaded that the defence has met its burden of showing the likely relevance of the records sought. On this evidence, the defence theory that Mr. Ahmad was acting as a police agent in the investigation remains well within the realm of speculation; thus, the application for the records requested cannot reasonably be characterized as anything other than a fishing expedition. The avoidance of fishing expeditions is one of the purposes for placing reasonable limits on disclosure requests: see *Gubbins* at para. 29.

[28] A reasonable reading of the evidence, when taken as a whole and in context, does not suggest that Mustafa Ahmad's involvement in the investigation at two separate and distinct stages was anything other than mere coincidence. This context includes evidence: (a) that Mr. Ahmad is an English and Arabic-speaking Kurd from Syria who has worked for Mosaic since 1996, and has provided translation services to the police on an ad hoc basis; and (b) that in his work with Mosaic, Mr. Ahmad focuses on helping Kurdish newcomers to settle in Canada, two of whom were Ibrahim and Chamdin Ali. For the police, Mr. Ahmad was an obvious source of information about Kurdish culture and the local Kurdish community, and for Chamdin Ali, he was an obvious contact when his brother Ibrahim asked for some post-arrest assistance.

[29] It is not surprising that when a coincidence exists, in some circumstances it will raise suspicions. That is what occurred here, and exploring such suspicions is exactly what one might expect, and indeed hope for, from defence counsel representing their clients' best interests. That said, not every exploration will expose evidence of something nefarious in that coincidence.

[30] Here, based on the evidence tendered, the suspicion that Mr. Ahmad was acting as a police agent remains in the realm of speculation. While the applicant's evidentiary burden is not onerous, the "likely relevance" threshold is recognized as significant and is intended to screen out applications that are based only in speculation rather than evidence. As this is the case here, it is expected that the judge's gatekeeper function will be exercised for the reasons stated in McNeil.

[31] In light of all of the foregoing, the defence application is dismissed. The defence may, of course, reapply if there is a material change in the evidence supporting its application.

"Bernard J."

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