

CANADA / JUDGMENT

R. v. Ali

2021 BCSC 2750

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 2750 R. v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali,

2021 BCSC 2750

Date: 20210521

Docket: 29405

Registry: Vancouver

Regina

v.

Ibrahim Ali

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Before: The Honourable Justice Bernard

Oral Ruling on Voir Dire

re Defence application to cross-examine police witnesses

Counsel for the Crown:

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Place and Date of Hearing:

Vancouver, B.C.

May 19-20, 2021

Place and Date of Judgment:

Vancouver, B.C.

May 21, 2021

- [1] THE COURT: Within this voir dire, declared for the purpose of determining the voluntariness of a post-arrest statement of the accused, the defence applies for a ruling that it may cross-examine nine police witnesses it intends to call in its case on the voir dire. The Crown opposes the application.
- [2] The application arises because the Crown did not accede to the defence's informal request to the Crown to call these police officers in the Crown's case and an application by the defence to compel it to do so was not made. The principal purpose for the defence calling these witnesses is to attempt to establish alleged police trickery; more specifically, the defence alleges that the police employed a police agent named Mustafa Ahmad to undermine the accused's s. 7 Charter right to silence, a live issue in the voluntariness voir dire, while he was in police detention. The defence submits it is unlikely to get to the truth of the matter without being able to cross-examine these witnesses.
- [3] In support of its application, the defence relies upon the court's discretion to control its own process in a manner that promotes procedural fairness and a just result. Notably, the defence application is not pursuant to s. 9 of the Canada Evidence Act; i.e., the defence does not seek declarations that these witnesses are adverse; rather, the defence says its application is analogous to those that might be made in defence applications for Charter

relief, where the court may permit the defence to cross-examine its own police witnesses, in recognition of the need to meet its evidentiary burden through witnesses who may have an interest in the outcome and be disinclined to admit any misconduct. In support of its position, the defence cites: *R. v. Feldman*, [1994] B.C.J. No. 722 [Feldman], at paragraphs 34 and 35; *R. v. Ward*, [2007] A.J. No. 1200 [Ward]; *R. v. Trang*, [2003] A.J. No. 1519 [Trang]; and *R. v. Sapara*, [2002] A.J. No. 483 [Sapara].

- [4] In *Feldman*, the court recognized that the trial judge has "leeway" in a Charter voir dire to permit the defence to cross-examine its own witnesses if fairness and the right to make full answer and defence require a relaxation of the usual rule against cross-examination of one's own witness:

34 If the defence had to call Constable Fogarty as a witness, it is apparent that the appellant would seek to cross examine him in an effort to establish a basis for contending that the search warrant was invalid. Normally, that would require a ruling by the trial judge that Constable Fogarty was an adverse or hostile witness. The defense might encounter serious difficulties in seeking to establish a basis for cross examining a witness called by the defence. But as Finlayson J.A. observed in *Kutynech*, *supra*, at p.302:

I recognize, particularly in cases tried in the Provincial Division, that there will be instances where the defence, through no fault of its own, cannot provide a detailed summary of the evidence that it anticipates it will call in support of an application to exclude evidence. It may be that fairness requires that the accused be given some latitude at some stage of the trial to explore potential Charter issues which he or she had no opportunity to develop prior to trial. If fairness requires that leeway, the trial judge will grant it, but he will control the proceedings to ensure that legitimate exploration does not become a fishing expedition, which will serve only to waste time and delay the expeditious determination of not only the particular case but other cases which await trial in the same court.

35 Applying that reasoning to the present circumstances, it may be that a trial judge conducting a voir dire into an alleged breach of the Charter would grant the defence more leeway than might otherwise be permitted if fairness and the right to make full answer and defence appear to require a relaxation of the normal rules with respect to permitting cross examination of one's own witness.

- [5] The cases of *Trang* and *Sapara* were judicially considered in *Ward*; accordingly, I will not address them separately here. In *Ward*, the court considered whether the appellant/accused had the right to cross-examine police witnesses called by the defence in his application for relief under the Charter. In dismissing this ground of appeal, the court acknowledged that permitting or denying accused persons the right to cross-examine their own witnesses in a Charter voir dire is a matter of judicial discretion that is exercised with the objective of adjudicative fairness in mind. At paragraphs 48-62, the court provided the following helpful analysis:

[48] The Appellant argues that an accused person has the "right" to cross-examine police witnesses even when that officer is called by the defence because the defence bears the initial evidential burden. However, despite the accumulation of 25 years of Charter jurisprudence, the Appellant was not able to refer me to a single ruling of precedential value that definitively established the existence of this supposed "right" to cross-examine.

[49] Although not cited by the Appellant, the decision in Morberg, supra, suggests that the strict rules pertaining to the examination of witnesses ought to be relaxed in the context of an application to exclude evidence. On this point, Romilly P.C.J. stated [at paragraph 29] that:

In my view, the nature of the inquiry in which we, as trial judges, are involved on a Charter voir dire is such that the strict rules of examination in chief and cross-examination should be relaxed. We should be concerned that the inquiry be relevant, succinct and fair. We should also be concerned about preventing prolix cross-examination.

[50] Despite outlining what seems to be a sensible procedure, the decision in Morberg was not binding upon the trial judge in the case at bar, and it is certainly not binding upon this Court.

[51] The Appellant refers extensively to the Alberta Provincial Court's decision in R. v. Coles, [2005] A.J. No. 122. However, for the same reason that Morberg was not binding, Fradsham P.C.J.'s decision cannot be used to impugn the trial judge's ruling as an error of law, nor is it binding on this Court. Moreover, I do not read Fradsham P.C.J.'s decision as providing a foundation for the Appellant's claim that he had a right to cross-examine "Crown-partisan witnesses" on the Charter voir dire. In my view, the decision in Coles simply canvasses whether a court has the authority to structure the voir dire so that an accused person is permitted to cross-examine Crown-partisan witnesses despite bearing the initial evidential burden.

[52] In Coles, Fradsham P.C.J. observed that the voir dire process is a discretionary matter that arises from the court's authority to control its own process, noting [at paragraph 39] that:

One of the factors which a trial judge must consider when determining the appropriate Charter voir dire procedure is the source of the evidence which will be called in support of the application. If it will be necessary for the accused to call Crown partisan witnesses in order to establish the Charter breach, a different procedure may be necessary than if the witnesses to be called by the accused are friendly to the accused, or neutral.

For example, if the accused, as a practical matter, will have to call as a witness the police officer whose actions are alleged to have violated the accused's Charter rights, it may be that fairness and efficiency will dictate that the accused, even though he or she called that witness, should be permitted to cross-examine that witness. In such a case, the Crown would be restricted to asking questions of that witness in the nature of an examination-in-chief (as opposed to a cross-examination which would be the norm when examining a witness called by the opposite party).

[emphasis added]

[53] As this portion of the judgment clearly points out, Fradsham P.C.J. did not suggest that an accused person has the "right" to cross-examine all Crown-partisan witnesses. Rather, the Judge suggested that when the accused must call such a witness to give evidence, it may be necessary for the trial judge to permit the use of the cross-examination technique. In fixing the voir dire process in the case before him, Fradsham P.C.J. stated [at paragraph 48]:

Meaning no disrespect to the officer, and without pre-judging his candour in the witness box, I am satisfied that the police officer is a partisan Crown witness. I would permit the accused to cross-examine the officer even if the accused called the officer as one of its witnesses in the voir dire. Likewise, I would require the Crown to then ask its questions of the officer as it would in an examination-in-chief. The end result is that the Crown will gain no tactical advantage if the accused, as the party bearing the persuasive burden, were to be required to call and examine its witness first in the voir dire.

[54] After hearing the submissions of the Crown and the defence, Fradsham P.C.J. considered the specific facts of the case before him, and then exercised his discretion to allow the defence to cross-examine the witnesses. In my view, this decision does not stand for the principle that every accused has the "right" to cross-examine all Crown-partisan witnesses. Instead, I read Coles as suggesting that the structure of the voir dire is ultimately determinable by the trial judge.

[55] That the procedural structure of a Charter voir dire is within the discretion of the trial judge is discussed by Wenden P.C.J. in *R. v. Habhab*, [1997] A.J. No. 175. In that case, the Crown and defence agreed to structure the Charter voir dire so that the Crown would call all of the evidence and the defence would then cross-examine all of the witnesses. Counsel agreed to this structure despite the fact that the defence bore the evidential burden on some of the issues. When this procedure was put to the court, the judge rejected it. After consideration of the authorities, Wenden P.C.J. held [at paragraph 37] that:

... the cases make it is (sic) clear that it is the Court that decides upon the procedure to be followed when an application is made to exclude evidence under s. 24(2). In arriving at the decision the Court will undoubtedly seek the advise (sic) of counsel, but ultimately the decision is that of the Court. This after all is simply a manifestation of the Court's inherent right to control its own process.

[56] The Judge then exercised his discretion to reject the procedure set out by counsel. In fixing what he believed was the correct methodology considering the facts of the case before him, Wenden P.C.J. stated [at paragraph 44] that:

One of the major concerns that will be raised by defence counsel is that for the most part, witnesses required for the application to exclude evidence will be the police who investigated the offence. Traditionally, counsel have dealt with police witnesses as cross-examiners. Counsel rightly or Wrongly (sic) take the view that such witnesses might be less than forthcoming in the

answers given. There is not in my view, any evidence, to support this belief. Defence counsel, in the event that the witness is, or appears to be adverse, can always ask the Court for leave to cross-examine. In a situation where an accused is trying to establish that a constitutionally protected right has been breached, the Court ought to give counsel more leeway in cross-examining ones [sic] own witness than is ordinarily done.

- [57] Wenden P.C.J. was not prepared to automatically permit defence counsel to cross-examine Crown-partisan witnesses simply because it was a Charter voir dire. Instead, he suggested that if circumstances so require, a trial judge has the discretion to permit leading questions of police witnesses, and that this discretion can be exercised upon request from defence counsel. This cannot be interpreted as a requirement that cross-examination be permitted in all cases.
- [58] The Appellant also cites several Alberta Court of Queen's Bench decision, beginning with Binder J.'s decision in *R. v. Trang*, [2003] A.J. No. 1519. My interpretation of *Trang* is similar to the treatment in *Coles*. More specifically, I view Binder J.'s decision as primarily standing for the principle that trial judges retain the discretion to structure the Charter voir dire procedure as they deem fit. Although Binder J. permitted cross-examination of police officers despite their technically being witnesses for the defence, he did so largely because this process was followed on prior applications pertaining to the same case. I do not read *Trang* as an authority for the proposition that an accused person has the right to cross-examine all Crown-partisan witnesses.
- [59] The Appellant also cites *R. v. Sapara*, [2002] A.J. No. 483 [Alta Q.B.]. I pause here to note that if the decision in *Sapara* was anywhere near as conclusive on this issue as the Appellant suggests, the decision in *Coles* would likely never have been rendered, given that *Sapara* was a Court of Queen's Bench decision issued three years prior to *Coles*. Nevertheless, the Appellant suggests that *Sapara* stands as an authority for an accused's unqualified right to cross-examination. I do not read Watson J.'s (as he then was) decision as supportive of the Appellant's position. Rather, it seems to state that the procedure on a Charter voir dire is discretionary, and that this discretion ought to be guided by the overarching goal of adjudicative fairness. In this regard, Watson J. states [at paragraph 19]:

... it does appear to me that Kutynec and Dwernychuk, as have been referred to at this point are not actually authority for the proposition that the defence as a Charter applicant is going to be forced into that kind of a straight jacket in every single instance when a Charter voir dire arises. It does seem to me that what is vital to the process is to remember the whole question of adjudicative fairness in this context. Even if a Charter applicant is in fact a Charter applicant, the moving party as it were, the relationship that particular phenomena has to the actual outcome of the voir dire process should not lose sight of fairness to the individuals. It should not be unrealistic in failing to consider exactly what witnesses we are talking about here.

[60] I read this passage as saying that the structure of a Charter voir dire should not be determined by blind adherence to formal procedural rules. I do not believe that Watson J. was attempting to exchange one set of procedural rules for another. That the Court did not intend to set down a rigid formula for the voir dire is made all the more clear by Watson J., where he held [at paragraph 23]:

Indeed I would observe that the way in which it has been approached by the Ontario Court of Appeal and implicitly approved by the Supreme Court of Canada in *R. v. Derrach* 2000 SCC 46 (CanLII), [2000] 2 S.C.R. 443 [parallel citations omitted] seems to suggest that the procedure is still extremely flexible and depends very much on the exercise of discretion by the trial judge on a case by case basis. [emphasis added]

[61] Watson J. went on to exercise his judicial discretion to set the Charter voir dire procedure according to the specific circumstances of the case before him, which involved the admissibility of wiretap evidence. In setting the process, he said [at paragraph 24-25]:

It was urged that the [police officers] may be friendly to the Crown and at least ought not to be led. It was also urged that in fact the applicant should have a full right to cross-examination. [The Crown] quite fairly did not dispute that particular point, and I have no question in my mind that in fact both applicants should have the right to examine or cross examine the witnesses within the scope of professional responsibility as lawyers. Therefore, for the purposes of this procedural direction, I would make it clear that I do not intend to take any objection to counsel. (sic) for the applicants cross-examining the Crown witnesses in any manner that they feel is appropriate, within the limits, of course, of law, namely the scope of relevance has to be a binding issue here, and no one of course is entitled to abuse or in other manners mislead or mistreat witnesses.

[62] Watson J. decided that defence counsel ought to be allowed to cross-examine the Crown-partisan witnesses. He therefore exercised his discretion to structure the voir dire to permit them to do so. However, his ruling cannot be interpreted as stating that such a process is necessary in all situations. Indeed, given the rulings in subsequent cases such as *Coles* and *Trang*, the courts have not interpreted the decision as a fetter on their discretion.

[6] The Crown agrees that whether to allow this application or not is a matter of judicial discretion, but submits that this discretion should not be exercised here because the evidence the defence hopes to elicit can be achieved through direct examination.

[7] Having due regard for all the foregoing, I am satisfied that in the context of this voluntariness voir dire in which police trickery undermining the accused's Charter right to silence is alleged, it is appropriate to grant the defence application. In this regard, it must be borne in mind that the factual circumstances, as they pertain to Mustafa Ahmad and his roles in the investigation - first as a resource to the police early in the investigation and then as the translator during the accused's post-arrest consultation with counsel - are unusual. Moreover, Mr. Ahmad was a casual civilian employee of the RCMP at these times.

[8] In these rather unusual circumstances, I am satisfied that fairness and the right to make full answer and defence are best served by the exercise of the court's discretion in favour of permitting the defence to fully explore the allegation of police trickery through cross-examination of its police witnesses, namely Derusha, Lew, Wilson, Gander, Turner, Kee, Yanicki, Khoury, and Pannu.

"Bernard J."

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