

CANADA / JUDGMENT

R. v. Ali

2022 BCSC 1909

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Supreme Court of British Columbia

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2022 BCSC 1909 R. v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali,

2022 BCSC 1909

Date: 20220713

Docket: 29405

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 17, 2024

Before: The Honourable Mr. Justice Bernard

Oral Ruling on Application #33

re third party suspects

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Place and Date of Hearing:

Vancouver, B.C.

April 28, 29

May 9, 2022

Place and Date of Judgment:

Vancouver, B.C.

July 13, 2022

Introduction

[1] THE COURT: The applicant, Ibrahim Ali, is charged with the first-degree murder of 13-year-old MS. At trial, proof of identity of the applicant as MS's killer will be the principal matter in issue. In this regard, the case against the applicant is entirely circumstantial; it rests upon DNA evidence from sperm found inside MS's vagina and anus in a post mortem forensic examination of her body.

- [2] In a scientific comparison of this DNA with two subsequently obtained DNA samples of the applicant - one by ante-arrest cast-off, the other by post-arrest warrant - the match result was the same for each sample: a one-in-72 quintillion chance that the sperm was not from the applicant.
- [3] Given the circumstantial nature of the evidence vis-à-vis proof of the identity of MS's killer, it is common ground that the jury will have to be satisfied that the only reasonable inference that can be drawn from the evidence it accepts as true is that the applicant was MS's killer.
- [4] In this pre-trial application, the applicant seeks extensive and far-reaching first-and-third-party disclosure from the Crown, in furtherance of his pending pre-trial application for a ruling permitting him to tender "third-party suspect" evidence at his upcoming jury trial. The Crown resists the disclosure sought principally on the basis of irrelevance. It says that the absence of any evidence of a sufficient nexus between any of the alleged third-party suspects and MS's murder is fatal to the defence application; thus, the application is merely an impermissible fishing expedition.

Background

- [5] MS's lifeless body was found in a wooded area of Central Park in Burnaby, B.C., at approximately 12:45 a.m. on July 19, 2017. She was found with her clothing askew. Her shirt and bra had been pulled up, exposing one breast, and her shorts and underwear had been pulled down, exposing her groin. Her underpants were bunched up, upside down, and around only one of MS's legs.
- [6] MS had last been seen alive and well only hours earlier. Based on CCTV video-footage capturing her residence and a commercial area adjacent to Central Park, it appeared: that she left her residence at 6:02 p.m. and entered a Tim Hortons restaurant at 6:09 p.m.; that she left the restaurant at 7:37 p.m.; and that at 7:38 p.m. she broke into a jog heading in the direction of nearby Central Park.
- [7] When MS had not returned to her family home in Burnaby by 9:30 p.m., and was not answering her cellphone, her mother became worried. At 11:45 p.m., MS was reported missing to the police. The police were quickly able to locate MS's cellphone by "pinging" it. It was found with her wallet and keys attached, on the ground at the edge of a secondary trail in a wooded area of Central Park. MS's body was discovered shortly thereafter at approximately 12:45 a.m., 15-to- 20 metres further into the woods from where her cellphone had been found. Her earphones were located in the woods between her cellphone and her body. It appeared that she had been accosted on the trail, dragged into the woods, sexually assaulted, and strangled to death.

- [8] A post-mortem examination of MS's body began on July 20, 2017, at 8:30 a.m. The pathologist noted that MS's clothing consisted of a sports bra, underpants, a T-shirt, jean shorts, socks, and running shoes. An examination of MS's vagina showed a tear near its opening with associated bleeding into the tissue. An examination of her anal canal identified a bruise within the rectum, multiple small lacerations, and a single, slightly larger laceration in the canal.
- [9] The lacerations in the anal canal were not associated with any "vital reaction" (i.e., the hemorrhaging or inflammation that would occur in a living body), thus raising the prospect that these anal lacerations might have been post-mortem injuries, whereas the existence of anal bruising indicated an ante-mortem injury.
- [10] The examination also revealed pinpoint hemorrhaging within MS's eyes and under her chin, a skin scrape on the back of her head, and two small areas of bleeding under the scalp. It showed no fractures to her skull or a brain injury. She had superficial abrasions, lacerations, and bruises on her face and extremities, with more prominence on her lower extremities. Examination of the brain demonstrated changes consistent with a lack of oxygen to the brain.
- [11] The post-mortem pathologist found that strangulation was the most likely cause of MS's death. He noted that the petechial hemorrhages on her face and within the eyes were highly suspicious for external compression of the neck.
- [12] In this post-mortem examination, degenerative spermatozoa were recovered from MS's vagina and anus, and subsequent DNA testing showed the source to be one man who was designated "Male 1". Swabbing, clipping, cutting, and other means were used to collect other bodily samples from MS for analysis, but these produced no other identifiable "stranger" DNA.
- [13] At the outset of the homicide investigation, the DNA from the sperm in MS's vagina and anus was the only evidence of the identity of MS's assailant, and there was no match found for it within the National DNA Data Bank. This remained the case throughout the 13.5-month investigation.
- [14] In the absence of any evidence identifying or tending to identify who was responsible for the attack on MS, the police investigation in its early stages was wide-ranging and unfocused. However, by mid-August 2017, the police had received a phenotype report from an analysis of Male 1's DNA, which indicated that Male 1 was likely of Kurdish descent. As the Kurdish community in Burnaby was relatively small and the police considered that they had no other viable leads, investigative resources were aimed at attempting to collect DNA samples from this community in an effort to identify Male 1.

- [15] In March 2018, the police conducted an undercover operation at a local Kurdish celebration, and collected 150 DNA samples. When these samples were compared to Male 1's DNA, none were a match; however, one bore sufficient similarities to send it to a DNA lab for a kinship analysis. This sample was from a man named Chamdin Ali. The result of the analysis was that Male 1 was very likely a full brother of Chamdin Ali.
- [16] The applicant was quickly identified as a brother of Chamdin Ali and a resident of Burnaby, B.C., living close to Central Park. He was placed under police surveillance and, on August 24, 2018, the police obtained a cast-off sample of his DNA from a cigarette butt he discarded. This sample was analyzed as a match to Male 1 and, on the strength of this match, the applicant was arrested and charged with the murder of MS.
- [17] Once the police were satisfied they had identified Male 1, and now knew his physical characteristics, they reviewed the evidence they had gathered in the early stages of the investigation with fresh eyes. However, in this review they were unable to find anything linking the applicant to MS or to the crime, beyond the evidence of his sperm in MS's vagina and anus, and his general presence in Burnaby on July 18, 2017.
- [18] No evidence was uncovered of any sort of history between MS and the applicant, or the existence of any reason for MS and the applicant to have known, or even have been aware of, one another at any time before the evening of the homicide. At the time of MS's death, the applicant was a 27-year-old Arabic-and-Kurdish-speaking man who spoke very little English. He had arrived in Canada from Lebanon as a Syrian refugee only 4.5 months earlier. MS was a 13-year-old Asian-Canadian school-girl living in Burnaby, with her mother.

The disclosure application

- [19] As a premise to the applicant's application for third-party suspect disclosure, the applicant submits there is another "available" inference that would account for the presence of his sperm in MS's vagina and anus at the time of her death, allowing for the possibility that a third-party was her killer. The applicant's counsel says, "This is not a case about whether Mr. Ali had sex with MS; it is about whether he was the killer", and he submits that it is "an available inference" that the applicant "left his DNA on the complainant's person independently of the killing at a different time and a different place" before she was attacked in the park and killed. He also suggests that "the killing could have been motivated by an attempted sexual assault, by robbery, or by a mental health delusion."
- [20] As I understand it, the applicant's counsel says that another plausible explanation for the presence of the applicant's sperm inside MS's injured vagina and anus at the time of her death in Central Park is that at some unspecified time and place before MS entered the park to go for a run, the applicant and MS, who were by all accounts complete strangers to one another, had a sexual encounter and that in this encounter the 27-year-old applicant penetrated the vagina and anus of 13-year-old MS with his penis and ejaculated, leaving his sperm in both. Some time after the sexual encounter during which MS apparently sustained

injuries to her vagina and anus, MS went for a run alone in Central Park without first washing off the blood from her injuries or the applicant's sperm, and while she was running along a secondary trail in a wooded area, she was attacked, dragged into the woods, and killed by someone other than the applicant.

The applicant argues that "logically this theory requires that another person did kill her" and "this is what he seeks to establish through his third-party suspects application and to ultimately prove at the trial", while at the same time recognizing that because the case against him as MS's killer is entirely circumstantial, a reasonable inference inconsistent with his guilt requires no evidence to raise a reasonable doubt as to his guilt. The applicant says that the third-party suspect evidence is somehow more compelling, but this is more appropriately addressed in the context of the applicant's intended application for a ruling that would allow him to tender evidence of third-party suspects.

[21] I turn now to the specifics of the instant disclosure application. The applicant identifies the following persons and groups of persons as potentially viable third-party suspects:

- 1) SR;
- 2) GD;
- 3) anyone placed on a list as possible person of interest;
- 4) Asian men carrying a bag;
- 5) SM;
- 6) Mr. W;
- 7) "weird man" at the film set;
- 8) person who attended the vigil site and took (stole) a photograph;
- 9) father of a classmate of the deceased;
- 10) CE or his brother D;
- 11) unknown Indigenous male with a knife;
- 12) stranger's ex-girlfriend's son;
- 13) potential clients of sex-trade workers; and
- 14) any person in Central Park at the time of the offence.

[22] He seeks the following disclosure:

- 1) all persons of interest, manuals, Violent Crime Linkage Analysis System ("ViCLAS") documentation and analysis, and tips in relation to this investigation, further specified as the persons-of-interest ledger, and the ViCLAS tool that the police used to aggregate their list of potential suspects;

- 2) all police investigative information on the persons that are the subject of the applicant's alternate suspect application as identified above, and further specified as all materials the police gathered in their investigation of these other potential suspects in the course of the investigation; and
 - 3) all materials in possession of the police relating to the applicant's alleged third-party suspects that establish geographic or temporal proximity to the offence in July 2017, motive, propensity, or opportunity; and
 - 4) all materials in the possession of the police that were not gathered in the course of this investigation but can support the applicant's underlying third-party suspect application, including two Vancouver Police Department ("VPD") investigative files, three Burnaby RCMP investigative files, and one Abbotsford Police Department investigative file.
- [23] It is not contentious that this far-reaching disclosure application engages both first-and-third-party disclosure regimes, as established in the seminal cases of *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 1991 CanLII 45 and *R. v. O'Connor*, [1995] 4 S.C.R. 411, 1995 CanLII 51, respectively. It is also common ground that in relation to first-party disclosure, the Crown must disclose all relevant non-privileged information in its possession or control, whether inculpatory or exculpatory, and upon a defence application for disclosure resisted on the basis of irrelevance, the Crown must show clear irrelevance. For third-party disclosure, the onus is on the applicant to show "likely relevance". This is defined as "a reasonable possibility that the information is logically probative to an issue at trial or to the competence of a witness to testify" or to "a reasonable possibility that [the records] may assist the accused in the exercise of the right to make full answer and defence": see *R. v. Johnston*, 2019 BCCA 107 at paras. 34 to 39.
- [24] The purpose of both disclosure regimes is to protect an accused person's right to make full answer and defence while at the same time recognizing the need to place limits on disclosure when required. Such limits include avoiding fishing expeditions: see *R. v. Gubbins*, 2018 SCC 44 at para. 29.
- [25] In relation to the first-party records sought, the principal position of the Crown is that they are clearly irrelevant due to the absence of any evidence of a connection between the alleged alternate suspects and the crime. Similarly, for the third-party records sought, the Crown says the applicant has failed to establish likely relevance due to the absence of evidence of a connection between any of the alleged alternate suspects and the crime.
- [26] As for the ViCLAS documentation and analysis the applicant seeks, the Crown says ViCLAS is merely an investigative tool for generating investigative leads and, much like police policies, practices, and procedures, it is not, in itself, relevant.

Legal framework re third-party suspects

[27] In *R. v. Grandinetti*, 2005 SCC 5, the leading case on the admissibility of third-party suspect evidence, the Court stated that without evidence of a sufficient link between the third-party and the crime, the evidence of a third-party suspect is neither relevant nor probative:

47 The requirement that there be a sufficient connection between the third party and the crime is essential. Without this link, the third party evidence is neither relevant nor probative. The evidence may be inferential, but the inferences must be reasonable, based on the evidence, and not amount to speculation.

48 The defence must show that there is some basis upon which a reasonable, properly instructed jury could acquit based on the defence: *R. v. Fontaine*, [2004] 1 S.C.R. 702, 2004 SCC 27, at para. 70. If there is an insufficient connection, the defence of third party involvement will lack the requisite air of reality: *R. v. Cinous*, [2002] 2 S.C.R. 3, 2002 SCC 29.

49 The trial judge correctly formulated the legal test for admitting third party evidence:

The cases establish that an accused may adduce evidence tending to show that a third person committed the offence. The disposition of a third person to commit the offence is probative and admissible provided that there is other evidence tending to connect the third person with the commission of the offence.

(Ruling (voir dire), Appellant's Record, at p. 64)

The remaining question, therefore, is whether she correctly applied the test to the facts in holding that there was an insufficient connection between Rick Papin and the murder of Connie Grandinetti for the jury to hear the evidence.

[28] Subsequently in *R. v. Tehrankari*, 2012 ONCA 718, leave to appeal ref'd, 35144 (25 April 2013), the court expounded on the prerequisites for admissibility of third-party suspect evidence as follows:

[35] An accused charged with a crime is entitled by way of defence to adduce evidence that a third party, not the accused, committed the crime. The evidence must meet the test of relevancy and must have sufficient probative value to justify its reception. In order to be relevant and probative, the evidence must connect the third person with the crime. If there is an insufficient connection between the third person and the crime, the evidence will lack the requisite air of reality: *R. v. McMillan* (1975), 1975 CanLII 43 (ON CA), 23 C.C.C. (2d) 160, aff'd 1977 CanLII 19 (SCC), [1977] 2 S.C.R. 824, at pp. 167-168; *R. v. Grandinetti*, 2005 SCC 5, 191 C.C.C. (3d) 449, at paras. 46-48.

- [36] Evidence of a violent disposition or animus towards the deceased, standing alone, will not meet the required threshold. However, if there is evidence that the third person had a motive to commit the crime or threatened the deceased and had the opportunity to carry out the crime, then the evidence of propensity may have probative value: *R. v. Murphy*, 2012 ONCA 573, at para. 21; *R. v. Baltrusaitis* (1996), 31 W.C.B. (2d) 184; *R. v. McMillan*, at p.168.
- [37] The evidence may be direct or circumstantial. Inferences based on the evidence may be drawn, but speculation is not permitted. The evidentiary burden on the accused is discharged if the defence shows that there is some evidence upon which a reasonable, properly instructed jury could acquit based on the proposed defence: *R. v. Grandinetti*, at paras. 47-48; *R. v. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702, at para. 70.
- [29] In *R. v. Grant*, 2015 SCC 9, the Court addressed the Grandinetti prerequisites to admissibility of third-party suspect evidence in circumstances where the identity of the suspect is unknown:
- [27] Where the third party's identity is unknown, the nature of the connection must reflect a different factual matrix. In such circumstances, the sufficient connection — to anchor the relevance and probative value of the evidence — generally arises from similarities between the crime charged and another crime that the accused could not possibly have committed.
- [28] This focus on the similarities between the offences is not a formulation of a new, categorical test. Rather, it reflects the principles underlying Grandinetti which play out differently in different factual contexts. Like known third party suspect evidence, "in the absence of some nexus with the alleged offence", unknown third party suspect evidence will constitute mere speculation (*R. v. McMillan* (1975), 1975 CanLII 43 (ON CA), 7 O.R. (2d) 750 (C.A.), at p. 758, aff'd 1977 CanLII 19 (SCC), [1977] 2 S.C.R. 824). Unless the circumstances and similarities to the other offence are sufficient to suggest that the same individual committed both crimes, unknown third party suspect evidence will not be logically relevant.
- [30] The foregoing specifically addresses the need for a sufficient nexus between the third-party suspect and the crime for the evidence to be relevant at trial, but it also informs the question of disclosure. Without some evidence beyond speculation that such a nexus exists in relation to a third-party suspect for whom the defence seeks disclosure, there is no relevance to the disclosure sought. Accordingly, whether the first party or third-party disclosure regime applies to such records, an application for disclosure fails where there is no evidence of the requisite nexus between the third-party and the crime: see *R. v. Thompson*, [2004] O.J. No. 5718, 2004 CanLII 53159 (S.C.) [*Thompson* (trial)], aff'd 2009 ONCA 243 [*Thompson* (appeal)].

- [31] In Thompson (trial), the judge dismissed a disclosure application for records relating to a proposed third-party suspect for lack of relevance, due to the absence of evidence linking this third-party to the crime (attempted murder). In so doing, the trial judge drew a distinction between "bald assertions" that the third-party was the shooter and the existence of some evidence linking the third-party to the crime:
- [50] I find that the request for production of the Toronto Police Service and Peel Regional Police records relating to Eion Rush does not meet the test of likely relevance as set out in O'Connor. No sufficient evidentiary basis has been established by the applicant satisfying me that there exists a connection or nexus between Rush, Opoka and the commission of the offence. There is no reference in the affidavit materials supporting the application that Rush was anywhere near the scene on November 10, 2002, or that he was in any way connected to Opoka. All that does exist is the bald assertion that Rush is the shooter. Submissions by defence counsel to the effect that there are witnesses who can place Rush at the scene is not enough to establish the evidentiary foundation necessary to meet the likely relevance test. Nor is it sufficient to allege that Rush was a person of bad character with a propensity for violence without establishing both relevance and linkage to Opoka and the shooting. To do otherwise would merely engage in speculation and a fishing expedition which is apparent through this part of the application.
- [32] In upholding the trial judge's decision to dismiss the disclosure application, the court in Thompson (appeal) made the following helpful remarks as to how such a link might be established in the context of a disclosure application:
- [9] The trial judge dismissed the application. He found that no sufficient evidentiary basis had been established that there existed a nexus between Rush, the victim and the commission of the offence. He held that the submission by defence counsel amounted to no more than a bald assertion and was insufficient to establish the evidentiary foundation necessary to meet the likely relevance threshold that must be established in an O'Connor application.
- [10] In my opinion, the ruling of the trial judge was correct.
- [11] The appellant properly proceeded with an O'Connor application as the way to seek production of the police files. These were not files relating to the appellant's case, nor were they in the possession or control of the prosecuting Crown, and do not therefore fall to be dealt with pursuant to the principles set out in R. v. Stinchcombe, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326, [1991] S.C.J. No. 83 (see R. v. McNeil, [2009] S.C.J. No. 3, 2009 SCC 3).
- [12] The first stage in an O'Connor application requires the applicant to show that the records sought are likely to be relevant in his or her trial. The appellant forcefully reminded the court that the burden is not onerous, as the majority made clear in R. v. O'Connor, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411, [1995] S.C.J. No. 98. In that case, the majority said that although not onerous, the burden is nonetheless significant, "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

CanLII 126 (SCC), [1995] 1 S.C.R. 727, [1994] S.C.J. No. 89, at para. 32).

- [13] The real debate here is whether the oral submission of counsel is enough to demonstrate the likely relevance of the records sought.
- [14] The appellant argues that the records, given their nature, likely show Rush's propensity for violence, and when this is coupled with counsel's submission that he is in a position to call evidence that Rush was the shooter and therefore at the scene, the files meet the likely relevance test. The appellant relies particularly on the following passage from O'Connor, at para. 19:

The onus we place on the accused should not be interpreted as an evidential burden requiring evidence and a voir dire in every case. It is simply an initial threshold to provide a basis for production which can be satisfied by oral submissions of counsel. It is important to recognize that the accused will be in a very poor position to call evidence given that he has never had access to the records. Viva voce evidence and a voir dire may, however, be required in situations in which the presiding judge cannot resolve the matter on the basis of the submissions of counsel.

- [15] This passage clearly cannot be taken to mean that the accused can always satisfy the likely relevance requirement by means of the oral submissions of counsel.
- [16] There may, however, be cases where that can happen. The majority's emphasis in this passage on the very poor position an accused will be in to call evidence, never having seen the records, suggests one example: since the accused has never had access to the records, oral submissions about their likely contents may be enough in some circumstances to meet the O'Connor threshold.
- [17] In this case, counsel's oral submissions are not about the likely contents of the record sought. Rather, they are put forward to provide the nexus between Rush and the commission of the offence that is necessary to make the records relevant to the appellant's trial, assuming that those records will demonstrate Rush's propensity for violence. The appellant's ability to show this nexus is not adversely affected by having no access to the records sought, since the records do not relate to this offence.
- [18] There can be cases where the oral submissions of counsel alone will be enough to meet the likely relevance threshold, even if those submissions do not address the likely contents of the records sought. However, I agree with the trial judge that this case is not one of them.
- [19] Assuming that the records demonstrate Rush's propensity for violence, they become relevant in the appellant's trial only if there is a sufficient connection between Rush and the crime (see *R. v. Grandinetti*, 2005 SCC 5 (CanLII), [2005] 1 S.C.R. 27, [2005] S.C.J. No. 3, at para. 27).

- [20] Here there is no affidavit evidence offered to supply that connection. There is nothing other than counsel's submission that he was in a position to call evidence that Rush was the shooter. The Crown was not content with this, but viewed the submission as simply a bald assertion amounting to nothing more than speculation.
- [21] In these circumstances, it would have been quite proper for the trial judge to require the accused to lay a better foundation demonstrating a sufficient connection between Rush and the crime before permitting him to put the records in evidence, even if he had possessed them and assuming they were otherwise admissible to prove propensity. In that sense, what faced the trial judge was really a trial management issue that he could quite properly resolve as he did. Viewed in the context of this O'Connor application, it was equally proper for him to find that the oral submissions of counsel were not enough to make the records likely relevant in the appellant's trial. I agree with his conclusion. This ground of appeal fails.

Discussion

- [33] A useful starting point to this application is the summary of the Crown's position, which includes what the Crown has already provided as first-party disclosure despite its position that many of these materials are clearly irrelevant:
7. With respect to the request for 'all persons of interest materials, VICLAS documentation and analysis and tips in relation to this investigation' (including POIPAT materials), the Crown has previously provided the Applicant with various 'possible persons of interest' lists prepared in relation to this investigation. The Crown has also provided the Applicant with information regarding some of the 'tips' received by the police during the course of this investigation. With respect to the remainder of the materials sought under subparagraph 4(i), the Crown submits that some of them are third party records, subject to the O'Connor production regime (*R. v. O'Connor*, [1995] 4 S.C.R. 411) (for example, the VICLAS tool itself). With respect to those materials, the Crown submits that the Applicant has not met the threshold for production. With respect to the remainder of the materials (for example, the miscellaneous tips received), the Crown submits that they are clearly irrelevant and not subject to disclosure. Further, some are subject to privilege (for example, the Crime Stoppers tips).
 8. With respect to the request for all police investigation into the named suspects that are the subject of the Applicants Alternate Suspect Application, despite the Crown's position that many of those materials are clearly irrelevant, the Crown has previously provided first party disclosure of those materials.
 9. Since the investigative file materials relating to the individuals the Applicant asserts are viable alternate suspects have previously been provided to the Applicant, any further materials related to those individuals are in the Crown's submission third party records, that are subject to the O'Connor production regime. The Crown submits that the Applicant has not met the threshold for disclosure of those materials.

10. Lastly, with respect to the other RCMP and Vancouver Police Department investigative files, the Crown submits that those are clearly third party records subject to the O'Connor production regime, and further submits that the Applicant has not met the threshold for disclosure of those materials.
11. The Crown ultimately anticipates that it will submit that there is not a sufficient evidentiary foundation to connect any of the proposed alternate suspects to the offence charged, and thus they are not individuals who the defence can assert are third party suspects.
- [34] Also, some of this Court's comments in relation to an earlier application for disclosure regarding third-party suspects, lend some context to the instant application and bear repeating here: see *R. v. Ali*, 2020 BCSC 942 at paras. 42-45:
- [42] I turn next to (b) "persons of interest". The defence began by observing that "the police identified and investigated over 1,300 men as so-called persons of interest before they settled on Mr. Ali as the main suspect in this investigation" and said:

One would ordinarily expect that the mere title - "persons of interest" - is enough to make that aspect of the investigation relevant and disclosable. The Crown has nevertheless refused to disclose much of that material.

The starting point to understanding why the Crown must disclose the fruits of the investigation relating to the other persons of interest is the decision of Justice Abella for the court in *R. v. Grandinetti*, 2005 SCC 5. One of the points in issue in *Grandinetti* was the admissibility of the "potential involvement of a third party in the commission of [the] offence".

...

There are several important points to take from Justice Abella's reasons in *Grandinetti*. The first is that it is "self-evident" that an accused is entitled to lead evidence that a third person committed the offence at issue. Stated in terms of the disclosure obligation on the Crown, an accused is entitled to lead evidence of the potential involvement of a third party, as an exercise of his or her right to make full answer and defence. Quite obviously, if an accused is entitled to lead evidence of the potential involvement of a third party, he or she must be entitled to know what evidence about that issue exists in the Crown's file.

- [43] The law regarding alternate suspects is not contentious here. I am satisfied that the Crown recognizes its duty under *Stinchcombe* to disclose any fruits of the investigation showing any potential involvement of an alternate suspect, and that it should err on the side of disclosure in this regard. The relevance of this sort of material was addressed by Mr. Justice Sopinka, delivering the judgment of the Court in *R. v. Egger*, [1993] 2 S.C.R. 451:
- [20] The trial judge reviewing the Crown's disclosure decisions, and by backward extension the Crown itself in exercising its discretion,

should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and [page467] defence, unless the non-disclosure is justified by the law of privilege. [Stinchcombe, at p. 340.]

One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed -- Stinchcombe, *supra*, at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.

[44] The Crown maintains its position that the material the defence seeks is clearly irrelevant, again stating that it is open to reconsidering its position with some indication of possible relevance from the defence. It notes that "the police cast a wide net in an effort to find any possible suspect" and submits that "merely because the police at one point in time considered a person to be a possible person of interest does not make the information regarding that person relevant." In this regard, it bears repeating that given the paucity of information in the police hands at the outset of the investigation, a "person of interest" was unusually broadly defined as "anyone who might have information concerning the investigation, including witnesses and potential suspects". In other words, it captured many people who were never regarded as possible suspects. The breadth of this definition explains the enormity of the number of persons who fell into this category, and the corresponding volume of information gathered. The Crown submits that:

. . . there must be a sufficient connection between a possible person of interest / alternate suspect and the crime, otherwise any evidence about the third party is immaterial, and . . . clearly irrelevant. Mere speculation that there may be something of significance is not a sufficient basis for disclosure.

As noted in *R. v. Anderson*, *supra*:

[74] What Mr. Anderson submits is that the possibility of an arguable defence in the material sought cannot be eliminated and therefore the Crown must disclose these items to make sure there is no stone unturned. While this is theoretically true, it is not the law. The obligation of the Crown to keep disclosing more and more peripheral material is not conditioned by the defence's speculation that there might be something of significance which might be useable by the defence. . . .

- [45] Without some contextual articulation of possible relevance of all the material within this broad category - which includes "anyone who might have information concerning the investigation" - I am satisfied the Crown has met its onus regarding clear irrelevance of this category of material. Importantly, I am satisfied it recognizes its obligation to disclose any material with possible relevance to an alternate suspect defence, and that it is open to reconsidering its position with some assistance from the defence regarding relevance.
- [35] The applicant's instant disclosure requests are voluminous and wide-ranging. I have considered each request and the arguments for it. For the reasons given by the Crown in their comprehensive written submission, I am satisfied that each fails because of the absence of a non-speculative sufficient nexus between the alleged third-party suspect and the crime. The Crown has addressed each request in its comprehensive written response to the applicant's request, and in each instance I accept and adopt its position, in most cases for the reasons advanced by the Crown. An exception to this is where the Crown has argued that hearsay evidence, because it is not admissible for its truth at trial, cannot be used as evidence to establish the requisite nexus to the crime for disclosure purposes. In this regard, I would say that where the evidence relied upon for this purpose is hearsay, the reliability of the hearsay evidence must be considered. Where, for example, the hearsay evidence includes material details of the crime that are patently false, it is evidence that can be afforded little, if any, weight. An example in the instant case is the hearsay evidence the applicant relies upon to link alleged third-party suspect Mr. W (and everyone who attributes this hearsay to him) to the crime, which includes material circumstances of the crime that are patently untrue, such as the abduction of MS from her apartment and the beating of her face to a pulp with a pipe. Neither of these circumstances existed in the instant crime; indeed, they are so wildly inaccurate that they completely undermine the words attributed to Mr. W, and thus the weight that can be given to them to establish a sufficient nexus between him and the others to the crime, even for disclosure purposes.
- [36] I will briefly address each of the categories of materials for which the applicant seeks disclosure in anticipation of his third-party suspects application:
1. Persons of interest ("POI") materials
- [37] The applicant has been provided with:
- a) the POI lists the police prepared throughout the investigation, which at times exceeded 1,000 names; and
 - b) the POI priority assessment tool (POIPAT), instructional guide and assessment tool used in the MS homicide investigation.

- [38] The POI lists for the MS homicide investigation were lengthy and broadly focused. This is consistent with the wide net the police cast to catch the perpetrator or perpetrators in circumstances where the only evidence of identity was DNA from sperm found inside MS's vagina and anus, for which there was no match in the National DNA Databank. A POI was unusually broadly defined as "anyone who might have information concerning the investigation, including witnesses and potential suspects": see Ali at para. 44.
- [39] The applicant submits that every person on the POI list is a viable third-party suspect, but given the breadth of the definition of a POI for the MS murder investigation and, thus, the length of the POI list, this is a patently untenable position: see Ali at para. 45. As noted in Ali, the Crown will consider requests for disclosure of any specific person on the POI list, with some assistance from the applicant in relation to relevance.
- [40] I agree with the Crown that for there to be any relevance to the information sought regarding an alleged third-party suspect, there must be some evidence of a sufficient nexus between the POI and the crime. Mere presence on the list is not evidence of that link.
- [41] As for the POIPAT, it is merely an investigative tool used to aggregate personal characteristics, including criminal histories, and I am satisfied there is no basis for its disclosure. It does not in itself connect POIs with the crime, and the information of various personal characteristics of persons is irrelevant in the absence of evidence of a sufficient nexus of that POI to the crime.
- [42] The Crown notes that it has already disclosed materials relating to third-parties who were investigated because of an alleged connection to the crime (such as SR and GD), and is willing to consider any requests for disclosure of any specific alleged third-party suspect whose name appears on the POI list, if there is some evidence linking that POI to the crime.

2. Tips

- [43] The Crown advises that a large number of members of the public provided solicited and unsolicited tips to the police regarding the MS homicide. These tips came to the police informally or through Crime Stoppers. Crime Stoppers' tips are protected by informer privilege; the applicant has not suggested otherwise nor sought to breach that privilege. All the tips the police received were assessed by the police and dismissed as clearly irrelevant. The Crown says it has disclosed to the applicant any tips with possible relevance, but the remainder were not disclosed because of clear irrelevance. The Crown provided two examples of clearly irrelevant tips received: (a) a tipster reporting that he was bike-riding through Central Park on July 18, 2017, and when he rode over a film crew cable at approximately 6:00 p.m., two males who may have been associated to a white BMX bike yelled at him; and, (b) tipsters reporting that they had "visions" regarding the crime.

[44] As noted in the first disclosure application, the Crown recognizes its duty to disclose any fruits of the investigation showing any potential involvement of an alternate suspect, and to err on the side of disclosure: see Ali at para. 43. I am satisfied that it has properly exercised its discretion not to disclose clearly irrelevant information in the form of tips, due to the insufficiency of nexus with the crime.

3. ViCLAS documentation and analysis

[45] ViCLAS is an investigative tool employed by Canadian police forces to attempt to identify, as the name suggests, if any link exists between a solved violent crime and an outstanding investigation of a violent crime. Possible links are based on information that has been entered into ViCLAS by police across Canada.

[46] In the MS homicide, the police used ViCLAS as an investigative tool as part of their efforts to identify the perpetrator or perpetrators in circumstances where the only evidence of a perpetrator was DNA for which there was no match in the National DNA Data Bank. The Crown's position is that ViCLAS itself, including documentation regarding the system, the database, and analytical techniques, are not part of the investigative file, and thus the O'Connor regime applies. I agree.

[47] In relation to these third-party records, the Crown says the applicant has not met the likely relevance test as it pertains to third-party suspects, but that even if these were properly categorized as first party records, the disclosure sought is clearly irrelevant due to the absence of evidence of a connection to the crime or the deceased. Again, I agree.

[48] The applicant says that the police added names to their POI list based on ViCLAS "hits" and then rejected these hits because their genetic profiles did not fit with the racial profile suggested by DNA phenotyping of Male 1. This simply brings the issue back to the POI list. It is not a sound basis for disclosure of a police investigative tool and third-party information drawn from a Canada-wide database. For these POIs added to the list as ViCLAS hits, it is open to the applicant to request disclosure of one or more of these specific persons, while recognizing that for there to be any relevance to the disclosure sought for these potential third-party suspects, there must be some evidence of a sufficient nexus between the POI in question and the crime.

4. Identifiable alleged third-party suspects

[49] Upon receipt of the applicant's third-party suspect application, the Crown obtained and disclosed investigative material for alleged third-party suspects, notwithstanding its view that these materials were irrelevant due to a lack of sufficient nexus between them and the crime. The materials pertained to SR, GD, SM, and Mr. W (with related information regarding NL, RB, DP, and PW), among others.

[50] The disclosure included the criminal histories of SR and GD, although these were not part of the investigative file.

[51] The applicant now seeks:

- a) any information in the police possession that could establish a geographical or temporal connection between these alleged third-party suspects and the crime;
- b) all criminal histories of these persons; and
- c) all reports to Crown counsel, occurrence reports, and any other documentation in the possession of the police relating to these persons.

[52] For all these third-party records, the Crown says that there is an absence of any evidence of a sufficient nexus between these persons and the crime; without this nexus, there is no relevance to the disclosure sought.

[53] I begin with alleged third-party suspects SR and GD. Each of these men was arrested for the murder of MS within the first two weeks of the investigation, and each was released soon after his arrest, without charge. In this regard, it is worth observing at the outset that the arrests, per se, are not, in my view, evidence of nexus to the crime. Arrests are based upon reasonable grounds to believe in a particular set of "facts", and that belief may subsequently prove to be unsound. This is the case with each of these men.

[54] Alleged third-party suspect SR was living approximately 20 metres from the crime scene. He was, at the time, a "homeless" man who was tenting in a wooded area of Central Park. He was investigated by the police and eliminated as a suspect. His DNA did not match Male 1 and the police found no other evidence linking him to the crime scene. I agree with the Crown that mere proximity of 20 metres with nothing more is not a sufficient nexus. If it were, then for crimes committed in densely populated areas, dozens if not hundreds of people with no other connection to the crime except for mere proximity would be viable third-party suspects. This is obviously an untenable position.

[55] Here, to establish something more than mere proximity, the applicant relies on the hearsay evidence of a police officer (the affiant in an Application to a Justice) to the effect that a police service dog tracked the scent of SR from the crime scene to his tent. This, arguably, could have been sufficient evidence linking SR to the crime scene if it had not been shown, by the dog-handler, to be misinformation. The dog-handler was the only person with first-hand knowledge, and he expressly stated that there was no such track. He explained that his service dog picked up SR's scent emanating from the tent, not from the crime scene, and led the dog handler to the tent where SR was found. Accordingly, there is no evidence linking SR to the crime scene.

[56] I agree with the applicant that at the disclosure stage, the evidence establishing the nexus need not be admissible for its truth to be relevant. However, I reject the applicant's submission that the hearsay statement here is enough to establish a link in circumstances where the only person in a position to give first-hand evidence is the dog-handler, and his unequivocal evidence is that the hearsay assertion of the affiant is a misstatement of what actually occurred. If the conflicting statements came from two first-hand sources, then that

would be a different matter.

- [57] I turn next to alleged third-party suspect GD, who was arrested on July 30, 2017, for the murder of MS. The arrest was based on a misunderstanding that GD had confessed to murdering MS, to two police officers he had approached. The notes of these officers show that this was not the case; rather, they show that GD approached the police, spoke about a murder, said he did not do it, but reported that people were following him and saying that he did. Based on a misunderstanding, these officers were directed to arrest GD; however, there is no evidence that he actually admitted, either before or after his arrest, to having anything to do with MS's murder.
- [58] Upon GD's arrival at the Burnaby detachment, he said, "I don't know why you guys think I did this. I was in Calgary" and the evidence the police gathered after GD's arrest was convincing as to his lack of involvement in MS's death. The evidence also suggested that GD has schizophrenia and was suffering from paranoid delusions and hearing voices at the time he spoke to the police; he believed people were following him and accusing him of being involved in a murder. GD told the police that he had recently arrived in Vancouver from Calgary (by bus) and had not taken his anti-psychotic medications (Olanzapine and Ativan).
- [59] As for his knowledge of the crime, GD said he read about it in a newspaper after he got off the bus in Vancouver. He said he recalled that the news story was about a child who was murdered in a forest "or something like that." He said it "kind of freaked him out" and made him think about his own daughter. In GD's police interview he denied any involvement in the homicide of MS, but said other people were saying to him that he might have been the person who killed her. He said he was in Calgary on July 18 and 19, 2017, and first heard of MS's death when he arrived in Vancouver on July 27, 2017. He produced a bus ticket and itinerary showing a departure from Calgary on July 26, 2017. The police confirmed that GD had attended to the Urgent Care Centre in Okotoks, Alberta (near to Calgary) on July 16, 2017, where he was psychiatrically assessed and given a prescription for medication that he filled that same day. They also confirmed that GD was in Calgary on July 18, 2017, and on that day he picked up his birth certificate from The Mustard Seed, a non-profit organization that operates a wellness centre and assists impoverished and homeless people.
- [60] In summary, there is no evidence that GD ever confessed to the crime; moreover, both his serious mental illness and his presence in Alberta on July 18, 2017, were confirmed by the police to their satisfaction, and, following the police interview, he was released without charge. I am satisfied there is no evidence of a sufficient nexus between GD and MS's homicide to support disclosure in furtherance of him as a third-party suspect.
- [61] Alleged third-party suspect SM's nexus to the crime consists of a question he posed to the bike-squad police officers at or near Central Park, at some point in the days or weeks following the homicide. He asked, "Some girl got raped and killed here, right?" The applicant says this question establishes a sufficient nexus to the crime, because it reveals that SM knew MS had been raped, and this particular of the crime was holdback information. The

Crown submits it is unsurprising, in all the circumstances, that members of the public speculated that MS had been raped. It says that the MS homicide received significant local, national, and international media attention in which it was reported that the police would not comment on whether she was sexually assaulted.

- [62] As a result of a lack of a match between SM's DNA and Male 1, and in the absence of any evidence of a motive or opportunity to commit the crime, the police eliminated SM as a suspect.
- [63] It is not in question that a sufficient nexus to the crime may be established by a person's knowledge of holdback information. However, I am satisfied that a distinction must be drawn between particulars of a crime that are logically assumed or surmised from all the known circumstances, and those that are not. When a 13-year-old girl is attacked and killed in a wooded area of Central Park, it is no stretch at all for a person who has no other knowledge of the crime to assume that she was sexually assaulted/raped. Indeed, sad as it may be to say, it would be challenging to identify another more likely motive for such an attack and killing.
- [64] For these reasons, I would give virtually no weight to SM's assumption that MS was raped, for the purpose of establishing a sufficient nexus between him and the crime for third-party disclosure purposes; thus, the requisite nexus for disclosure has not been shown.
- [65] I turn next to the man identified as Mr. W, and several other persons who are linked to Mr. W. The applicant has received first-party disclosure for Mr. W, NL, RB, PW, and DP, and now seeks wide-ranging third-party disclosure for these persons, including any police contact and any police reports (e.g., occurrence reports and reports to Crown counsel, criminal histories, employment, residences, etc.).
- [66] The circumstances underpinning the applicant's disclosure request relating to these persons as alleged third-party suspects have been summarized by the Crown at paras. 174-182 and 186-190 of its written submissions:
174. In referring to the facts regarding [Mr. W], the Crown will, as much as possible refer to original statements of individuals, notes taken by police officers of conversations they had with individuals, or task action reports prepared by police officers detailing their contact with individuals.
175. As noted, the two sources of information relating to [Mr. W] are [RB] and [NL].
176. [RB] is an individual who has been flagged on PRIME as having 'mental health' issues'.
177. On May 17, 2018, Cst. Frcic spoke with [RB] on the telephone. [RB] refused to meet in person for a recorded conversation. [RB] told Cst. Frcic (see Task-02117):

- i. In the days following the homicide, [RB] spoke with an acquaintance of his, Richard. Richard was a homeless male who collected cans and scrap metal. He spoke with Richard in the area of the Salvation Army in Metrotown, Burnaby;
 - ii. Richard told [RB] that the homeless community was uneasy about a male that had recently showed up; as they were worried that he may steal their belongings;
 - iii. Richard said that the members of the homeless community believed 'it was this unknown male' and they were going to 'confront him' the following day;
 - iv. [RB] did not go to any confrontation and had not subsequently heard anything about that male;
 - v. Sometime after, [RB] spoke with an unknown couple outside of a 7-Eleven in New Westminster, and asked them if they knew who killed the girl in Central Park. They told him that the 'word' on the Surrey 'strip' was that the male responsible was '[Mr. W]'. RB did not know who the couple was, or who '[Mr. W]' may be.
 - vi. [RB] had previously given this information to a New Westminster City employee and to the Transit police. [RB] said he was not in a good mental state when he gave the information to those people.
178. The individuals that [RB] had previously spoken with were [DP] and [PW].
179. On August 24, 2017, Cst. Kovacevic spoke with [DP]. According to [DP], at approximately 9:10 am on August 4, 2017, he was working as a SkyTrain attendant at the New Westminster Station, when he was approached by [RB], who appeared to be 'delusional' as he stated that he was part of a secret society, and rambled about nonsensical things. Later that day, at 1500 hours, [DP] was at the Sapperton Skytrain Station and ran into [RB] again. [RB] walked by [DP] and stated, "we got him". [DP] asked [RB] "who got what?", and [RB] said "the guy that murdered the 13 year old girl in the park. He then said that the suspect's name was "[W]" and that he had apparently "abducted the victim from her apartment building, taken her to the park, beat her face to a pulp and fucked her in the ass and the pussy" (see Task-00430).
180. On August 31, 2017, Corporal Halliday spoke with [PW] regarding two messages he had left on an IHIT tip line. Those messages were believed to have been left on August 10, 2017. [PW] was an employee with the city of New Westminster. According to [PW], [RB] approached him at a job site, and commented on the work they were doing. [RB] said he would help them out with the work, and then brought up the topic of the girl killed in Central Park. [RB] said that "Dan Wayler or Wayland" killed the girl at Central Park. [PW] believed that [RB] said that Dan Wayler hit the girl with a pipe and then sexually assaulted her (see Task-00659, statement is Audio-00506).
181. [PW] said that [RB]'s state of mind was "all over the map", and [PW] "didn't take him as too truthful" (per Audio-00506, previously disclosed to the Applicant).

182. [RB] did not identify himself to [PW] at the time. However, [PW] subsequently identified [RB] through a photograph that had been taken by [DP].
- ...
186. The final piece of information relied upon by the Applicant to suggest that an individual named [Mr. W] is a viable alternate suspect is information police received from [NL], an inmate at Surrey Pre-trial Correctional Centre.
187. On May 2, 2018, [NL], contacted the Surrey RCMP and reported that sometime in July 2017, a male named "[Mr. W]" said that he had just watched a girl get strangled.
188. Cpl. Kee and Cst. Frcic went to the jail to speak with [NL] on May 7, 2018. [NL] said:
- i. In July or early August, he was on the Surrey Strip using meth. He said that a guy using heroin spoke with him and said, "I watched a girl get strangled". He said the guy's name was "[Mr. W]". He said that the guy was fighting with a drug dealer. He described [Mr. W] as 6'3" or 6'4" with skull rings, a leather jacket, Caucasian and about 40. He said he did not know his last name. Described him as a creepy dude. He said [Mr. W] was an acquaintance who lived near Bridgeview.
 - ii. He said he last saw him in November or so. He said that he had read the newspaper about the investigation. He also stated that every police officer on the strip knows this person. (See Task Report re: Task-02107).
189. Cst. Frcic contacted the Surrey Police who identified the person as [JW] 58-12-28 ([W] Sr.). Cst. Frcic was also told that [JW] had a son, [JBW] 82-12-04 ([W] Jr.) (p. 1-13 of Cst. Frcic's notebook - notes from May 9- May 17, 2018 - Doc-03299).
190. As noted in Cst. Frcic's notebook, on May 15, 2018, he spoke with [JBW]. who put him in contact with [JW]. [JW]. told Cst. Frcic that he had not witnessed an act of violence and would have told investigators if he had. He did not have any knowledge of what had been told to IHIT investigators. Cst. Frcic noted that [JW] did not match the description of the male provided by [NL] (see also, Task-00014, p. 239-244).
- [67] The applicant relies on the content of hearsay statements to establish a sufficient nexus between Mr. W and the crime, and by extension, to NL, PW, RB, and DP. The principal objection of the Crown is that the evidence is hearsay and therefore inadmissible at trial for its truth; however, the Crown also notes the significant inaccuracies between Mr. W's alleged version of the crime and the actual crime.

- [68] As commented upon earlier in these reasons, where, for disclosure purposes, the evidence relied upon to establish the requisite link between the alleged third-party suspects and the crime is hearsay, I am not persuaded that this is per se fatal to the application; a prima facie assessment of the hearsay's reliability is required. In the instant case, for reasons already expressed, I am satisfied the hearsay evidence has virtually no prima facie reliability and, thus, does not establish the sufficient nexus required.
- [69] The final three "identifiable" alleged third-party suspects are simply described as two weird men at the film set and another who stole a photograph from a vigil. In relation to the first two, on July 18, 2017, at about 6:00 p.m., a woman who attended Central Park to watch the filming there said she saw a "weird" man in his forties (black hair, tan skin, part-Asian looking, tall, thin, muscular) at the film shoot. She considered him out of place in the group watching the filming. At an August 2, 2017, police debriefing, Constable Wu reported that a woman working on the filmset in Central Park had noticed that a male in his forties (five-feet-six-inches tall, Caucasian, dark hair, overweight, and wearing glasses) always stood with a group of 13-year-old girls and watched the filming. She said "security" told her that this man lures girls to watch the filming. Neither of these men has been identified by the police.
- [70] The third of these alleged third-party suspects is a man who attended a vigil for MS in Central Park on February 13, 2018. He was captured on camera (set up by the police) stealing a photograph of MS. It is believed that he may also have stolen a photograph of MS on an earlier date. The video shows that the man had grey hair and a grey beard; his identity remains unknown.
- [71] The Crown says there is no evidence of a sufficient nexus between any of these three men and the crime. I agree. Presence at a filmset at Central Park, coupled with very vague and subjective perceptions of weirdness, is not enough. Similarly, theft of MS's photograph, in the absence of any evidence of motive for the theft, is not enough.
- [72] I turn next to the following known alleged third-party suspects, comprised of persons who were identified, either by name or otherwise, in the tips the police received from members of the public: (a) the father of a classmate of MS; (b) DE; (c) a man seen with a bloody knife; and (d) the son of an ex-girlfriend of a tipster.
- [73] The tip naming the father of an unnamed classmate as the killer came in the form of a "prediction" from a self-described "expert predictor". The prediction was that the classmate's father set up an appointment with MS and then killed her because his daughter hated MS.
- [74] The tip naming DE as a suspect came from DE's brother, CE, whom the police determined was in a dispute with DE over their parents' estate. The information the police obtained suggested that CE had serious financial and other troubles, including struggles with mental wellness. It is believed that he was the author of some graffiti that said, "[DE] + [MS]/Central Park, coincidence? FBI knows." (I note that PC McLaughlin's notebook has another version of the graffiti, which names DE's father rather than [DE], but I am satisfied there is no need to resolve this difference for the purposes of this disclosure application.)

- [75] The tip reporting a "man with a bloody knife" as a suspect was a report that an unnamed Aboriginal student had said that his uncle killed MS, and that he had seen the bloody knife.
- [76] The tip naming the son of an ex-girlfriend as a suspect arose in the context of the police attending to a domestic disturbance in which the tipster was allegedly harassing his ex-girlfriend. The report apparently consisted of nothing more than the bare assertion that his ex-girlfriend's son may be responsible for killing MS.
- [77] For each of the foregoing alleged third-party suspects, the Crown's position is that there is no evidence establishing a sufficient nexus to the crime to make the disclosure sought relevant. This is patently so, and it resolves the matter of disclosure, against the applicant. The applicant says each of these tips ought to have been fully investigated to see if there was a nexus between the alleged suspects and the crime, but this is not a disclosure issue; it is, in essence, a complaint that the police did not do what the applicant says they should have done. On this point, it is to be expected that limited investigative resources will be focused on leads that the police, using their knowledge and expertise, assess as worthy of their resources.
5. Unknown third-party suspects
- [78] The next category of alleged third-party suspects is "Unknown third parties" described as: (a) clients of sex-trade workers; and (b) persons in Central Park.
- [79] The sex-trade clients for whom the applicant seeks disclosure are: (a) a man named L, who said to a VPD member while being fingerprinted on August 25, 2017, "It was too bad about the girl in Central Park"; and (b) an unknown man with whom a sex-trade worker reportedly had a "bad date", during which he mentioned MS.
- [80] The applicant submits that MS may have been involved in the sex trade and that if she was a sex-trade worker then her clients are potential suspects in her murder, for whom there should be disclosure. There is absolutely no evidence establishing, or even raising a reasonable prospect, that MS was a sex-trade worker, and the benign words attributed to two sex-trade clients certainly do not establish any nexus between them and the widely-publicized crime.
- [81] Turning next to "persons in Central Park", the applicant's position is that any person in Central Park at the time of the offence is a potential suspect for whom there should be disclosure. It is not contentious: that Central Park is a very large and well-used urban park of approximately 86 hectares; that the park has many facilities, including a sports stadium, a pitch-and-putt golf course, tennis courts, and trails; and that MS was killed in the park on a warm and dry summer's eve when many people were in the park, including a film crew. For a busy urban area the size of Central Park, mere presence in the park is not sufficient to establish the requisite nexus to the crime for the purposes of disclosure.

6. Police files in unrelated investigations

- [82] I turn next to the six specific police files of which the applicant seeks production on the basis that they are files that were mentioned by investigators in the context of the MS homicide investigation. The files are identified as:
- a) VPD File 17-172100 - a sex worker's second-hand report of a bad date who mentioned MS to another sex worker;
 - b) VPD File 2017-225480 - a report of sexual assault on an "ESL" complainant by a man variously described as Caucasian, Aboriginal, and Mexican at 3:00 a.m. on November 1, 2017;
 - c) Burnaby RCMP File 2017-50080 - a report by runners in Central Park of a pant-less man masturbating in the bushes on approximately November 26, 2017;
 - d) Abbotsford Police File 2018-2340 - a report of sexual assault in an Abbotsford park by a Caucasian male;
 - e) Burnaby RCMP File 2018-2520 - a report that an Asian female was groped at Metrotown Mall by an Asian assailant on January 17, 2018; and finally,
 - f) Burnaby RCMP File 2018-2875 - a report of the January 22, 2018, arrest of a man named RC as a suspect in a Burnaby sexual assault complaint.
- [83] The Crown resists disclosure of these third-party records on the basis that they are not logically probative to any issue in the case at bar and, therefore, have no relevance. It argues that if these files were relevant, then VPD and other police department files as far-reaching as Abbotsford and beyond, over a similar or perhaps greater time-frame than these files, which involve a sexual assault or other violent crime, would be similarly relevant, and this simply cannot be so. I agree and find there is no sufficient nexus between these files and the crime to support their production.

Disposition

- [84] For the reasons expressed herein, this far-reaching disclosure application in furtherance of the applicant's third-party suspect application is dismissed. However, this is done with leave granted to the applicant to re-apply for specific third-party suspect disclosure if new or different evidence or circumstances warrant a reconsideration of aspects of this ruling. For example, the pending third-party suspect application may lend a helpful context to some of the third-party suspect disclosure sought in the instant application.
- [85] As always, I encourage open discussions and minds between counsel on these matters, with a view to resolving disclosure requests by agreement where that is feasible. I remain grateful for counsel's continuing efforts in this regard, for the respectful working relationship they have established and have maintained, and for the depth of appreciation they have shown for their respective roles in this challenging case.

"Bernard J."

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