

CANADA / JUDGMENT

R. v. Ali

2022 BCSC 2502

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 2502 R. v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali,

2022 BCSC 2502

Date: 20220325

Docket: 29405

Registry: Vancouver

Regina

v.

Ibrahim Ali

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Before: The Honourable Mr. Justice Bernard

Oral Ruling on Disclosure Application

re RCMP Policies and Directives

Counsel for the Crown:

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appearing by videoconference:

K. McCullough

B. Lynskey

Place and Date of Hearing:

Vancouver, B.C.

March 16-17, 2022

Place and Date of Judgment:

Vancouver, B.C.

March 25, 2022

- [1] THE COURT: The applicant, Ibrahim Ali, applies for disclosure of, inter alia, all RCMP policies and directives concerning the CCTV video recording system, and its operation, at the cellblock of the RCMP detachment in Burnaby, British Columbia. More specifically, Mr. Ali seeks the following (as set out in the Notice of Application):
- a. The policy or directive, if any, that causes Mr. Chu to say that "he is not permitted to turn off the CCTV system"
 - b. All other policies related to the operation of the CCTV video system, including policies for the review and retention of video;
 - c. The disclosure form that was used to secure disclosure of the video at issue in this matter;
 - d. All disclosure relating to the direction to apply pixilation to the holding cell and the lawyer phone room including:
 - i. Internal documents in relation to the decision making to implement the pixilation;
 - ii. When the direction to install pixilation was made;
 - iii. What the state of pixilation currently is (IE a sample of what can be seen); and,

iv. Details of the state of the CCTV system before the 2013 retrofit.

- [2] The disclosure sought is resisted by the Crown, on the basis that Mr. Ali has failed to meet the threshold of "likely relevance". Mr. Ali's disclosure request has arisen in the context of the Crown/Respondent's case in a voir dire declared for the purpose of hearing his claim that his s. 10(b) Charter rights were breached when the police video-recorded him using a CCTV camera in the cellblock telephone room in which he was placed for the purpose of speaking to his lawyer, in the exercise of his post-arrest right to counsel. More specifically, Mr. Ali says that the video-recording breached his right to privacy during the telephone call.
- [3] In the voir dire, the following circumstances are not contentious:
- (a) Mr. Ali was placed into a secure "telephone room" in the cellblock for the purpose of a private telephone consultation with a lawyer;
 - (b) while in this room, Mr. Ali was connected by phone to a lawyer;
 - (c) the room was equipped with a CCTV camera that fully captured Mr. Ali's unpixelated image and showed his body position and movements, including arm and hand gestures, during the course of the call; and
 - (d) this video-recording subsequently became part of a standard police disclosure package of all CCTV post-arrest video footage of Mr. Ali during his time in the cellblock.
- [4] In an earlier voir dire declared for the purpose of determining the voluntariness of Mr. Ali's statements in a post-arrest interview, the Crown used the video-recording in question, without objection, for the purpose of challenging Mr. Ali's direct testimony to the effect that he spoke to the interpreter for the first two minutes of the 16-minute call and that, for the balance of that call, he listened to the interpreter and the lawyer speak to one another in English: a language he did not understand. In the result, he says he received no legal advice during this call. The video-recording used to cross-examine Mr. Ali, shows Mr. Ali holding the telephone receiver to his ear with one hand while making various hand and/or arm gestures with the other at various times within the last 14-minute period of the 16-minute call.
- [5] In the instant s. 10(b) Charter voir dire, Mr. Ali testified, inter alia, that the police told him he would not be video-recorded during his consultation with counsel. He said that if he had known this was not true, he would not have made any body movements, including hand/arm gestures, during the call.
- [6] The narrow issue raised by Mr. Ali's s. 10(b) breach allegation is whether the act of video-recording Mr. Ali during the telephone call with his lawyer was a breach of his right to privacy in the exercise of his s. 10(b) right to retain and instruct counsel without delay. In this regard, it is common ground that Mr. Ali had the right to communicate with his counsel in private. In support of their common position, both Mr. Ali and the Crown cite the following passage from *R. v. Miller*, 1990 CanLII 6514 (N.L.C.A.):

- [14] The law in this regard has been properly applied by the trial Judge and by the appeal Judge. As to their actual statements of law, I would take exception only to their use of the word "reasonable" as applied to the available facilities. That perhaps imports an objective element rather than a subjective one dependent upon the circumstances, and is not strictly correct.
- [7] Although it is not conceded by Mr. Ali, it is clear that it is the O'Connor disclosure regime which governs disclosure of the third-party records Mr. Ali seeks. These materials are neither the fruits of the investigation nor obviously relevant records in the hands of the police. Under the O'Connor regime, the onus falls to the applicant to establish "likely relevance" of the materials sought: *R. v. Johnston*, 2019 BCCA 107 [Johnson], paras. 34- 36; *R. v. Ali*, 2020 BCSC 2011 [Ali], paras. 5- 6.
- [8] In *Johnson*, the court said:
- [34] First party records are governed by the disclosure regime enunciated in *R. v. Stinchcombe*, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326 [Stinchcombe]. Third party records are governed by the disclosure regime enunciated in *R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411 [O'Connor].
- [35] The Supreme Court of Canada recently summarized the differences between the two disclosure regimes in *R. v. Gubbins*, 2018 SCC 44 [Gubbins].
- [36] In short, *Gubbins* identified the principles applicable to production of first party records under the *Stinchcombe* regime as follows (at paras. 18-24):
- a) the Crown has a duty upon request by an accused to disclose all relevant non-privileged information in its possession or control, whether inculpatory or exculpatory. The purpose is to protect the accused's Charter right to full answer and defence;
 - b) relevance is viewed from the perspective of whether there is a reasonable possibility the undisclosed information could have been used in meeting the case for the Crown, advancing a defence or otherwise making a decision which could have affected the conduct of the defence;
 - c) the Crown's duty to disclose is ongoing;
 - d) where the Crown refuses to produce, the defence can request a review. The burden is then on the Crown to show that the information is either "clearly irrelevant" or privileged;
 - e) the Crown's duty to disclose does not extend to all Crown entities, but only to the prosecuting Crown. Records in the hands of other Crown entities, including police, are considered third party records. This is subject to the qualifications that:
 - i) the Crown has a duty to make reasonable inquiries when put on notice that other Crown entities have material that is potentially relevant. This obligation was set out in more detail in *R. v. McNeil*, 2009 SCC 3 [McNeil];

ii) police have a duty to disclose to the Crown all material pertaining to the investigation of the accused, known as the "fruits of the investigation". Police investigative files, as opposed to operational records or background information, will be considered first party/Stinchcombe disclosure; and

iii) police have a corresponding duty to disclose to the Crown other information beyond the "fruits of the investigation" where it is "obviously relevant" to the accused's case, which also will be considered first party/Stinchcombe disclosure. The phrase "obviously relevant" does not indicate a new standard or degree of relevance: it relates to the accused's ability to meet the Crown's case, raise a defence or otherwise conduct the defence. An example would be records that relate to convictions for perjury for Crown witnesses.

[9] In Ali, the court said:

[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.

[10] 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.

[11] Likely relevance is a contextual determination, and in this regard, the following passage in *R. v. D.M.*, [2000] O.J. No. 3114 (S.C.J.), is instructive:

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: *R. v. Mills* (1999), 1999 CanLII 637 (SCC), 139 C.C.C. (3d) 321 (S.C.C.) at 380; *R. v. Batte* (2000), 2000 CanLII 5751 (ON CA), 34 C.R. (5th) 197 (Ont. C.A.) at para. 74.

[12] Having due regard for the narrow issue for determination here, I am not persuaded that Mr. Ali has met his burden of showing the likely relevance of any of the materials he seeks. The materials sought would not assist in establishing the alleged breach. In this regard, the words of Justice Krindle in *R. v. Pangman*, 2000 MBQB 96 [Pangman], at paras. 11 and 13 are apposite.

[13] In *Pangman*, as in the instant *voir dire*, the issue for determination was whether the police conduct infringed a Charter right of the accused. In relation to that issue, Mr. Pangman sought to tender evidence of police policies, procedures, and practices. In concluding this evidence was irrelevant and inadmissible to prove the Charter breach, Justice Krindle said:

- [11] Evidence of policies, procedures and practices generally, whether of the Winnipeg Police Service or of other police forces, is irrelevant and inadmissible to the establishing of the fact of the breach. If the policies were offensive to the Charter but the conduct of the officers complied with the Charter, there would be no breach of the Charter made out. If the policies were a model of Charter respect but the conduct of the officers offended the Charter rights of the accused, then the breach will be made out.
- [13] What is relevant to establishing the alleged s. 7 breach is how the accused was actually dealt with by the Winnipeg Police Service and why. If the conduct of the police toward the accused, considered in its entirety, does not offend s. 7 of the Charter, then the issue of the policies of the Winnipeg Police Service cannot be of interest. If the conduct of the police to the accused, considered in its entirety, does offend s. 7 of the Charter, then I am willing to consider revisiting the question of the policies of the Winnipeg Police Service only as those policies may relate to the issue of the remedy to be granted. However, for reasons which I have previously articulated in earlier decisions, the question of establishing the breach and the granting of the remedy will be kept separate.
- [14] I agree with, and adopt, the foregoing reasoning of Justice Krindle, and I am satisfied that it is dispositive of the instant disclosure application. Mr. Ali has not met the threshold of likely relevance to the live issue for determination in the instant voir dire. If there is any relevance to the records sought, it would be to a s. 24(2) Charter application to exclude the evidence. Such an application is, however, only a hypothetical prospect until the alleged breach has been proved. As such, it cannot inform the context in which the likely relevance of the records sought is assessed. Notably, if the alleged breach is proved, the live issues for determination will change, and within that new context, if Mr. Ali believes there is likely relevance to the records sought, he may renew his disclosure application.
- [15] I am mindful that in the instant voir dire, much of the evidence elicited from witnesses and tendered as exhibits by both the applicant and the respondent, without objection, has quite arguably gone well beyond that which is relevant to the narrow issue of whether the act of video-recording Mr. Ali, during his consultation with counsel, was a breach of his s. 10(b) Charter rights. I attribute this to an accepted practice that is aimed at matters of practicality and efficiency. In other words, there are times when the parties to a Charter voir dire might elicit, without objection, evidence that could only bear upon a s. 24(2) Charter remedy, from a witness who is able to give evidence relevant to the breach remedy as well as the alleged breach.
- [16] In such circumstances, it may be understood as merely practical and efficient to do so to obviate the need to recall that witness in the event that a Charter breach is proved. However, the evidence is, nonetheless, irrelevant to the Charter breach and here it does not assist Mr. Ali in meeting the test of "likely relevance" in relation to the live issue before the court.

- [17] As already noted, a s. 24(2) Charter application to exclude the evidence remains a hypothetical prospect for Mr. Ali, until he has proven the alleged Charter breach. For this reason, typically the evidence relevant only to s. 24 will be kept brief during the breach hearing, recognizing that it will be of no value if a breach is not proved. Such brevity has not been maintained in the instant voir dire; nonetheless, this changes nothing in relation to the disclosure application. A s. 24(2) application to exclude the evidence remains a hypothetical prospect, and it is no less so simply because the parties have tendered, in the voir dire, a body of evidence relevant only to remedy issues, if a breach is proved.
- [18] Finally, I am also mindful of Mr. Ali's position that the police deliberately attempted to mislead him into believing he would not be video-recorded during his lawyer consultation, and that this attempt is an independent breach of his s. 10 rights. He says the police, in the preparation of the arrest script, knowingly misled him, and, through the disclosure sought, he hopes to establish "shared institutional knowledge" in support of establishing the police intended to mislead.
- [19] In support of this claimed "independent" breach of Mr. Ali's s. 10(b) Charter right to counsel, he cites the following cases: R. v. J.J., [2010] O.J. No. 915 (S.C.J.), and R. v. Paryniuk (2017), 134 O.R. (3d) 321 (C.A.), but neither of these cases stands for the proposition asserted by Mr. Ali. Notably, they involve Charter rights other than s. 10(b), and trigger very different considerations in a breach analysis. Even by analogy or extension of logic, I am unable to agree that they support Mr. Ali's position that, in the absence of police conduct that actually infringed Mr. Ali's right to counsel, an attempt by the police to mislead him is, itself, a s. 10(b) breach. I cannot find merit in this submission in the absence of clear and helpful authority supporting it. Accordingly, this alleged independent breach cannot inform the context in which the likely relevance of the disclosure sought is assessed.
- [20] For all these reasons, Mr. Ali's disclosure application is dismissed, with leave to re-apply if he proves that the video-recording in question was a breach of his right to consult with his counsel in private.

"Bernard J."

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