

CANADA / JUDGMENT

R. v. Ali

2023 BCSC 2439**COURT**

Supreme Court of British Columbia

DECIDED

29 March 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCSC 2439 R. v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali,

2023 BCSC 2439

Date: 20230329

Docket: 29405

Registry: Vancouver

Rex

v.

Ibrahim Ali

Restriction on Publication: Pursuant to s. 486.4(2.2) of the Criminal Code of Canada, any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

Restriction on Publication: Pursuant to s. 486.5(9) of the Criminal Code of Canada, no person shall publish in any document or broadcast or transmit in any way, the contents of the application made pursuant to s. 486.5(1); any evidence taken, information given or submissions made at a hearing under subsection 486.5(6); or any other information that could identify the person to whom the application relates as a victim, witness, or justice system participant in the proceedings.

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

Before: The Honourable Mr. Justice Bernard

Oral Ruling on Application Re Alternate Suspects

Counsel for the Crown:

D.J. Porte

I. Keeley

Counsel for the Accused:

K. McCullough

Place and Date of Hearing:

Vancouver, B.C.

October 11-14, 24-25, and November 8-10, 2022

Place and Date of Judgment:

Vancouver, B.C.

March 29, 2023

A. Overview

- [1] Mr. Ali is before the court on a charge of first-degree murder of MS. In this pre-trial application, he seeks a ruling permitting him to adduce at trial evidence to show that the following persons are viable third-party suspects: SR, GD, two Asian men carrying a bag, SM, Mr. W, and two men seen at the film set in Central Park. The Crown opposes this application on the basis that Mr. Ali has failed to show that a sufficient connection exists between any of these alleged third-party suspects and the crime.
- [2] It is well settled in our jurisprudence:
- (a) that a sufficient connection between an alleged third-party suspect and the crime is an essential prerequisite to the admissibility of third party suspect evidence; and
 - (b) that the accused bears the onus of meeting the "air of reality" test: i.e., that there is some basis upon which a properly instructed jury acting reasonably could acquit based on the defence of third-party involvement in the crime.

R. v. Grandinetti, 2005 SCC 5, paras. 47- 49.

- [3] For reasons that follow, I have concluded that Mr. Ali has failed to show a sufficient connection between any of the alleged third-party suspects and the crime. Accordingly, he has not met the "air of reality" test for the defence of third-party involvement, and this application must be dismissed.

B. Background

- [4] The necessary background is found in paras. 5-18 of the related disclosure ruling (R. v. Ali, 2022 BCSC 1909), reproduced here for convenience:

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, 2018, 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 was 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.

C. Legal Framework

- [5] The law regarding the admissibility of evidence of third-party suspects is well settled and thus not controversial in the instant application. It has been helpfully and ably summarized by the Crown in paras. 35-58 of the Crown's written argument, as follows:
35. The principles relating to the admissibility of evidence of third party suspects are well settled.
36. The evidence relating to a third party suspect defence must be compliant with the rules of admissibility; i.e., it must be relevant, material and admissible. As Watt J.A. observed at para 72 of *R. v. Tomlinson*, 2014 ONCA 158, "[t]he proponent does not get a free ride through the admissibility thicket upon mere announcement of 'third party suspect'". As noted in *R. v. A.D.*, [2004] O.J. No. 5938 (Ont. SCJ), this includes adherence to the rules respecting the admissibility of hearsay.
37. The principles respecting the admissibility of third party suspect evidence were addressed in *R. v. McMillan*, (1975) 7 O.R. (2d) 750 (Ont C.A.), aff'd [1977] 2 S.C.R. 824.
38. In *McMillan*, the accused was charged with the murder of his infant daughter. The child lived with the accused and his wife, and suffered a number of injuries, including a fractured skull. At trial, the accused alleged that his wife had murdered the child, and led psychiatric evidence that she suffered from a psychopathic personality disorder. The Court did not permit the Crown to rebut this evidence with evidence about the mental condition of the accused, and acquitted the accused at trial.

39. The Ontario Court of Appeal set aside the acquittal and ordered a new trial. It upheld the trial judge's decision permitting the accused to lead evidence about his wife's psychiatric disposition, holding:
- [22] The admissibility of the impugned evidence raises a question of some novelty with respect to which there appears to be no direct authority and it must be determined by the application of the general principles of law of evidence in the light of modern knowledge in relation to human behaviour.
- [23] I take it to be self-evident that if A is charged with the murder of X, then A is entitled, by way of defence, to adduce evidence to prove that B, not A, murdered X: see Wigmore on Evidence, 3rd ed. (1940), vol. 1, p. 573, s. 139. A may prove that B murdered X either by direct or circumstantial evidence.
- [24] Evidence that a third person had a motive to commit the murder with which the accused is charged, or had made threats against the deceased is commonly admitted on this principle. Evidence directed to prove that the crime was committed by a third person, rather than the accused, must, of course, meet the test of relevancy and must have sufficient probative value to justify its reception. Consequently, the Courts have shown a disinclination to admit such evidence unless the third person is sufficiently connected by other circumstances with the crime charged to give the proffered evidence some probative value: see Wigmore on Evidence, *ibid.*, pp. 573-6.
40. However, the Court found that the trial judge had erred in not permitting the Crown to lead evidence about the accused's mental condition, in order to rebut the suggestion that there was only one psychopath who resided in the home.
41. In *R. v. Grandinetti*, 2005 SCC 5, the Court set out the prerequisites for leading evidence of a third party or alternate suspect. In *Grandinetti*, the accused sought to adduce evidence, mostly hearsay statements, about the possibility that a third party, Rick Papin, had killed the deceased. Evidence was led in a *voir dire* about Papin's propensity for violence and bad character. The trial judge ruled that there was an insufficient link between Papin and the murder and excluded the evidence. On appeal, the Supreme Court adopted the principles articulated in *McMillan*, holding that without evidence of a sufficient link between a third party and the crime, the proposed evidence is neither relevant or probative. Thus, it is inadmissible:
- 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 (CanLII), 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 (CanLII).

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.

42. The Court found that the evidence relied upon for the third party suspect defence was nothing more than speculation. The accused had sought to lead evidence that the third party, who knew the victim, had motive, opportunity and propensity. Although the Court accepted that threats could provide evidence of motive, it found the connection between the threats made by the third party to be insufficient; as they had been made a year prior to the murder. That and the other proposed motive evidence was described as "a chain of speculation joined by gossamer links": para 51-58.
43. The evidence of opportunity consisted of the fact that the third party was released from prison three days before the murder. The Court found that standing alone that evidence was "palpably unprobative": para 59.
44. Although there was ample evidence of the third party suspect's bad character and propensity for violence, the Court found that evidence to be "inadmissible in the absence of evidence connecting Mr. Papin and the murder": para 60.
45. In the result, the Court concluded that there was an insufficient connection between the third party and the murder, and the evidence was properly excluded.
46. With respect to the term opportunity Watt, J.J.A. in *Tomlinson* noted:
- [75] we use the term "opportunity" or "evidence of opportunity" to describe the nature of the connection between the third party and the conduct charged that is essential to provide an air of reality to the third party suspect defence. Absent this evidence, circumstantial evidence of an alleged third party's disposition and motive for example, would be excluded as immaterial: *Grandinetti*, at para 48.
47. In *R. v. Tehrankari*, 2008 CanLII 74556 (ONSC), the trial judge considered the *Grandinetti* analysis, and noted:
- [23] The evidence linking other suspects to an alleged offence must rise above mere conjecture or speculation. The nexus between the other suspects and the facts of the crime with which the accused is charged must be a rational one: See *R v. Latta* (1972), 8 C.C.C. (2d) 530 (Alta CA) at paras 43 to 46. The purpose of the other suspect evidence bears on the issue of proof beyond a reasonable doubt. To create reasonable doubt the basis must be rational, not

conjectural. It must be more than a collateral issue fostering only speculation and confusion: See *R v. Badgerow*, [2000] O.J. No. 5438, 49 W.C.B. (2d) 480 (Ont. S.C.J.) at para 19.

- [24] The defence is not permitted to merely speculate or engage in a fishing expedition for other possible perpetrators. The evidence it wishes to advance must be relevant, probative and its value must outweigh its costs, in terms of the time it takes to explore it, the distractions to the central issue it may engender and the extent to which it might reasonably assist the jury in reaching a just verdict: See *Baltrusaitis*, *supra*, at paras 4 and 5.
48. The evidence connecting Mr. Tehrankari to the deceased included her blood being found in his residence and his semen being located in her vagina. Mr. Tehrankari sought to lead evidence that the deceased ex-husband was a viable third party suspect, and that his (Mr. Tehrankari's) DNA and semen had been stolen by DNA thieves who planted the evidence.
49. On Appeal, indexed at 2012 ONCA 718 (CanLII), application for leave to SCC dismissed [2012] SCCA No. 547, the Court expanded on the governing principles set out in *Grandinetti*, stating at para 35-37:
- [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), 23 C.C.C. (2d) 160 (Ont. C.A.), *aff'd* [1977] 2 S.C.R. 824 (S.C.C.), at pp. 167-168; *R v. Grandinetti*, 2005 SCC 5, 191 C.C.C. (3d) 449 (S.C.C.), 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 (Ont. C.A.), at para 21; *R v. Baltrusaitis* (1996), 31 W.C.B. (2d) 184 (Ont. Gen. Div.) [1996 CarswellOnt 2217 (Ont. Gen. Div.)]; *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 c. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702 (S.C.C.) at para 70.
50. The *Grandinetti* test as discussed in *Tehrankari* was recently affirmed by Gropper, J. in *R. v. Berry*, 2019 BCSC 2424 (CanLII). In *Berry* the accused was alleged to have killed his children and then seriously injured himself inside his ground floor apartment on December 25, 2017. The deceased and the injured accused were found by police at approximately 6:00 pm that evening. The Court held that the estranged partner of the accused was not a viable third

party suspect despite a history of spousal acrimony together with evidence that she had gone to the apartment building in the midafternoon of December 25, 2017, and peered through the windows of the accused's apartment, allegedly seeing nothing. Without ruling on what evidence of opportunity would be sufficient, the court noted:

- [26] I find the defence theory of opportunity is entirely speculative. It relies on Ms. Cotton sending friends to Mr. Berry's apartment to spy on him, particularly on December 25, 2017. It relies on Ms. Cotton going to the apartment building on December 25, 2017 and attempting to peer in the windows of Mr. Berry's suite and not seeing what Constable Lueder saw, and that she has no alibi. None of this connects Ms. Cotton to the crime. There is no basis beyond speculation to suggest that Ms. Cotton or her friends, who, according to the defence, were acting as her agents, were at the site at any time, least of all December 25, 2017
- [27] In the words of the court in Tehrankari, "[i]nferences based on the evidence may be drawn, but speculation is not permitted".
51. In A.D. the Court held that even though the proposed alternate suspect OB had some connection to the deceased and the location of the homicide, those connections were not sufficient to allow the accused to raise OB as an alternate suspect. Some of those connections included (para 30):
- i. OB was the former resident of the deceased's (P.B.'s) rental apartment and was on the lease until a few months prior to the homicide (a friend of his took over his lease for some time after OB moved out);
 - ii. OB continued to use the address as a mailing address after he moved out (until at least a couple of weeks prior to the homicide);
 - iii. A month or two before the homicide, OB went to the apartment and spoke with the deceased (P.B.) for the first time, to find out if he had received any mail at that address. He also wrote his name and phone number on a piece of paper and gave it to her;
 - iv. OB returned to the apartment on a day when police were present;
 - v. The police found a piece of paper with his name and phone number at the scene of the homicide, as well as his business card;
 - vi. Approximately 2 weeks after the homicide, OB paid the unpaid balance of the rent owing on the apartment from the time he had been on the lease.
52. In finding that OB was not a viable third party suspect, the Court noted in part:
- 32 all of this evidence adds up to nothing at all. While it undoubtedly connects Mr. O.B. to Ms. P.B., it doesn't connect him "with the crime charged: or "with the Page circumstances of the crime" or "with the commission of the offence", to use three of the formulations found in the cases on this issue. Based on the evidence before me on the voir dire, Mr. O.B.'s connection to Ms.

P.B. is entirely neutral. To put it in a sinister light requires considerable imagination. If the sort of connection that the evidence reveals that Mr. O.B. had with Ms. P.B. is sufficient to make him a third party suspect, then there are no doubt hundreds of other friends and acquaintances of Ms. P.B. that qualify equally well. I do not believe that this is what Martin J.A. had in mind in *McMillan and Williams*.

53. The Applicant refers to *R. v. Pickton*, 2007 BCSC 799, and asserts that it stands for the proposition that "it was sufficient that the proffered suspect had a link to the property on the night that the deceased disappeared and that there was further forensic evidence linking them both to the same location on the property" (at para 83). It must be noted, however, that there was also forensic evidence linking the proffered suspect to the deceased.
54. In *R. v. Grant*, 2015 SCC 9, the Supreme Court considered the *Grandinetti* prerequisites in the context of an unknown third party suspect. It did not change the *Grandinetti* requirement for a sufficient connection between the third party and the offence, but modified the test in recognition of the different type of factual matrix when there was not a known suspect, stating at para 27-28:
- [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.
55. In considering whether to allow the introduction of evidence of a third party suspect, the Court noted the importance of maintaining the integrity of the trial process, stating at para 4:
- [4] the accused's rights are not the only interests at stake. The integrity of the administration of justice requires that the proceedings stay focused on the indicted crime and not devolve into trials within a trial about matters that may not be sufficiently connected to the case. Such tangents risk causing delays, confusion and distractions that undermine the trial's truth-seeking function. This risk is especially heightened where the defence seeks to introduce other alleged suspects or crimes into the trial.

56. In *Pickton*, the Court held that the requirement to satisfy the *Grandinetti* test applies not only when defence seeks to advance a third party suspect defence as part of its case, but also during the cross-examination of Crown witnesses. As stated by Williams J.:

[85] I wish to make a final observation with respect to the *Grandinetti* test and my conclusion that it must be satisfied when evidence is adduced by cross-examination. In my view, it engages when the line of cross-examination meaningfully advances the proposition that a third party is an alternate suspect. At the same time, the Court must be prepared to afford reasonable latitude to defence counsel's cross-examination where the nature of the enquiry is of a general or exploratory nature. It should not be that the *Grandinetti* requirement will have the effect of imposing unnecessary and restrictive fetters on the general right of counsel to conduct their case, and I would be loath to see that come about. A measure of common sense must prevail in terms of how the test will be imposed.

57. Recently the Alberta Court of Appeal in *R v. Profeit*, 2021 ABCA 379, considered the issue of alternate suspects on an application to introduce fresh evidence on appeal. The Court denied the introduction of the fresh evidence in that case. In dismissing the application the court reviewed a number of prior authorities, stating:

[164] In *R v Malley*, 2017 ABCA 186, 352 CCC (3d) 1, leave denied (2018) [2017] SCCA No 342 (QL) (SCC No. 37740), the appellant was convicted of first-degree murder for the delivery of a gift-wrapped bomb to the wheelchair bound victim's door. At trial he sought to implicate eight or nine people, with different links to the victim or her residence. At paras 55-57, this Court said:

55 As with any evidence adduced in a criminal trial, evidence of a possible third party suspect must comply with the basic rules of admissibility. The evidence must be relevant, material, and not barred by any exclusionary rule.

56 Where the defence alleges that a known third party suspect committed the offence, there must be a "sufficient connection between the third party and the crime" to justify admitting this evidence: *Grandinetti* at para 47. The accused must point to some evidence tending to connect the third party with the commission of the offence: *McMillan* at 757. Evidence of a third party's means, motive, or opportunity to commit the offence often establishes the requisite nexus: *Grant* at para 24. If there is no evidence to establish such a connection, however, the third party evidence is neither logically relevant nor probative, and is therefore inadmissible. Although the accused may rely upon circumstantial evidence to establish the connection, inferences arising from the evidence must be reasonable, not speculative: *Grandinetti* at para 47; *Tomlinson* at para 74.

57 Similarly, for evidence of an unknown third party suspect to be admissible, there must be some nexus between the unknown third party and the offence charged: *Grant* at para 28. This nexus usually arises from similarities between the offence charged and another crime that the accused could not possibly have committed: *Grant* at para 27.

The case for Malley had at least some linkage. So did the case in *R v Lavallee*, 2020 ABCA 464, 401 CCC (3d) 211. But in those cases, and even more emphatically in the case at bar, the proposed fresh evidence and what was to a similar effect at trial, does not get over the logically relevance hurdle.

[165] In this appeal, the proposed fresh evidence and the trial evidence was and is vague, essentially grounded in alleged statements of Ms Boysis of doubtful provenance and incomplete description, inconsistent with her demeanor when alive around the relevant time, and linked to no one in particular. The perpetrator would have had to find and attack Ms Boysis in the same location where her body was later found hours after the appellant said he left her in that location. The appellant's version was that Ms Boysis' father brought her a blanket because she was cold, but then stripped the black jacket from her when leaving the location only to give it to the appellant, who was wearing the jacket when he cycled to Ms Profeit's residence.

[166] In other words, this attacker, of unknown motive or identity, would have had to locate Ms Boysis, beat her to death and then depart, leaving no apparent trace of being there at the time. The trial judge could reasonably determine that such hypothesis made no sense and ran up against other established evidence which she itemized. As Watt JA said in *R v Tomlinson*, 2014 ONCA 158, at para 72, 307 CCC (3d) 36, "[t]he proponent does not get a free ride through the admissibility thicket upon mere announcement of 'third party suspect' ..."

[167] These elements of proposed fresh evidence are not cogent, are inadmissible on grounds of irrelevance and hearsay, would be inadmissible on substantial prejudicial effect, are speculative and, when considered in light of the other evidence, virtually nonsensical.

58. In short, in order to allege a third party suspect committed the offence charged, there must be a sufficient admissible evidentiary foundation to connect the suspect, known or unknown, to the offence charged. If not, there is no air of reality to the assertion that the third party is a viable suspect, and the proposed evidence is inadmissible. This legal framework was considered and accepted in this Court's disclosure application ruling regarding third party suspects, *R v. Ali*, 2022 BCSC 1909.

D. Discussion

1. SR

[6] In July 2017, SR was living in a small tent in a forested area of Central Park. His tent was discovered by the police at approximately 12:27 p.m. on July 19, 2017, during a crime scene "article search" conducted by RCMP police service dog handler Constable Cottrill, and his dog Garner. Constable Cottrill testified that he and Garner attended to the site where MS's body had been discovered approximately 12 hours earlier, to search for articles of interest. He said the search began approximately 10 feet from MS's body, and the pattern of the search was circular and moving away from the body. Constable Cottrill said that during the search Garner picked up the scent of a human in the air and pulled Constable Cottrill

northwards through the dense brush, to the source of the scent as indicated by Garner. That source was a small, single-person tent hidden under branches. Constable Cottrill estimated that the distance from the tent to MS's body was 25-35 metres. Constable Cottrill alerted other officers to the tent and carried on with his article search.

- [7] Constable Cottrill testified to the distinct difference between an article search and a "track" by a police dog. He explained that Garner was in "article search profile" and not in "track profile" when he led Constable Cottrill to the tent. In other words, Garner did not track a scent from MS's body to the tent; indeed, he testified that tracking a human scent from the body of MS would have been impossible given the amount of time that had elapsed (approximately 12 hours) since the commission of the crime. Constable Cottrill explained that a police dog can only track from the crime scene within 45-60 minutes of when the crime occurred.
- [8] Constable Cottrill is an experienced dog handler who testified with clarity and assurance. I accept his evidence as accurate and reliable. It is of no moment to the accuracy or reliability of Constable Cottrill's evidence that another officer acting as an affiant in a subsequent application for a search warrant, stated that the police dog had "tracked" a scent from the crime scene to the tent. That officer had no personal knowledge of the actions of the police dog in the scene search. His Information to Obtain ("ITO"), evidence in this regard was based on information and belief. It was hearsay from him and, as such, not admissible for its truth, through him. In any event, he testified in the voir dire that, in preparing the ITO, he paraphrased what he understood Constable Cottrill's crime scene evidence to be, and stated that he did not believe Constable Cottrill actually ever used the word "track" in his account of what the police dog did at the crime scene.
- [9] Constable Lim attended to the tent upon learning of its existence from Constable Cottrill. He found SR sleeping inside it, and informed him that he was "camping in a crime scene." SR asked, "What crime?"
- [10] Detective Stewart was at the crime scene with Constable Lim, to mentor him because Constable Lim was new to the Integrated Homicide Investigation Team (IHIT) at the time. Upon notification of the existence of a tent, he attended to the tent to deal with the occupant, SR. He asked SR to step outside, and he informed him that the police were investigating a nearby homicide. SR denied any knowledge of it: he said he was sick, had been asleep inside his tent since the previous afternoon, and just wanted to go back to sleep. Detective Stewart noted that SR looked sickly and frail: he was coughing, sneezing, and "snotty-nosed."
- [11] Detective Stewart detained SR for investigative purposes and escorted him, unhandcuffed, to the main trail. Detective Stewart said SR was old, frail, and cooperative for the most part. Detective Stewart said he did not consider him (SR) a threat to anyone, and would not have arrested him if he had not been instructed to do so. In this regard, Detective Stewart spoke by telephone with Corporal Lew from the MS homicide investigation team, and it was she

who directed him to arrest SR. Detective Stewart then arrested SR. He said SR was compliant and said that the police were wasting their time with him. (In Inspector Turner's voir dire testimony, he explained that the decision to arrest SR was for the purpose of acquiring, protecting, and preserving any evidence that may exist in SR's tent, given its location).

- [12] SR was transported to the RCMP detachment in Burnaby, where DNA and penile swabs were taken and his clothing seized. He was subsequently released from custody. He then gave a warned statement to the police at 21:09 hours the same day. In this statement, SR said, *inter alia*, that he had been in his tent from approximately 4:00 p.m. the previous day, to when the police showed up at his tent the next day. He said he had been tenting in Central Park for approximately eight years, and in his current location since April 2017. He said he collected cans and bottles to earn money. He denied any involvement in or knowledge of MS's homicide. He said the police would find nothing linking him to it, and this proved to be true. SR was released without charge.
- [13] No evidence was tendered in the voir dire that called into question the truth of anything SR said to the police, and SR was not called as a witness. A later comparison of SR's DNA to Male 1 did not result in a match.
- [14] The foregoing is the extent of the admissible evidence against SR as an alleged third-party suspect. It shows only that on the night of MS's death, SR was inside his tent in a wooded area of Central Park 25-35 metres from where MS's body was found at 12:45 a.m. In other words, it is some evidence that SR had the opportunity to commit the crime, but there is absolutely no evidence of motive or propensity to do so. In this regard, no reasonable inferences may be drawn from the fact that SR was living in a tent in Central Park or that he has a very dated, unrelated, and relatively minor criminal record.
- [15] I am not persuaded that the evidence is adequate to establish a sufficient connection between the crime and SR, to make him a viable third-party suspect. If merely being 25-35 metres from a crime scene were sufficient to give an air of reality to a person being a third-party suspect, then for crimes committed in urban areas (as they often are), dozens if not hundreds of people would be viable third-party suspects simply by being within approximately 100 feet of where the crime was committed. This is, obviously, an untenable proposition. Here, it bears noting that although the immediate area where SR pitched his tent was otherwise unpopulated, it was within a very popular urban park adjacent to a densely populated urban area where thousands, if not tens of thousands, of people lived, worked, or were otherwise present. This distinguishes the site from one in a very remote and virtually uninhabited location where a person's presence within 100 feet of a crime scene might reasonably be viewed through a different lens. In the instant case, SR's opportunity was essentially no different than thousands of other persons who were either in the park or near to it at the time of the crime.

- [16] Mr. Ali cites, *inter alia*, R. v. Myers, [2021] O.J. No. 588, in support of his argument, but Myers and the other cases relied upon by Mr. Ali are materially distinguishable on their facts from the case at bar. For example, in Myers, the alleged third-party suspect was in the company of the accused at the time of the crime and, thus, in sufficiently close proximity to both the accused and the crime scene to establish the requisite nexus and meet the "air of reality" test.
- [17] Mr. Ali also argues that the police decision to arrest SR is relevant to the determination of whether he is a viable third-party suspect. Indeed, he goes so far as to argue that the arrest, *per se*, should shift the onus to the Crown to prove that SR did not commit the crime. Mr. Ali cites no authority for such propositions, and I would not accede to these arguments in the absence of binding or persuasive authority supporting them. In my view, they are without merit. While the grounds supporting the arrest may have probative value to a third-party suspect question, the arrest, *per se*, does not. The grounds for an arrest may be based upon reasonable and honestly held beliefs that subsequently may prove to be unsound. Here, the police grounds for arresting SR were quickly discounted by the investigators and he was released without charge. In such circumstances, it would be absurd if the fact of his arrest were to have any probative value on the question of his viability as a third-party suspect, let alone make him a presumptive third-party suspect.
- [18] In light of all the foregoing, I am not persuaded that Mr. Ali has shown that SR is a viable third-party suspect.

2. GD

- [19] On July 30, 2017, GD approached VPD officers on street patrol, informed them that he had an outstanding warrant for his arrest, and said he was turning himself in. The demeanour and appearance of GD raised immediate concerns with the officers that GD was either suffering from mental health issues or "high" on drugs. He was disheveled, sweating, and moving erratically; he spoke quickly and excitedly; he told the police he had been off his medications for one day and wanted to go to Lions Gate Hospital to get medication for his psychiatric issue.
- [20] In his encounter with the officers on patrol, GD also reported to them that people were following him and saying that he had been involved in a murder. The officers testified that GD told them he "didn't do it" and explained to them that he was in Calgary at the time of the homicide. Constable MacDonald believed that GD was referring to the MS homicide, although he had not used MS's name. Constable Rhode said he did not believe that GD had been involved in the Shen homicide, but decided, nonetheless, to contact Sergeant Turner, the team leader, for the MS homicide investigation. He testified that Sergeant Turner told him to arrest GD on the outstanding warrant.
- [21] Sergeant Turner's testimony on this point was that he instructed Constable Rhode to arrest GD on the outstanding warrant, and also give him the police warning with regard to the homicide before transporting him to the RCMP detachment in Burnaby. In any event, GD

was arrested and transported to the detachment in Burnaby, where he was interviewed by the MS homicide investigators. In the custodial interview, GD denied any involvement in MS's death. He said he was a paranoid schizophrenic who sometimes heard voices in his head. He said his usual medications were Olanzapine and Ativan, and he wanted to go to the psych ward. In relation to his familiarity with the MS homicide, he said [as read in]:

I got off the bus, read the paper somewhere about that. It was the first article that I saw 'cause the paper was kinda bent that way and it said uh, child murdered in BC found in forest or some shit like that I was just like, holy shit. So I didn't even read it, all the details. It kinda freaked me out. I was just like, what if that coulda been my daughter

[22] During the interview, GD also expressed a concern about being set up by the police. This arose from a piece of wire he found in the police-wagon during his transport. He believed this piece of wire had been placed among his personal possessions by the police to incriminate him. In this context, he said:

. . . I don't know how this little girl was murdered, I have no idea but if that's how she was done. . .

At this point the police interviewer interrupted GD to assure him that he did not need to worry about being set up and GD responded:

Thank God, that's crazy.

[23] GD informed the police that he was in Alberta on July 18, 2017, and first heard of the MS homicide when he arrived in Vancouver on July 27, 2017. He said, inter alia, that he got a Greyhound bus to Vancouver on July 26, 2017, and before that trip he attended an Urgent Care Clinic in Okotoks, Alberta, on or about July 16, 2017. He also said he picked up his birth certificate at a place called The Mustard Seed, on July 19, 2017. GD produced the following items in support of his assertions: an envelope from the Alberta Government that was addressed to The Mustard Seed and had GD's name handwritten on it; a Calgary Transit ticket with a July 23, 2017, date; Calgary store receipts dated July 26, 2017; and a Greyhound bus ticket and itinerary showing a Calgary departure at 10:30 p.m., July 26, 2017, and a scheduled arrival in Vancouver of 12:35 p.m. on July 27, 2017.

[24] The investigators were able to confirm that GD had attended the Urgent Care Centre in Okotoks on July 16, 2017, where he had a psychiatric assessment and obtained a prescription for medication that was filled at 6:00 p.m. on July 16, 2017. They also learned that GD was known to the staff at The Mustard Seed - a non-profit organization that assists the poor and homeless - and that he had attended there on July 18, 2017, to pick up his birth certificate. GD was released without charge.

[25] Notably, despite his arrest, the voir dire evidence did not establish that GD ever admitted to any involvement in the MS homicide or claimed to have knowledge of anything that was holdback information in the MS homicide investigation. As for the latter, there is no evidence that GD knew that MS had been strangled. He did raise a concern, in his paranoid

state, that he was being "set up" by the police putting him in possession of a piece of wire. This caused him to speculate that MS may have been strangled with wire, but he expressly denied knowing whether such was true or not.

[26] In sum, the MS homicide investigators uncovered no evidence linking GD to the crime. Moreover, they satisfied themselves that GD was in Alberta at the time the crime was committed. They also had compelling evidence that GD was being truthful when he said he was a paranoid schizophrenic who needed antipsychotic medication. This was consistent with:

- (a) his appearance and demeanour as observed by the officers whom he first approached;
- (b) his belief that some people were accusing him of being responsible for the "child murdered in the forest," which he had read about in a local newspaper upon his arrival to Vancouver from Calgary; and
- (c) his desire to be taken into custody.

[27] As for the arrest of GD, I am not persuaded it has any probative value to his viability as a third-party suspect for the reasons given in relation to SR's arrest. Whatever the grounds were for the arrest of GD, they soon proved to be unsound, and GD was released without charge.

[28] For all these reasons, I am not persuaded that Mr. Ali has shown that GD is a viable third-party suspect; there is a clear absence of sufficient evidence connecting him to the crime.

3. Asian Men Carrying a Bag

[29] A woman living across the street from Central Park reported to the police that on July 18, 2017, between approximately 10:30 p.m. and 11:00 p.m., she had seen two men remove what appeared to be a heavy dark bag from the trunk of a "newer" white car in a parking lot on the east side of Central Park (beside tennis courts and a trail entrance to the park) and carry or drag it into the park. She said she saw the two men in silhouette only, but believes they were both young Asians and, more specifically, Chinese, due only to their small statures. Apparently, she did not see anything tending to identify these two men, and their identities remain unknown.

[30] The parking lot is on the east side of Central Park and is an estimated 250-300 metres east of where MS's body was discovered, as the crow flies. However, Constable Lim testified that the walk from the parking lot to where MS's body was found was approximately 420-620 metres in distance. He said one would have to walk westward, in the dark, along a trail for 300-400 metres, turn left at the first intersecting trail and walk southeast for another 100-200 metres, and then walk east off the trail through the woods for 15-20 metres to where MS's body was found.

- [31] Mr. Ali submits there is a sufficient connection between these two unknown men and the crime to make them viable third-party suspects. He argues that, based on what the witness saw, MS could have been in the bag the two men were struggling to move into the park. He says the dragging of the bag described by the witness is consistent with MS's skin scrapes and the skewed state of her clothing at the crime scene.
- [32] The Crown submits that any proposed connection between what the witness observed in the park and the offence is speculative, and I agree. The available evidence and any reasonable inferences drawn from it do not establish a sufficient connection between these two unknown men and the crime scene. It is not reasonable to infer from the observations of the witness: (a) that the heavy bag the two men struggled to move while in the witness's sight contained the body of MS; (b) that these two men then carried or dragged the bag 500-plus metres along trails into the park before dumping the body; and, (c) that the scrapes and twisted clothing found on MS occurred in the course of moving the body to where it was dumped. I am satisfied it would be an exercise in speculation to draw such conclusions from the witness's limited observations. While the activity the witness observed was quite arguably suspicious, something more than her limited observations would be required to establish a sufficient non-speculative link between these two men and the crime scene. The evidence of twisted clothing and scrapes on MS cannot be that "something more." Such reasoning simply compounds speculation upon speculation.
- [33] For these reasons, I am not persuaded that Mr. Ali has shown that there is an air of reality in relation to these two men as third-party suspects.

4. SM

- [34] On or about August 22, 2017, two Burnaby Bike Squad officers were on patrol on a street adjacent to Central Park. Their attention was drawn to SM because he was reportedly pretending to be speaking with someone on his cellphone and saying, "Yeah, someone got murdered here. Yeah, definitely someone got murdered here," as he walked his bicycle past the two officers. He was stopped by the officers, and said, "Yeah, some girl got raped and killed here, right?" He told the police he had heard that from other people. The officers made notes of their encounter with SM because they understood that the rape aspect of the crime was hold-back information in the MS homicide investigation. The officers also noted that SM had a driving prohibition. As a result of the foregoing, SM became a "person of interest" in the MS homicide investigation for approximately seven weeks. On October 12, 2017, the police received the results of a DNA analysis showing that SM's DNA did not match Male 1, and he was eliminated as a suspect.
- [35] Mr. Ali submits that SM is a viable third-party suspect because:
- (a) he knew hold-back information; and
 - (b) it may be inferred from his driving prohibition that he has a criminal record.

- [36] The Crown agrees that a sufficient nexus between a third-party and the crime may be satisfied by evidence of a person's knowledge of hold-back information, but submits that in the circumstances of the instant crime: i.e., a 13-year-old girl found murdered in the woods of Central Park, SM's question to the police ("Some girl got raped and murdered here, right?") is not enough to establish sufficient connection between SM and the crime to make him a viable third-party suspect. In this regard, the Crown noted there was speculation in the media coverage of MS's death that she had been sexually assaulted, as well as media reports that the police would not comment on whether a sexual assault took place, or not.
- [37] In relation to knowledge of hold-back information as evidence establishing the requisite link to the crime, Mr. Ali cites *R. v. Bennett*, 2017 ONSC 2119, and *R. v. Berard*, 2018 ONSC 5218; however, these cases are materially distinguishable from the case at bar. While they demonstrate just how compelling knowledge of certain holdback information can be in some cases, to link a third-party suspect to a crime, they also demonstrate, by contrast, just how low the probative value of the evidence is here to establish a sufficient connection between SM and the crime.
- [38] Having due regard for the foregoing, I am not persuaded that SM's simple question to the bike patrol officers is enough to establish a sufficient nexus between SM and the crime. The most that can be made of this question is that SM had surmised that the circumstances of MS's killing included a sexual assault. Notably, SM never suggested he had personal knowledge of this circumstance of the crime; indeed, he said he had heard it from others. However, even if he had asserted it as something he knew, it was a bare assertion upon which it would not be reasonable, in the known circumstances, to conclude that only a person involved in the crime would make such a statement. In other words, something more is required, such as details that lend probity to the assertion. Where an aspect of the hold-back information is easily and readily surmised, as was the case here, it is insufficient to establish a sufficient link to the crime without something more, and Mr. Ali's inference of a criminal record based on SM's driving prohibition, adds nothing.
- [39] For all these reasons, I am not persuaded that Mr. Ali has shown that SM is a viable third-party suspect.

5. Mr. W

- [40] Mr. Ali submits that a man identified as "W" by various people, is a viable third-party suspect because statements attributed to him by these people show knowledge of hold-back information. These statements are, "I hit her in the head and raped her," "I watched a 13-year-old get strangled," and, "I abducted her from her apartment building, took her to the park, beat her face to a pulp, and fucked her in the ass and pussy."

- [41] The identity of the man believed to go by the name Mr. W (correct spelling unknown) remains unknown. I will not attempt to summarize Mr. Ali's complex submission in relation to Mr. W. That submission is found at paras. 196-213 of the defence's written argument, and is reproduced here:
196. The next person identified by police who was in possession of holdback information is a suspect named "[W]" (or some variation of that name), first name unknown, as well as the persons who attributed information to him.
197. In the course of the investigation the police spoke with a number of persons on the Surrey Strip, including Ranjit Purwell and Randall Bigg. These people described a [DW] who said a guy "bashed her in the head and fucked her in the pussy and ass." (Task 14, pg 71). This information is detailed in the holdback, and is very case specific. The holdback discloses that the victim had injuries to the back of her head, and that it was suspected that there was semen in both her anal and vaginal canals. Even if someone learned that the deceased was sexually assaulted, this specific anatomical detail, anal sex, is unique to the facts of the case.
198. Another similar piece of information came from Peter Ward, an employee of the City of New Westminster, who was approached by a man in Central Park who said that his name was [DW] or [DW]. The man apparently said that he hit "her" in the head and raped her. (Task 14, pg 70) Later, the police followed up, and this man was later believed to have been identified to be Randall Bigg. (Task 659)
199. Again, consistent with this tip, the police observed that the deceased had a scrape and lacerations on the back of her head with small areas of bleeding. (Doc 3469 para 36.11)
200. In addition to this information, a person named Nikki Lake reported to police that he had heard a man named [Mr. W] say something to the effect of "I don't need this shit, I just watched a 13 year old girl get strangled." (Task 14, pg 239) Strangulation, as the cause of death, was also treated by the police as hold back.
201. The police apparently attended on Mr. Lake at Surrey Pretrial Centre to take a statement from him. Notes of this statement have been disclosed, but no transcript. (Task 2107).
202. The police believed the person from Mr. Lake's tip to be John [W]. (Task 14, pg 242) As a result of this deduction, the police met with a person named John [W], who denied making such a statement. Notably, John [W] did not match the description given by Lake. (Task 14, pgs, 243 - 244)
203. Despite these frailties in the potential link, including the fact that the [W] that the police interviewed had a different first name than several of the tips, and did not match the physical description, the police recommendation was to "Conclude task as [W] had no knowledge" (Task 2118)
204. Notably, Sgt. Gander recorded in his notes a different incident involving a person named 'Wallin'. (Doc 3191, pg 77) His notes read:

205. The parallel between the incident recorded in the note, and the present case, as well as the similarities between the name [W] and Wallin are stark, and simply give further substance to this person who knows unique holdback information about the present case.
206. This sequence of provision of holdback information is significant as it raises a number of inferences supporting the fact that someone other than the Applicant, named [W], had intimate knowledge of the killing of the deceased, and accordingly is an alternate suspect.
207. Flowing from this are a number of arguments. First, the Applicant will argue that the police failed to identify, and eliminate, the correct [W]. The fact that two persons named [W], one named [D], and one named John, could be in possession of holdback information is an unlikely coincidence. The police do not appear to have investigated [DW], nor do they appear to have investigated Robert Wallin. Additionally, the John [W] that the police spoke to, who repudiated the information did not match the description provided by the tipster. This also supports the inference that the police spoke to, and ruled out, the wrong person. Finally, the John [W] involved could have been John [W] not Senior.
208. The other available inference is that John [W], simply repudiated the information because he knew of its significance, and was in fact, the killer.
209. The final possible inference is that the persons who attributed information to '[W]', Mr. Lake, Mr. Bigg, and Mr. Purwell, or someone in their circle, could have been the actual killer because they were the ones who knew the holdback information. Notably, at least one person, Daljit Purwal, apparently implicated Randall Bigg as the killer. (Task 14, pg 69)
210. The Applicant seeks to argue each of these inferences to establish that there was someone involved in this group that was the potential killer as the information that came from people is highly detailed information only likely to be known by investigators and the killer.
211. In this case, and at this stage in the proceedings, the Applicant repudiates the final option. Logically then, this means that either 'Mr. [W]' is the source with firsthand knowledge of the holdback information, or that Mr. Lake, Mr. Bigg, Mr. Ward, or Mr. Purwell is the firsthand source of the information.
212. The police sought to keep this information locked down because they hoped to create information with probative value, the Applicant now seeks to use it for that same purpose. Following the logic in Brerard, knowledge of this unique and case specific information is sufficient to draw a connection between the potential suspects and the crime.
213. The purpose of holdback information, from an investigatory standpoint, is to identify a perpetrator. These people know the holdback information, and so a nexus has been created with the offence.

- [42] The Crown's position is that there is no admissible (i.e., non-hearsay) evidence connecting Mr. W to the crime; moreover, some of the hearsay attributed to Mr. W is inconsistent with known circumstances of the MS homicide. For example, MS was not abducted from her apartment, and her face was not beaten to a pulp. For essentially the same reasons, the Crown submits that Mr. Ali has failed to show a sufficient connection between Mr. Bigg and Mr. Purwal, Mr. Ward, and/or Mr. Lake, to satisfy the "air of reality" test.
- [43] In my assessment, the evidence to establish a sufficient link between Mr. W or any of the others, is highly problematic in various ways, including its admissibility. Particularly troubling is the statement attributed to [W] that is materially inconsistent with the MS homicide. Notably, it is the only statement attributed to him that is not devoid of details that might lend some weight and reliability to the basic inculpatory assertions attributed to Mr. W; however, as already noted, the details provided in the more fulsome assertion do just the opposite.
- [44] For all these reasons, I am not persuaded that Mr. Ali has met the onus he bears to establish a sufficient connection between Mr. W (or any of the others named) and the crime to satisfy the "air of reality" test.

6. Men at the Film Set

- [45] The MS homicide investigators interviewed members of a film crew who were filming a television series in Central Park on July 18, 2017. Two of these persons, L.T. and E.B., each reported that they had seen a man in his 40s among the people watching the filming of a television show in Central Park in the evening of July 18, 2017. L.T. described the man she saw as a short, dark-haired, overweight, bespectacled, Caucasian man who often watches the filming. She said he stood out because he was among 13-or-14-year-old-girl fans watching the filming. L.T. said she was told by "cast security" that this man "lures the girls into watching the filming."
- [46] E.B. described the man she saw as "random" and "kind of weird", or "just" kind of weird, meaning that he "didn't do anything he was just out of the ordinary for someone who would be there." She said he was watching the filming with a "fan group", and stood out among this group because he was a 40-year-old man. She said he had his photo taken with one of the female actors and then walked away towards the tennis courts "after a while." E.B. described the man as black-haired, tanned, Asian-looking "but not like fully Asian" relatively tall, thin, muscular and, "[t]he whole time he was just on his phone." Neither L.T. nor E.B. knew the identity of the man she observed, and the identities of these men remains unknown. The starkly different physical descriptions of the men each witness saw suggests that the witnesses were not describing the same man. Mr. Ali submits that the combination of "the luring behaviour" and proximity to the crime scene (physically and temporally) establishes a sufficient connection between the unknown men and the crime, to make these men viable third-party suspects. The Crown's position is that the observations of L.T. and E.B. at a film site in Central Park on the evening of July 18, 2017, is not enough to establish a sufficient

nexus between the men they observed and the crime, to satisfy the third-party suspect "air of reality" test.

- [47] The essence of the collective evidence of L.T. and E.B. is that they each saw a man in his 40s who was a notable misfit among the fan group watching the filming, due to his age and gender. L.T.'s suspicions as to the motives of the man she saw were raised by something "security" told her - the truth of which she had no knowledge - and not by anything she knew about the man, or observed him doing. Similarly, E.B.'s description of the man she saw as "kind of weird" was apparently based solely on his presence at the filming site.
- [48] In my view, these are inadequate bases to establish a link between either of these men and the crime. L.T. and E.B. placed the men with film crew members and fans of the television show in Central Park, thus all these persons, including L.T. and E.B., were in virtually the same temporal and physical proximity to the crime as the two men who Mr. Ali says are viable third-party suspects. However, this proximity, with nothing more, does not establish a sufficient connection to the crime. If it were otherwise, all the persons these men were in the company of would also be viable third-party suspects. For the reasons given in relation to SR and proximity, this would be an untenable position.
- [49] In sum, I am not persuaded that Mr. Ali has shown sufficient connection between the two men in question and the crime, to make either of them a viable third-party suspect.

E. Disposition

- [50] Mr. Ali's application is dismissed. He has failed to show sufficient connection between any of the alleged third-party suspects and the crime, to meet the "air of reality" test for the admission of third-party suspect evidence. Accordingly, he is not permitted to adduce evidence, at his trial, suggesting that any of these persons were responsible for the murder of MS.

"Bernard J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/23/24/2023BCSC2439cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-ali-2023-bcsc-2439>

Prepared on 29 October 2026 · Esheria