

CANADA / JUDGMENT

R. v. Ali

2023 BCSC 2550

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Supreme Court of British Columbia

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2023 BCSC 2550 R. v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali,

2023 BCSC 2550

Date: 20230317

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Pursuant to s. 486.4(2.2) of the Criminal Code of Canada, any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.

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Before: The Honourable Justice Bernard

Oral Ruling on Challenge for Cause

Counsel for the Crown:

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K. McCullough

B.S. Lynskey

Place and Date of Hearing:

Vancouver, B.C.

January 20, 2023 and July 22, 2022

Place and Date of Judgment:

Vancouver, B.C.

March 17, 2023

Introduction

- [1] THE COURT: Mr. Ali is charged with having committed the first-degree murder of 13-year-old MS on July 18, 2017. His trial is set to proceed by judge and jury. In anticipation of the jury selection, Mr. Ali applies under s. 638(1)(b) of the Criminal Code to challenge prospective jurors for cause on a number of grounds, including pretrial publicity, religion, race/ethnicity, and immigration status.
- [2] Mr. Ali is Muslim and is of Middle Eastern and Kurdish heritage. He was born in Syria and lived the first 11 years of his life there before moving to Beirut, Lebanon. He lived in Lebanon for the next eight years before returning to Syria for 21 months, and then returning to Lebanon where he lived until he immigrated to Canada as a refugee, in March 2017. He was 27 years old when he arrived in Canada.
- [3] The Crown agrees that a challenge-for-cause based on pretrial publicity is warranted in light of the significant media coverage of the circumstances of MS's death and Mr. Ali's subsequent arrest and prosecution. The Crown is not opposed to a challenge on the basis of racial/ethnic and religious prejudice, in view of authorities which provide that courts should take a reasonably generous approach to applications to challenge for cause, in order to safeguard an accused's fair trial rights: see *R. v. Williams*, [1998] 1 S.C.R. 1128 at para. 32 [Williams].

- [4] However, the Crown disagrees with the list of questions Mr. Ali proposes to ask prospective jurors regarding these topics. The Crown opposes a challenge of prospective jurors regarding Mr. Ali's immigration status (i.e., his status as a refugee) and the nature of the offence, on the basis that Mr. Ali has not established the existence of widespread bias arising from these grounds.

2. Legal Framework

(a) Overview

- [5] The authority to challenge prospective jurors for cause based on partiality or prejudice is found in s. 638(1)(b) of the Criminal Code, which provides as follows:

638 (1) A prosecutor or an accused is entitled to any number of challenges on the ground that

...

- (b) a juror is not impartial;

- [6] The purpose of the right to challenge for cause is to ensure a fair trial, taking into account not only the perspective of the accused, but also the practical limits of the justice system and lawful interests of others involved in the process: see *R. v. Find*, [2001] 1 S.C.R. 863 at para. 28 [Find].

- [7] In *R. v. Jaser*, 2014 ONSC 7528 at para. 10, Justice Code summarized the governing law regarding applications to challenge jurors for cause based on partiality, in four bullet points:

- [10] The law in this area is now well-settled. In brief summary, the following principles apply:

- First, there is a presumption that jurors will carry out their duties with impartiality. This presumption is based on long experience with the practice of trial by jury. Unless the presumption is rebutted, challenge for cause is not permitted;
- Second, the presumption of impartiality can be rebutted upon a showing that there is a "realistic potential for the existence of partiality" in the circumstances of a particular case. Pre-trial publicity and race-based prejudices are the most common ways in which the presumption can be rebutted;
- Third, once the presumption has been rebutted and challenge for cause has been permitted, the trial judge has considerable discretion in determining the number and form of the questions. Relevant considerations, in this regard, are whether the proposed questions will "unnecessarily invade the privacy of the potential jurors, or unnecessarily prolong the trial";
- Fourth, there are two relevant issues that a challenge for cause should inquire into, namely, whether a particular source of prejudice or lack of partiality exists in the prospective juror and whether the prospective juror can set it aside. These two avenues of inquiry are often referred to as the "attitudinal component" and the "behavioural component" of lack of partiality.

(b) Whether to allow a challenge

[8] The "realistic potential" test referred to in the second bullet point, as developed in Supreme Court of Canada jurisprudence, seeks to determine whether the alleged ground of partiality could prevent a juror from being indifferent as to the result. It was explained by Chief Justice McLachlin in *Find* as follows:

31 In order to challenge for cause under s. 638(1)(b), one must show a "realistic potential" that the jury pool may contain people who are not impartial, in the sense that even upon proper instructions by the trial judge they may not be able to set aside their prejudice and decide fairly between the Crown and the accused: *Sherratt*, *supra*; *Williams*, *supra*, at para. 14.

32 As a practical matter, establishing a realistic potential for juror partiality generally requires satisfying the court on two matters: (1) that a widespread bias exists in the community; and (2) that some jurors may be incapable of setting aside this bias, despite trial safeguards, to render an impartial decision. These two components of the challenge for cause test reflect, respectively, the attitudinal and behavioural components of partiality: *Parks*, *supra*, at pp. 364-65; *R. v. Betker* (1997), 1997 CanLII 1902 (ON CA), 115 C.C.C. (3d) 421 (Ont. C.A.), at pp. 435-36.

33 These two components of the test involve distinct inquiries. The first is concerned with the existence of a material bias, and the second with the potential effect of the bias on the trial process. However, the overarching consideration, in all cases, is whether there exists a realistic potential for partial juror behaviour. The two components of this test serve to ensure that all aspects of the issue are examined. They are not watertight compartments, but rather guidelines for determining whether, on the record before the court, a realistic possibility exists that some jurors may decide the case on the basis of preconceived attitudes or beliefs, rather than the evidence placed before them.

[9] The attitudinal portion of the test involves two key elements: "bias" that is "widespread". Bias, in the context of challenges for cause, refers to an attitude that could lead jurors to discharge their function in a partial and unfair manner. To be "widespread", it must be established that the bias is sufficiently pervasive in the community to raise the potential that it may be harboured by one or more members of a representative jury pool: see *Find* at paras. 34-39.

[10] If widespread bias is shown, the question on the behavioural component is whether some jurors may be unable to set aside their bias, despite the cleansing effect of the trial judge's instructions and the trial process: see *Find* at para. 40.

[11] In *Find*, McLachlin C.J. confirmed that the "realistic potential" for juror partiality must be established on the evidence, on judicial notice, or on both:

46 A party may displace the presumption of juror impartiality by calling evidence, by asking the judge to take judicial notice of facts, or both. In addition, the judge may draw inferences from events that occur in the proceedings and may make common sense inferences about how certain biases, if proved, may affect the decision-making process.

47 The first branch of the inquiry - establishing relevant widespread bias- requires evidence, judicial notice or trial events demonstrating a pervasive bias in the community. The second stage of the inquiry - establishing a behavioural link between widespread attitudes and juror conduct - may be a matter of proof, judicial notice, or simply reasonable inference as to how bias might influence the decision-making process: Williams, supra, at para. 23.

[12] Chief Justice McLachlin further explained when proof by judicial notice, is possible:

48 In this case, the appellant relies heavily on proof by judicial notice. Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: R. v. Potts (1982), 1982 CanLII 1751 (ON CA), 66 C.C.C. (2d) 219 (Ont. C.A.); J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1055.

[13] Where the "realistic potential" test has been met, the right to challenge must follow. If in doubt about whether the test has been met, the judge should err on the side of permitting the challenge, on the basis that the accused's fair trial rights are at stake; it is better to risk allowing what may be unnecessary challenges, than to risk prohibiting necessary ones: see Find at para 45.

(c) The questions for prospective jurors

[14] Once the challenge-for-cause has been permitted, the trial judge has considerable discretion as to the questions to be asked of prospective jurors, so as to ensure a fair trial while not unnecessarily invading the privacy of the prospective jurors or unnecessarily prolonging the trial: see R. v. Spence, 2005 SCC 71 at para. 24 [Spence].

[15] In the recent decision of R. v. Chouhan, 2021 SCC 26 [Chouhan], Justices Moldaver and Brown, writing for themselves and Chief Justice Wagner, commented on the challenge-for-cause procedure as modified by 2019 amendments to the Criminal Code. They confirmed that the threshold for raising a challenge-for-cause is low, and that the trial judge has significant discretion to determine how and in what circumstances the presumption of impartiality will be displaced, and the number and types of questions that may be asked of prospective jurors:

- [62] While widespread bias cannot be presumed in all cases, the parties do not face an onerous burden for raising a challenge for cause. The accused person or the Crown must merely demonstrate a reasonable possibility that bias or prejudicial attitudes exist in the community, with respect to relevant characteristics of the accused or victim, and could taint the impartiality of the jurors. In most cases, expert evidence will not be necessary: challenges for cause must be available wherever the experience of the trial judge, in consultation with counsel, dictates that, in the case before them, a realistic potential for partiality arises. The trial judge necessarily enjoys significant discretion to determine how and under what circumstances the presumption of impartiality will be displaced, and how far the parties may go in the questions that are asked on a challenge for cause (Spence, at para. 24; *R. v. Williams*, 1998 CanLII 782 (SCC), [1998] 1 S.C.R. 1128, at para. 55; Find, at para. 45).
- [63] In our view, the challenge for cause procedure is itself a vehicle for promoting active self-consciousness and introspection that militate against unconscious biases. The prospective juror, who, when empanelled, steps into an adjudicative role must bring to bear a degree of impartiality similar to that of judges. Impartiality requires active and conscientious work. It is not a passive state or inherent personality trait. It requires jurors to be aware of their own personal beliefs and experiences, and to be "equally open to, and consider the views of, all parties before them" (*R. v. S. (R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484, at para. 40). Given these principles, the questioning on a challenge for cause ought to be able to explore the juror's willingness to identify unconscious bias and strive to cast it aside when serving on the jury (Find, at para. 40).
- [64] Appropriate questions on a challenge for cause will ask prospective jurors for their opinion as it relates to salient aspects of the case. For instance, counsel may point to characteristics of the accused, complainant or victim, such as race, addiction, religion, occupation, sexual orientation or gender expression, and ask prospective jurors whether, in light of such characteristics, they would have difficulty judging the case solely on the evidence and the trial judge's instructions, because they hold an opinion about such characteristics that on careful reflection, they do not believe they could put aside. Before posing that question to jurors, trial judges ought to call each individual juror's attention to the possibility of unconscious bias and impartiality. It should be stressed that the mischief is not in acknowledging a difficulty setting aside unconscious bias, but in failing to acknowledge such a difficulty where one exists.
- [16] In *R. v. Dhillon*, 2001 BCCA 555 at para. 53 [Dhillon], Justice Low discussed the types of questions that are usually considered appropriate:
- [53] It is not necessary for me to cite the many cases that make it clear that the questioning of potential jurors should not be intrusive. It should not involve inquiry into their lifestyles, backgrounds, or personal experiences. In this country, we have not adopted the American model, something the Supreme Court of Canada made express reference to in *Williams* at paras. 12, 13 and 52. The questions should be simple and designed to identify possible

prejudice, require the potential juror while under oath to admit to it if it exists, and to impress upon the jurors sworn that they must remain impartial at all times. In my opinion, the questions asked of the potential jurors in the present case were capable of accomplishing all those things in compliance with the law as stated in Williams.

- [17] In Chouhan, Justices Moldaver and Brown referred to the "Parks question" (i.e., the question endorsed in the case of *R. v. Parks* (1993), 84 C.C.C. (3d) 353 (ONCA) [Parks]). Parks was a case that concerned an application to challenge prospective jurors based on racial prejudice. In Spence, at para. 1, the Supreme Court of Canada noted that the Parks question, raised as follows, had broad acceptance:

Would your ability to judge the evidence in the case without bias, prejudice or partiality be affected by the fact that the person charged is . . . black . . . and the deceased is a white man?

- [18] In Chouhan, Justices Moldaver and Brown noted that although the Parks question was never intended to be the only question available on a challenge for cause, it maintains an appropriate balance of the accused's fair trial rights and the private interests of prospective jurors. Judges who permit questions beyond the Parks formulation must be mindful to balance these principles:
- [66] Our colleague Abella J. suggests that "[t]he new robust challenge for cause process will require more probing questions than have traditionally been asked to properly screen for subconscious stereotypes and assumptions" and will necessitate "a more sophisticated manner of questioning" (paras. 160-61). While we agree that the Parks question was never intended to be the only question available on a challenge for cause (*R. v. Parks* (1993), 1993 CanLII 3383 (ON CA), 15 O.R. (3d) 324 (C.A.)), we caution that trial judges who permit questions beyond the Parks formulation must be mindful of the fundamental principle of respect for jurors' privacy upon which our system of jury selection has "long been based" (*Kokopenace*, at para. 74, per Moldaver J.; at para. 155, per Karakatsanis J.; and at para. 227, per Cromwell J. (dissenting but not on this point)). The Parks question itself permits only limited incursions into juror privacy, and further developments in the challenge for cause process must continue to balance "the accused's right to a fair trial by an impartial jury, while also protecting the privacy interests of prospective jurors" (*Williams*, at para. 53 (emphasis added); *Spence*, at para. 24; *R. v. Davey*, 2012 SCC 75, [2012] 3 S.C.R. 828, at para. 30). It is for this reason that the jurisprudence has long resisted the temptation to move the Canadian law regarding juror privacy closer to that of the U.S. system. In concluding that it is "unclear that the [U.S.] system produces better juries than the Canadian system", this Court has pointed to the high degree of protection of and respect for juror privacy, and our concern to prevent "abuse by counsel seeking to secure a favourable jury, or to indoctrinate jurors to their views of the case" (*Find*, at para. 27; see also, *R. v. G. (R.M.)*, 1996 CanLII 176 (SCC), [1996] 3 S.C.R. 362). Any future developments should account for these precedents.

[Emphasis in original]

3. Proposed questions

[19] Mr. Ali proposes that the following preamble and questions be posed to all prospective jurors:

Preamble: As the judge will tell you, in deciding whether or not the prosecution has proven the charge against an accused, a juror must judge the evidence of the witness without bias, prejudice, or partiality.

- 1) Would your ability to judge the evidence in this case without bias, prejudice, or partiality be affected by anything you have read, seen, or heard about the case in a newspaper or on the radio or television or on social media?
- 2) Have you read, seen, or heard any commentary by or about any lawyer regarding the investigation of this case?
- 3) Have you ever participated in any protests, meetings, vigils, or memorial services connected with this case or have you contributed or supported any group or cause arising from this incident?
- 4) Do you believe due process protections are owed to everyone regardless of citizenship status?
- 5) How do you feel about Canada's policy on immigration that has allowed for an increase in the number of refugees from Muslim-majority countries?
- 6) Would your ability to judge the evidence in the case without bias, prejudice, or partiality be affected by the fact that the accused is of Middle Eastern descent?
- 7) Would your ability to judge the evidence in the case without bias, prejudice, or partiality be affected by the fact that the accused is Muslim?
- 8) Would your ability to judge the evidence in the case without bias, prejudice, or partiality be affected by the fact that the accused is a Muslim man and the deceased was a female?
- 9) Would your ability to judge the evidence in this case without bias, prejudice, or partiality be affected by the fact that the accused is a Muslim man and the deceased was a teenager?
- 10) Do you think people from a Muslim and/or Middle Eastern background are not credible?
- 11) Do you think people from a Muslim and/or Middle Eastern background are less likely to obey Canadian law?
- 12) Do you think Muslim and/or Middle Eastern men are by nature more violent than men of any other race or faith?
- 13) Do you think Muslim and/or Middle Eastern men are more likely to kill someone than a person of any other race or faith?

14) Do you think Muslim and/or Middle Eastern men are more likely to engage in acts of non-consensual sex than a person of any other race or faith?

[20] Mr. Ali submits that these questions are necessary to meaningfully determine whether a prospective juror would be able to act impartially in this case, and that they would not unduly intrude into a juror's privacy.

4. The Crown's position

[21] The Crown is not opposed to a certain subset of the proposed questions, with some tweaks. However, the Crown submits that many of the questions proposed by the defence should not be posed, either because they are overly specific in a way that would intrude on a juror's privacy interests, or because Mr. Ali has not established the existence of a widespread bias in relation to the particular subject-matter of the question. The Crown further submits that the Court should provide an anti-bias instruction to the jury panel prior to the challenge-for-cause portion of jury selection.

[22] The Crown proposed the following preambles and questions, instead of the questions Mr. Ali proposes. First, in relation to pre-trial publicity:

Preamble: The offence that Ibrahim Ali is charged with involves the sexual assault and killing of a 13-year-old girl named [MS].

- 1) Have you seen, heard, or read anything about this case, about the accused Mr. Ali, or about the alleged victim [MS], in any form of media: for example, from the radio, the television, the internet, newspapers or magazines, or through discussions with others, including discussions on social media?
- 2) As a result of anything you may have seen, heard, read, discussed, or communicated, have you formed an opinion about the possible guilt or innocence of Mr. Ali?
- 3) Despite any opinion that you may have formed, would you be able to set that opinion aside and decide the case based only on the evidence presented at trial and the instructions of the trial judge?

[23] On racial/ethnic and religious prejudice, the Crown's proposal is as follows:

Preamble: In this case, the accused Ibrahim Ali is Muslim. He is a visible minority. He is a Kurdish man of Middle Eastern heritage (or from Syria/ Lebanon). The crime charged is one that alleges both physical and sexual violence against a 13-year-old girl.

- 1) Would your ability to judge the evidence in this case without bias, prejudice, or partiality be affected by the fact that the person charged/accused is Muslim?
- 2) Would your ability to judge the evidence in this case without bias, prejudice, or partiality be affected by the fact that the person charged/accused is a visible minority, namely a Kurdish man of Middle Eastern heritage (or from Syria/Lebanon)?

5. Discussion

(a) Defence Questions #1 and #2

[24] For ease of reference, these proposed questions are as follows:

- 1) Would your ability to judge the evidence in this case without bias, prejudice, or partiality be affected by anything you have read, seen, or heard about the case in a newspaper or on the radio or television or on social media?
- 2) Have you read, seen, or heard any commentary by or about any lawyer regarding the investigation of this case?

[25] These questions relate to pretrial publicity. It is not disputed that there has been significant media coverage and other pre-trial publicity related to the circumstances of MS's death, the police investigation that followed, Mr. Ali's arrest in September 2018, and certain preliminary court appearances by Mr. Ali. Mr. Ali tendered examples of news articles that were published in the Lower Mainland of British Columbia, as evidence on the instant application.

[26] I am satisfied there is sufficient evidence to show that this case has acquired a relatively high-profile status in the community, such that a challenge for cause is necessary and appropriate. There is a realistic potential for the existence of partiality arising from the significant publicity the case has received.

[27] Proposed question #1 is a formulation of the Parks question. The Crown does not take issue with the format but submits that the question is overly narrow, in that it does not require prospective jurors to reflect on: (a) what, if anything, they have heard about the case; (b) whether they have formed an opinion about Mr. Ali's guilt or innocence; and, (c) whether they could set any opinion aside for the purposes of carrying out the function of a juror. Instead, the Crown proposes the preamble and the first three questions as set out above, which are essentially the same as the questions Justice Devlin permitted in *R. v. Coban*, 2021 BCSC 2154 [Coban], in relation to pretrial publicity: see paras. 14-21.

[28] Turning next to question #2, Mr. Ali submits that it is necessary because it will identify prospective jurors who have read or heard about a lawyer who acted briefly for Mr. Ali, and, who later disclosed information from Crown disclosure to reporters about the police investigation of the DNA evidence, which was published. Mr. Ali submits that the information the lawyer disclosed may not be addressed at trial, and may taint jurors who previously heard about it through the news coverage.

[29] The Crown submits that question #2 is unnecessary, because publicity about the former lawyer is subsumed within the three questions as rephrased by the Crown, and, that these questions require prospective jurors to reflect on anything they have read or heard about in the case.

[30] In my assessment, the preamble and questions as drafted by the Crown, allow for a more focused and comprehensive inquiry to determine whether, in the specific circumstances of this case, a prospective juror will be able to act impartially despite having formed opinions as a result of pretrial publicity. The questions require only "yes" or "no" answers, and the next question is asked only if the previous one is answered in a way that raises the potential for concern. The defence's proposed question #2 is subsumed within the Crown's proposed questions, which also address the issue of whether, considering what prospective jurors have read or heard, they would be able to decide the case in a fair and impartial manner: see Coban at para. 19.

(b) Defence Question #3

[31] This proposed question is as follows:

3) Have you ever participated in any protests, meetings, vigils, or memorial services connected with this case or have you contributed or supported any group or cause arising from this incident?

[32] Mr. Ali submits that question #3 is necessary and appropriate because participation in any of the things described in the question would demonstrate obvious bias to such an extent that a prospective juror would not likely be able to set it aside. Mr. Ali's position is that any prospective juror who answered this question in the affirmative should not be sworn-in.

[33] I do not share Mr. Ali's view of question #3. In my view, a simple affirmative answer to that question would not necessarily elicit strong information to rebut the presumption of impartiality, or assist in determining whether a prospective juror would be able to set aside any pre-existing views or opinions for the purposes of the trial. A prospective juror who participated in a protest, meeting, or memorial service, or supported a cause connected with MS's death, may have had one of a number of reasons for doing so that may not have anything to do with the issue of the guilt or innocence of the accused. Accordingly, a "yes" answer would require follow-up questions and a mining of the details of what the prospective juror participated in or supported, and their motives for doing so. Answers to the follow-up questions could lead to a debate about whether an individualized set of facts demonstrates an inability to judge the case impartially. On this basis, I find that question #3 risks prolonging the process without an apparent corresponding enhancement to the selection of a jury: see Dhillon at para. 53, and Williams at para. 53. Moreover, question #3 is improper, as it invites an inquiry into the lifestyles, backgrounds, or personal experiences of the prospective jurors.

[34] For these reasons, this proposed question should not be permitted.

(c) Defence Questions #4 and #5

[35] These proposed questions are as follows:

4) Do you believe due process protections are owed to everyone regardless of citizenship

status?

- 5) How do you feel about Canada's policy on immigration that has allowed for an increase in the number of refugees from Muslim-majority countries?
- [36] Mr. Ali submits that the materials he presented - consisting of news and journal articles - establishes a widespread anti-immigrant bias in the Canadian population, and raises a realistic potential for partiality in the circumstances of this case. He proposes questions #4 and #5 be asked to address the issue.
- [37] The Crown opposes these two questions, on the basis that Mr. Ali has not established a realistic potential for jury partiality on the ground of immigration status. The Crown submits that the proposed questions are unduly intrusive and will not assist the Court in determining whether prospective jurors are able to act impartially.
- [38] In my view, the materials tendered by Mr. Ali do not tend to show a widespread bias in the community based on anti-immigrant sentiment which would raise the potential for partiality in the circumstances of this case: i.e., specifically, the alleged murder of a teenage girl. Here, the materials address immigration status as a basis for discrimination rather than as part and parcel of "Islamophobia" or prejudice against Muslims, whether immigrants or not. For example, the following materials attached to the affidavit (Exhibit #1) appear to primarily focus on immigration status.
- a) Tab 14, CBC Edmonton news article, February 9, 2017, "Storm of reaction to news Syrian refugee charged with sexual assaults". The article reports that there has been a strong reaction to a Syrian refugee accused of sexual assaults on Edmonton girls, both by anti-immigration groups and refugees themselves. There is discussion of inflaming a segment of the population that harbours a bias, discrimination, or unfair views towards newcomers, and that some commenters are exploiting the fact that a Syrian refugee was charged with the crime. There is no information about any bias in the Lower Mainland of British Columbia, or even that anti-immigrant views in Edmonton are pervasive within that community.
- b) Tab 17, Maclean's online article published April 23, 2019, "Why race and immigration are gathering storm in Canadian politics". The subtitle to this article states that, "Fears of a surge in anti-immigrant attitude and bigotry are misplaced" and there is no evidence of a dramatic spike in anti-immigrant sentiment in Canada. The article does not support the existence of pervasive bias.
- c) Tab 21, IRCC Minister transition binder 2019: IRC-Public opinion research on Canadians' attitudes towards immigration. The results of a survey indicate Canadians' views on immigration levels remain supportive, though there is a group that feels too many immigrants are coming to Canada. Respondents in Toronto and Vancouver were particularly likely to say there were too many: about 37%. In response, the Crown tendered the 2021 IRCC report which shows support for immigration to Canada. The report indicates that

those living in Toronto and Vancouver were concerned about the impact of continued population growth on housing, transportation, and social services.

- d) Tab 23, Globe and Mail article published November 19, 2017, "How should Canada handle criminals cloaked as refugees?" This article discusses refugee policy but contains no information about British Columbians' attitudes towards refugees.
- e) Tab 40, Toronto Sun news column published February 13, 2017, "It's fine to report when a refugee's been charged with a crime". The columnist opines that, for a number of reasons, it is appropriate for media to report that a person charged with a crime is a refugee. There is no commentary on public attitudes about refugees.

[39] I am not satisfied Mr. Ali has met the required threshold to challenge for cause with these proposed questions. The record does not demonstrate a realistic potential for jury partiality on the ground of citizenship status, which could not be set aside for the purposes of the trial.

[40] I find there is no sound basis for taking judicial notice of such a bias. Moreover, I consider questions #4 and #5 to be inappropriate for the following reasons:

- a) They invite prospective jurors to express their personal beliefs and feelings about the very general topics of "due process" and "Canada's policy on immigration" in relation to refugees from Muslim-majority countries. This is intrusive and not permissible according to the law in Canada. In fact, question #5 appears to be more focused on anti-Muslim, rather than anti-immigrant, sentiments (which are discussed further below).
- b) It is conceivable that some prospective jurors may not have a sufficient understanding of due process rights or current refugee immigration policies to be able to articulate a meaningful response, which would then require further explanations and inquiries prolonging the process.
- c) It is also likely that some additional back-and-forth may be required to frame how a particular answer may inform a juror's ability to judge the trial fairly or impartially; the questions alone do not require a juror to do so.

[41] For these reasons, I am not persuaded these proposed questions should be asked.

(d) Defence Questions #6 and #7

[42] These proposed questions are as follows:

- 6) Would your ability to judge the evidence in the case without bias, prejudice, or partiality be affected by the fact that the accused is of Middle-Eastern descent?
- 7) Would your ability to judge the evidence in the case without bias, prejudice, or partiality be affected by the fact that the accused is Muslim?

- [43] Mr. Ali submits that it is necessary and appropriate to challenge prospective jurors for cause on the basis that Mr. Ali is a visible minority of Middle Eastern descent, and a Muslim. He tendered materials in support of the existence of widespread bias against Muslims and people of Middle-Eastern heritage, including numerous articles and columns, social science articles, and statistics from Canadian government websites.
- [44] The Crown is not opposed to a challenge for cause based on Mr. Ali's race or ethnicity, but takes issue with the defence questions as they have been proposed. With respect to a challenge based on prejudice against Muslims, the Crown accepts and agrees that anti-Muslim sentiment exists in Canada, and that Mr. Ali's materials relate to the existence of such; however, it submits that Mr. Ali has not demonstrated a widespread bias that some jurors may not be able to set aside in order to render an impartial decision in this case. The Crown points to shortcomings in Mr. Ali's materials, including a lack of hard data upon which to draw any conclusions about the pervasiveness of anti-Muslim attitudes within the community that would be engaged in the particular circumstances of this case, or that could not be set aside for the purposes of this trial.
- [45] Despite the issues the Crown has identified with Mr. Ali's evidence, given: (a) the low threshold for raising a challenge for cause; (b) the lack of strenuous opposition to a challenge on any of the three grounds; and (c) the guidance from Find that, when in doubt, the court should err in favour of allowing a challenge, I am satisfied it would be appropriate to exercise my discretion in favour of permitting a challenge for cause on race/ethnicity and religion.
- [46] The two questions posed by the defence are formulations of the "Parks question" with which the Crown agrees, subject to some minor changes. The Parks question is frequently utilized for race-based challenges for cause, on the basis that it can identify possible prejudice without undue intrusion, and that it impresses upon jurors the utmost importance of judging impartially.
- [47] I agree that the appropriate approach here is to utilize Parks-type questions. The Crown seeks the addition of a preamble and an adjustment to question #6. The justification for the inclusion of a preamble is to list Mr. Ali's characteristics more comprehensively instead of simply referring to him as being of Middle-Eastern descent, which the Crown asserts could have different and diverse meanings to different people. The preamble also sets out the nature of the crime charged, which would inform prospective jurors that it involves physical and sexual violence against a teenage girl. The Crown's proposal is as follows:

Preamble: In this case, the accused Ibrahim Ali is Muslim. He is a visible minority. He is a Kurdish man of Middle Eastern heritage (or from Syria/Lebanon). The crime charged is one that alleges both physical and sexual violence against a 13 year old girl.

- 1) Would your ability to judge the evidence in this case without bias, prejudice, or partiality be affected by the fact that the person charged/accused is Muslim?

2) Would your able to judge the evidence in this case without bias, prejudice, or partiality be affected by the fact that the person charged/accused is a visible minority, namely a Kurdish man of Middle Eastern heritage (or from Syria/Lebanon)?

[48] In my assessment, the foregoing with some minor non-substantive adjustments, would adequately address the issue of partiality based on racial/ethnic and religious bias as they may relate to the circumstances of this case.

(e) Defence Questions #8 and #9

[49] These proposed questions are as follows:

8) Would your ability to judge the evidence in the case without bias, prejudice, or partiality be affected by the fact that the accused is a Muslim man and the deceased was a female?

9) Would your ability to judge the evidence in this case without bias, prejudice, or partiality be affected by the fact that the accused is a Muslim man and the deceased was a teenager?

[50] Mr. Ali submits that questions #8 and #9 are necessary because they link prejudice against Muslims with specific stereotypical views that prospective jurors may hold in relation to the treatment of women and children as second-class citizens by Muslim men.

[51] The ground Mr. Ali intends to cover with these questions is addressed by the preamble and Parks question, as has been discussed above regarding prejudice against Muslims. It asks prospective jurors to consider any biases or prejudices they may have regarding Mr. Ali as a Muslim man, and in light of the salient aspects of the allegations in this case: i.e., physical and sexual violence against a teenaged girl.

[52] I am not persuaded that these proposed defence questions would provide any further assistance in assessing the risk that a prospective juror may not be able to decide the case impartially on the evidence.

(f) Defence Questions #10 to #14

[53] These proposed questions are as follows:

10) Do you think people from a Muslim and/or Middle Eastern background are not credible?

11) Do you think people from a Muslim and/or Middle Eastern background are less likely to obey Canadian law?

12) Do you think Muslim and/or Middle Eastern men are by nature more violent than men of any other race or faith?

13) Do you think Muslim and/or Middle Eastern men are more likely to kill someone than a person of any other race or faith?

14) Do you think Muslim and/or Middle Eastern men are more likely to engage in acts of non consensual sex than a person of any other race or faith?

- [54] Mr. Ali submits that these questions are necessary, in addition to the Parks questions above, in order to get to the root of the particular biases a prospective juror may have, for the purposes of assessing whether the prospective juror could nonetheless serve impartially. He submits that the Crown's Parks questions alone are "overarching" and that his "broken-down" questions are required to get to the truth regarding the existence of any bias or prejudice and whether it can be set aside.
- [55] In *R. v. Gayle* (2001), 154 C.C.C. (3d) 221 (Ontario Court of Appeal) [Gayle], the accused sought to ask eight questions to prospective jurors on the issue of racial bias which, similar to Mr. Ali's questions #10-#14 about Muslim people or people of Middle Eastern descent, were intended to probe specific stereotypes or preconceived notions jurors may have about black people. The trial judge permitted one question about racial prejudice, and it was a formulation of the Parks question. On appeal, the accused made a similar argument to the one Mr. Ali makes now: i.e., the single "rolled-up" Parks-type question was inadequate as it provided no basis for the triers of fact to determine, from a negative answer, whether the prospective juror was claiming to be free of racial prejudice or was admitting to prejudice but claiming to be able to set it aside. He further argued that the elimination of the disputed questions left the triers with nothing more than the jurors' self-assessment of their own racial attitudes, and that specific information about attitudes would have better equipped the triers to determine both attitudinal and behavioural partiality whether conscious or unconscious: see para. 15.
- [56] In *Gayle*, Justice Sharpe, speaking for the appellate court, dismissed the argument that the caselaw requires discrete questions on each aspect of partiality, pointing out that in both *Parks* and *Williams*, rolled-up questions were said to be appropriate: see para. 18. He also noted that the precise nature of the questions must be determined by the trial judge in the circumstances of each case: see para. 19.
- [57] Justice Sharpe summarized the considerations involved in formulating challenge-for-cause questions, noting that ensuring an impartial jury is paramount, but also that there are other relevant principles to consider including the presumption of impartiality and the avoidance of inquiries that invade the privacy of prospective jurors and attempt to probe personal feelings, opinions, and beliefs: see para. 22.
- [58] Proposed defence questions #10-#14 are also similar to those sought to be asked in *Dhillon* (see para. 46) and which were not permitted by the court. This decision was upheld on appeal. Also germane is the caution of Justices Moldaver and Brown in *Chouhan* (at para. 66), to the effect that trial judges who permit questions beyond the Parks formulation must be mindful of the balance between fair trial rights and the fundamental principle of respect for jurors' privacy, upon which the Canadian jury system is based.

- [59] The strategy behind the proposed defence questions is to better reveal stereotypical views Mr. Ali believes prospective jurors may have about Muslim and/or Middle Eastern men. However, the defence has not shown that these questions would be an improvement on the Parks question, the form of which has been endorsed by the Supreme Court of Canada and widely used for race-based challenges for cause.
- [60] It is foreseeable that rather than admitting to holding any of the prejudicial beliefs described in the questions, prospective jurors may tailor their answers in a way that they perceive to be socially acceptable. Moreover, the questions are intrusive and do not address the critical question of whether a prospective juror who admits to holding these thoughts and beliefs, could put them aside for the purposes of judging the case impartially. The Parks question focuses each potential juror on whether any views or personal beliefs that they may have about Mr. Ali's race or religion in the circumstances, would affect their ability to judge the case impartially.
- [61] In sum, I am not persuaded that the record establishes that there is anything to be gained by posing the additional questions regarding racial/ethnic and religious bias, in addition to the two rolled-up Parks questions. Accordingly, the proposed questions 10-14 will not be permitted.

Conclusion

- [62] Having due regard for all the foregoing, I conclude that the following challenge for cause questions, with preambles, will be asked of each prospective juror drawn from the jury pool for selection as a juror in this case:

(a) Pretrial publicity

Preamble: The offence Ibrahim Ali is charged with involves an alleged sexual assault and murder of a 13-year-old girl named [MS] on or about July 18, 2017, in Central Park, Burnaby, B.C.

- 1) Have you seen, heard, or read, anything about this case, about the accused Ibrahim Ali, or about the alleged victim, MS, in any form of media: for example, radio, television, the internet, newspapers or magazines, or through discussions with others including discussions on social media?
- 2) As a result of anything you may have seen, heard, read, discussed, or communicated, have you formed an opinion about the possible guilt or innocence of Mr. Ali?
- 3) Despite any opinion that you may have formed, would you be able to set that opinion aside and decide the case based only on the evidence presented at trial, and the instructions of the trial judge?

(b) Racial/ethnic and religious prejudice

Preamble: In this case, the accused, Ibrahim Ali, is a Muslim man and a visible minority. He is a Kurdish man from the countries of Syria and Lebanon in the Middle East. The murder charge against him is one that involves allegations of physical and sexual violence by him against a 13-year-old girl.

- 4) Would your ability to judge the evidence in this case without bias, prejudice, or partiality, be affected by the fact that Ibrahim Ali is a Muslim?
- 5) Would your ability to judge the evidence in this case without bias, prejudice, or partiality, be affected by the fact that Ibrahim Ali is a member of a visible minority: that is, he is a Kurdish man from the Middle East and, more specifically, the countries of Syria and Lebanon?

"Bernard J."

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