

CANADA / JUDGMENT

R. v. Ali

2023 BCSC 2560

COURT

Supreme Court of British Columbia

DECIDED

27 July 2023

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2023 BCSC 2560 R. v. Ali IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Ali, 2023 BCSC 2560 Date: 20230727 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Pursuant to s. 486.4(2.2) of the Criminal Code of Canada, any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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. Before: The Honourable Justice Bernard Oral Ruling on Application #47 re cross-examination of Christine Crossman Counsel for the Crown: C.J. Smith D.J. Porte I.A. Keeley Counsel for the Accused: K. McCullough B.S. Lynskey Place and Date of Hearing: Vancouver, B.C. June 19, 2023 Place and Date of Judgment: Vancouver, B.C. July 27, 2023

- [1] THE COURT: On June 19, 2023, Mr. Ali applied to revisit a prior ruling of the court dismissing his application to cross-examine Crown witness Christine Crossman immediately following Part 1 of her two-part testimony.
- [2] Ms. Crossman is a reporting scientist at the National Forensic Scientific Laboratory where DNA related to the case at bar was analyzed. The grounds for revisiting the court's prior ruling were an alleged material change in circumstances arising from an unanticipated delay in the completion of Ms. Crossman's Part 1 testimony, and a lengthier period than anticipated between the two parts of her testimony.
- [3] Mr. Ali's application was dismissed with reasons to follow. These are those reasons.
- [4] For proper context to these brief reasons, they must be considered in conjunction with two prior related rulings of the court. In brief, on May 24, 2023, the court granted the Crown leave to split Ms. Crossman's testimony into two parts (see R. v. Ali, 2023 BCSC 2426), and on May 25, 2023, Mr. Ali applied to cross-examine Ms. Crossman after each part of her direct testimony. That application was dismissed with reasons to follow (delivered orally on June 19, 2023; not transcribed).

- [5] Ms. Crossman began Part 1 of her direct testimony on May 25, 2023. On May 26, 2023, the defence objected to the admissibility of business records from the forensic lab and a voir dire was declared to determine that question. The voir dire concluded on May 29, 2023, with a ruling that the records were admissible as business records. In addition, a mid-voir dire defence application for disclosure was heard and dismissed.
- [6] On June 1, 2023, Mr. Ali applied to adjourn the trial until June 19, 2023, due to alleged issues with the Kurdish/Arabic/English interpreter who was substituting for Interpreter Abbas during his approximately two-week unanticipated absence to attend a family emergency abroad. On June 5, 2023, the court reluctantly granted that application, noting that it was of dubious merit.
- [7] Ms. Crossman resumed Part 1 of her direct testimony on June 19, 2023, and it concluded that morning. The court then heard Mr. Ali's application to revisit the court's ruling dismissing his application to cross-examine Ms. Crossman after each part of her direct testimony.
- [8] In addition to the foregoing, Ms. Smith, the Crown counsel who was specifically tasked with tendering the Crown's DNA evidence following Mr. Ali's untimely, i.e., on the first day of the jury trial, withdrawal of admissions of fact, was not available from June 22, 2023 to July 19, 2023. Notably, Ms. Smith had allotted more than a reasonable period of time for tendering all the DNA evidence; however, on the first day of Ms. Crossman's evidence, the defence objected to a leading question and announced, to an apparently surprised and perplexed Ms. Smith, that "everything": i.e., everything, including the continuity of every DNA exhibit, was in issue.
- [9] It is noteworthy that this defence position was in stark contrast to its earlier position at the pre-trial conference (PTC), held in January 2023 for the purpose of determining the length of the jury trial for, inter alia, the purpose of selecting a jury. At this PTC, in support of its position that the trial would take six weeks the defence stated that many matters were not in issue, and counsel was thus encouraged by the court to consider admissions of fact to obviate apparently unnecessary witnesses.
- [10] In Mr. Ali's instant application to revisit the court's dismissal of his earlier application to cross-examine Ms. Crossman twice, Mr. Ali relies on the extension of the gap between the two parts of Ms. Crossman's testimony as a material change that would justify the court revisiting its earlier ruling. Mr. Ali argues that, "as a result of these delays, the jury has now been left with the unchallenged evidence of Ms. Crossman for weeks. If the defence is not permitted to cross-examine Ms. Crossman at the conclusion of the first phase of her evidence, Ms. Crossman's evidence will sit unchallenged with the jury for more than a month and potentially into July of 2023."
- [11] In support of Mr. Ali's concern that Part 1 of Ms. Crossman's testimony will "sit unchallenged" for a longer period than initially anticipated, Mr. Ali relies on the comments of the court in *R. v. Violette*, [2008] B.C.J. No. 2767 at para. 19:

- [19] In exercising their right to make full answer and defence, the accused are entitled to hear the entirety of a Crown witness's testimony, to make tactical decisions on the entirety of that evidence, and to confront the witness through cross-examination. Were I to permit the Crown to recall its witnesses, some a significant number of times according to its Trial Plan, it would then be necessary to consider how to manage the cross-examination of those witnesses. Permitting the accused to cross-examine the witnesses each time they were called would not only significantly complicate the trial, but it would also interfere with their ability to confront the witnesses on the entirety of their evidence and across chapters. On the other hand, limiting the accused to cross-examining the witnesses only once at the end of their testimony in chief on all of the chapters regarding which they were allowed to testify would create other problems. For one, in a trial of this anticipated duration, the jurors would be left with the unchallenged evidence of certain of the Crown's witnesses for a fairly lengthy period. Allowing that unchallenged evidence to settle in the minds of the jurors, particularly if the evidence of other witnesses built upon or related to it, could undercut or compromise the effectiveness of the cross-examination that came late in the day.
- [12] I am not persuaded that Violette assists Mr. Ali; not only is it materially distinguishable from the case at bar in its circumstances, it does not stand for the proposition for which Mr. Ali cites it: i.e. he ought to be permitted to cross-examine Crown witnesses each time they take the stand. Read in proper context, the trial judge was commenting on the perils of such, in the context of a Crown application to have certain of its witnesses testify multiple times in circumstances that bear no similarity to the split of Ms. Crossman's direct testimony into two logical portions in the circumstances of the case at bar.
- [13] The Crown's position is that the additional unanticipated time gap between the two parts of Ms. Crossman's testimony is not a material change justifying a revisiting of the court's order denying Mr. Ali the right to cross-examine Ms. Crossman after each part of her testimony. The Crown notes that Part 1 of Ms. Crossman's testimony: i.e., the fundamentals of DNA, is not realistically contentious and was simply intended to give the jury a framework to follow the testimony of lab employees in relation to aspects of lab processes that preceded Ms. Crossman's analysis and her opinions as a DNA expert: i.e., Part 2 of her testimony. I agree.
- [14] The Crown also notes that it cannot be faulted for the additional time between the two parts of Ms. Crossman's testimony. Again, I agree, but consider this to be a factor of little to no weight in the specific circumstances of the case at bar.
- [15] In sum, having due regard for all the foregoing, I am not persuaded that Mr. Ali has established a sufficient basis for this court to revisit its earlier ruling denying Mr. Ali's application to cross-examine Ms. Crossman after each part of her testimony. Given the nature of Ms. Crossman's Part 1 testimony, I regard the additional unintended delay between the two parts of her testimony to be inconsequential; when viewed in its proper and full context, it is not reasonably capable of justifying the relief Mr. Ali seeks here.

[16] For these reasons, Mr. Ali's second application to cross-examine Ms. Crossman twice during her testimony, is dismissed. "Bernard J."

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