

CANADA / JUDGMENT

R. v. Ali

2024 BCSC 2063

COURT

Supreme Court of British Columbia

DECIDED

9 February 2024

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2024 BCSC 2063 R. v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali,

2024 BCSC 2063

Date: 20240209

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Pursuant to s. 486.4(2.2) of the Criminal Code of Canada, any information that could identify the victim shall not be published in any document or broadcast or transmitted in any way.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 #72**Counsel for the Crown:**

D.J. Porte

I.A. Keeley

Counsel for the Accused:

T.J. Russell

Counsel for KS appearing by videoconference:

B. Martland, K.C.

Place and Date of Hearing:

Vancouver, B.C.

January 26, 29 and

February 2, 2024

Place and Date of Judgment:

Vancouver, B.C.

February 9, 2024

- [1] THE COURT: On December 8, 2023, Mr. Ali was found guilty of the first- degree murder of 13-year-old MS. He has yet to be sentenced, pending the resolution of certain post-verdict matters. These include a defence application for a stay of proceedings for trial delay, and a sentencing hearing if the stay application is unsuccessful.
- [2] Mr. Ali is in detention and has been appearing in court by video-link in the post-verdict period.
- [3] On January 11, 2024, Mr. Ali filed Notice of Application #72, seeking an order prohibiting KS, the father of MS, from "participating in the proceedings by Teams or other means."
- [4] On January 24, 2024, KS applied for standing to oppose the relief sought by Mr. Ali. This application was supported by the Crown, and opposed by Mr. Ali. KS was granted standing on the basis of the audi alteram partem principle: i.e., justice requires that KS, as a person who would be directly affected by the relief sought, be provided with an opportunity to be heard: A.(L.L.) v. B.(A.), 1995 CanLII 52 (SCC) at paras. 27-28:

27 The one question that remains is whether both a complainant, a third party to the proceedings (whether or not an appellant, but here one of the appellants), and the Crown, a party to the proceedings, have standing in third party appeals. There is no doubt in my mind that they do. The audi alteram partem principle, which is a rule of natural justice and one of the tenets of our

legal system, requires that courts provide an opportunity to be heard to those who will be affected by the decisions. The rules of natural justice or of procedural fairness are most often discussed in the context of judicial review of the decisions of administrative bodies, but they were originally developed in the criminal law context. In Blackstone's Criminal Practice (Murphy rev. 1993), the authors remark at p. 1529:

Traditionally, the rules of natural justice have been defined with a little more precision, and are said to involve two main principles - no man may be a judge in his own cause, and the tribunal must hear both sides of the case. [Emphasis added.]

See *Forsythe v. The Queen*, 1980 CanLII 15 (SCC), [1980] 2 S.C.R. 268; and *Attorney General of Quebec v. Cohen*, 1979 CanLII 223 (SCC), [1979] 2 S.C.R. 305.

28 Here, both the complainant and the Crown possess a direct and necessary interest in making representations. Both would be directly affected by a decision regarding the production of the complainant's private records. The decision is susceptible of affecting the course of the criminal trial. Both, therefore, must be afforded an opportunity to be heard.

- [51] Similarly, in *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33 at para. 47, the Court stated that a person who is directly affected by an order concerning court openness -- because it might harm their individual interest -- should, as a matter of course, have standing to challenge that order:
- [47] In respect of standing, an order limiting court openness engages the constitutionally-protected right of a free press to report on judicial proceedings (*Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2, [2011] 1 S.C.R. 19, at para. 2; *Vancouver Sun*, at para. 26). When that order has been made in the absence of notice to the media, a representative of the media should generally have standing to challenge an order that threatens the open court principle where they are able to show that they will make submissions that were not considered in its making that could affect the result (see, generally, *Hollinger*, at paras. 36-39). In practice, and properly in my view, standing is seldom refused to the media to participate in open court proceedings where it is sought (*J. Rossiter, Law of Publication Bans, Private Hearings and Sealing Orders* (loose-leaf), s. 8.1.10). Equally, a person directly affected by an order concerning court openness because it might harm their individual interests should, as a matter of course, have standing to challenge that order (see, generally, *Ivandaeva Total Image Salon Inc. v. Hlembizky* (2003), 2003 CanLII 43168 (ON CA), 63 O.R. (3d) 769 (C.A.), at para. 27). Courts should nevertheless retain some residual discretion to deny standing where hearing the motion would not be in the interests of justice, as in the case, for example, that it would unduly harm the parties or merely duplicate argument that is already before the court (*Dagenais*, at p. 869; *White*, at para. 12; see, e.g., *Canadian Transportation Accident Investigation and Safety Board v. Canadian Press* (2000), 2000 CanLII 50628 (NS SC), 184 N.S.R. (2d) 159 (S.C.), at paras. 18-21). The requirement of standing, therefore, by limiting who may challenge a publication ban or sealing order, serves the goals of finality and mirrors the discretionary approach to standing

that this Court has previously endorsed.

- [6] I turn, next, to Mr. Ali's application (NOA#72), which engages the Court's inherent jurisdiction to manage these court proceedings. In this regard, I refer to the concluding remarks of Associate Chief Justice Holmes in her oral reasons for judgment regarding Mr. Ali's recent application for mandamus, prohibition, and Charter orders: see *R. v. Ali*, 2024 BCSC 131. In dismissing the application, Holmes A.C.J. made the following observations:
- [27] It is disappointing that this application was brought, and has taken time and effort better applied to the proceedings before the trial judge. The stated grounds for the application raise a classic trial management issue for the trial judge to determine. If there are safety concerns, the trial judge is best placed to assess them and ensure that the appropriate measures are in place. If fears or anxieties on the part of counsel are impairing their ability to represent their client, the trial judge is best placed to assess those effects and the various other circumstances, including the . . . father's interest in following the proceedings, and to determine the appropriate course of action, including form(s) of access to the courtroom.
- [7] This Court's trial management power was described in *R. v. Samaniego*, 2022 SCC 9, as follows:
- [20] The trial management power allows trial judges to control the process of their court and ensure that trials proceed in an effective and orderly fashion . . .
- [21] The power has three interrelated purposes: ensuring that trials proceed fairly, effectively, and efficiently . . .
- [8] Accordingly, I intend to employ the court's trial management power to resolve this matter.
- [9] The "participation" Mr. Ali seeks to end is KS following the post-verdict court proceedings remotely, through his Mandarin/English translator (who listens to the proceedings via MS Teams and then simultaneously translates it to KS by telephone). This allows KS to follow the proceedings from his residence or another remote location. This form of access does not afford KS any role, or voice, in the proceedings.
- [10] In the pre-verdict period, KS frequently followed the trial proceedings in this manner, without incident or objection. However, Mr. Ali and his counsel now say that they are in fear of KS and that any form of participation by him in the proceedings is distracting and intimidating to the point of compromising counsels' ability to defend Mr. Ali.
- [11] Mr. Ali and his counsel submit that this fear of KS arises from information Mr. McCullough says he received from a member or members of the Victoria Police Department on December 10, 2023, in the course of an "update" of importance regarding his, and his wife's, safety. It was an update because Mr. Ali's counsel (whose law practice is based in Victoria) had already been the targets of anonymous death threats and considerable negative online commentary relating to their representation of Mr. Ali, during the trial.

[12] At para. 3 of Mr. McCullough's December 11, 2023 affidavit, he very briefly sets out the December 10, 2023, update as follows:

At the Victoria Police Station, I was advised by police that [KS], the deceased's father, had been in possession of a "Glock" firearm in the courtroom on Friday, December 8, 2023, and had an intention to kill.

[13] Despite the unequivocal nature of the words attributed to the Victoria Police by Mr. McCullough, KS has yet to be arrested and charged for this specific act.

[14] Mr. Ali's counsel assert a belief that the reason KS did not carry out his plan was because the jury returned a "guilty" verdict. In other words, they link KS's murderous intent to a "not guilty" verdict, and believe the only reason he did not act on this intent was the guilty verdict. Nonetheless, they say that they are in mortal fear because they believe KS still intends to kill them. In this regard, paras. 5 and 13 of Mr. Lynskey's December 11, 2023, affidavit are apposite:

[5] . . . Had the jury acquitted, I believe I would likely be dead. The thought of an angry gunman erupting from the gallery and firing shots in my direction is horrifying when I think about how close it may have been to reality had the verdict been different.

. . . [13] Not only is [KS's] virtual presence distracting, but it is also very intimidating. The news that [KS] had brought a loaded gun to the verdict has had a huge and lasting impact on me. The fear of harm lingers long after the events of December 8, 2023. [KS's] attendance by Teams renews that fear and triggers in me an underlying sense of anxiety and dread. I know he is watching me and I believe he is plotting my death with the means, the motive, and what appears to be a serious intention to achieve that very end.

[15] A loaded firearm in the possession of a member of the public who is attending court proceedings is, of course, a matter of utmost concern to the court. It puts the lives and safety of every person in the courtroom at serious risk, not just those who believe that they were the intended targets. Accordingly, I, as the presiding judge, would expect to be informed immediately of such an occurrence by the court sheriffs or by members of the Vancouver Police Department, if either knew, or had reasonable grounds to believe, such to be true. However, no such information came to my attention through the sheriffs or the police on December 8, 2023, or at any time in the following two months that have elapsed, despite Mr. McCullough apparently having been informed of it as early as December 10, 2023.

[16] That said, I am reliably informed that:

- a) there is an outstanding police investigation into whether KS brought a loaded gun into the courtroom for the verdict on December 8, 2023;
- b) in the early stages of this investigation, KS was taken into police custody for the offences of carrying a concealed weapon and possession of a weapon at an unauthorized place;

- c) having taken KS into custody on these charges, the police released him without charge on an undertaking, pursuant to s. 498(1) of the Criminal Code [Code];
 - d) the conditions of KS's undertaking include not attending to this courthouse or within a defined area surrounding it, not having direct or indirect communication with Mr. Ali and his trial counsel, and not having firearms in his possession; and
 - e) since this contact with the police approximately eight weeks ago, KS has remained at large without any criminal charges having yet been laid against him.
- [17] It is noteworthy that there is no evidence of the specific circumstances that led to KS being taken into police custody and then released on an undertaking without charge. Moreover, under s. 498(1.1)(a)(iii) of the Code, peace officers are not to release a person pursuant to s. 498(1) if they believe that, inter alia, it is necessary in the public interest that the person be detained in custody or that the matter of their release be dealt with under another provision of the Code, having regard to all the circumstances, including the need to prevent the continuation or repetition of the offence or the commission of another offence.
- [18] Importantly, however, given: (a) the nature of the ongoing investigation and the asserted fears of Mr. Ali and his counsel arising from their subjective belief that KS is plotting their deaths; and, (b) the death threats Mr. Ali's counsel have received from anonymous others, there was a sufficient basis for the court sheriffs to put additional security measures in place and, indeed, this has occurred. The post-verdict applications are being held in a "secure" courtroom with various safety enhancements, not least of which is Lexan bullet-resistant glazing separating the public gallery from the rest of the courtroom. Moreover, when Mr. Ali and/or his counsel are attending any of these post-verdict court proceedings personally, I am informed that there will be a security gate at the entry to the courtroom.
- [19] I am satisfied these enhanced security measures and the police restrictions imposed upon KS provide the appropriate balance between the subjective fears and anxieties of Mr. Ali and his counsel as well as the safety and security of all court participants and members of the public attending these proceedings, on the one hand, and KS's interest in being able to follow the proceedings as they unfold, on the other.
- [20] KS, as a member of the public, has a strong presumptive right to observe and listen to the trial proceedings pursuant to the well-established "open court principle". He also happens to have a compelling personal interest in the proceedings as the father of 13-year-old MS, the victim who Mr. Ali raped and murdered. Notwithstanding the foregoing, KS seeks only to be permitted to follow the proceedings by telephone connection to a Mandarin interpreter who would attend the court proceedings remotely (by MS Teams) and simultaneously translate them to KS, who would be at another remote location outside the area restriction in his undertaking, such as his residence.

- [21] Mr. Lynskey categorizes this as "virtual attendance" and says he finds it unnerving because it allows KS to see him but does not allow him to see KS. However, KS and Mr. Lynskey would not be able to see one another if KS were allowed to follow the proceedings in the manner proposed by him. This manner of participation is not prohibited by KS's undertaking, and while Mr. Ali has argued that it is a form of indirect communication with him and his counsel, I am not persuaded that is so.
- [22] Indirect communication is well understood to mean a communication that is transmitted from Person A to Person B through Person C, rather than directly from A to B, and there is no suggestion this has occurred, or will be a concern here.
- [23] Mr. Ali also argues that the manner of participation sought undermines the purpose of his area restriction because it would allow KS to know when Mr. Ali's counsel are "coming and going from the courthouse". Mr. Ali provided no authority supporting this position. The proceedings are being held in open court on dates that are a matter of public record. The "comings and goings" of counsel are an aspect of these public proceedings and would be readily ascertainable by any member of the public, including KS, whether he was following the proceedings in the manner proposed or not.
- [24] In the absence of supporting law, I would not accede to the proposition that an area restriction implicitly restricts the person bound by it from access to any information that might suggest when another person might be entering or leaving a protected zone, if for no reason other than the virtual impossibility of enforcing such an implied term.
- [25] For all these reasons, I am satisfied that the exclusion of KS, as sought by Mr. Ali and his counsel, would be more heavy-handed than is necessary to protect their interests as participants in the proceedings and to preserve the overall fairness of the trial. The fears and anxieties of Mr. Ali and his counsel have been recognized and addressed through enhanced courtroom security measures. Moreover, KS is bound by an undertaking that, inter alia, bars him from attending the proceedings in person.
- [26] KS is permitted to follow the proceedings remotely, in the manner sought by him.

"Bernard J."

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