

CANADA / JUDGMENT

R. v. Ali

2024 BCSC 131

COURT

Supreme Court of British Columbia

DECIDED

25 January 2024

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2024 BCSC 131 R. v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali,

2024 BCSC 131

Date: 20240125

Docket: 29405

Registry: Vancouver

Rex

v.

Ibrahim Ali

Applicant

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Before: The Honourable Associate Chief Justice H. Holmes

Oral Reasons for Judgment

re Application for Mandamus, Prohibition and Charter Orders

Counsel for the Crown:

D.J. Porte

I.A. Keeley

Counsel for the Applicant:

T.J. Russell

Counsel for the father of the deceased victim:

B. Martland, K.C.

Place and Date of Hearing:

Vancouver, B.C.

January 25, 2024

Place and Date of Judgment:

Vancouver, B.C.

January 25, 2024

Introduction

- [1] It is abundantly clear, from a review of Mr. Ali's application materials, that his application must be dismissed. The application asks for orders that either this Court has no jurisdiction to grant, or, to the extent to that there may be jurisdiction, clearly should not grant.
- [2] My reasons will be brief. They are based on legal principles that are well established, some of them fundamental to our legal system. Also, I do not wish to occasion any further delay in counsel redirecting their energy to concluding the proceedings before the trial judge.

The Nature and Context of the Application

- [3] The application describes itself as urgent, is directed to the Chief Justice of the Court or his designate, and is set down for January 25, 2024 at 10:00 a.m. for an estimated one hour. The Chief Justice is out of the province today and is unavailable to hear the application. I am presiding both in the capacity of Associate Chief Justice, exercising the authority of the Chief Justice in his absence, and in the capacity of the Chief Justice's designate to hear the application.
- [4] Mr. Ali was found guilty by a jury on December 8, 2023 of first degree murder after a lengthy trial in this Court. After the jury's verdict, various matters remained to be addressed before the trial judge, Justice Bernard, and some are still outstanding. These include some miscellaneous matters, including whether some proceedings heard in camera may appropriately be made accessible to the public, and some applications by media representatives for access to trial exhibits or records, as well as, more substantively, Mr. Ali's Jordan application for a stay of proceedings, and, if no stay is granted, his sentencing.

- [5] The present application seeks "orders in the nature of mandamus and prohibition, pursuant to the common law, and pursuant to sections 7, 11(d) and 24(1) of the Canadian Charter of Rights and Freedoms". Later in the notice of application, what is sought is described as, "an order in the nature of a writ of mandamus and/or prohibition, to remedy the trial judge's excess of jurisdiction, or alternatively, . . . an order under section 24(1) of the Charter, to prevent the continuing violations of sections 7 and 11(d)".
- [6] More specifically, the application seeks the following (quoting from the notice of application):
1. An order prohibiting the trial judge from continuing the proceedings without an interim order protecting the Applicant and his counsel from the intimidation of [the deceased's father], and/or
 2. An order of mandamus directing the trial judge to grant an interim order excluding [the deceased's father], until such time as the application can be heard, and/or
 3. An order pursuant to section 24(1) of the Charter excluding [the deceased's father] from attending any part of the trial by Teams or otherwise.
- [7] From the notice of application as a whole, it is evident that these requests to "exclude" the deceased's father mean not merely to prevent him being in the public gallery of the courtroom during the proceedings, but also to prohibit him listening to the proceedings or having the proceedings interpreted to him while he is in a remote location, as the trial judge has thus far permitted.
- [8] The stated grounds are, in very brief overview, that defence counsel on the trial fear for their and their client's safety and are in a heightened state of anxiety about having any connection, even by remote means, with the deceased's father. This is because (a) to their understanding, the deceased's father brought a gun into the courtroom during the proceedings, and (b) defence counsel have received a large number of offensive messages, some of them threatening toward them or their client. On their face, the messages appear to be from a number of different senders.
- [9] Because the present application must obviously be dismissed, there is no need to discuss the merits of the stated grounds for the orders Mr. Ali seeks, and I will not do so.

The Application Should Be Dismissed

- [10] The jurisdictional problems for this application include the following five points. Some relate only to the applications for mandamus and prohibition. Others apply more generally to the entirety of the application, which appears to also seek Charter-based orders, although the jurisdictional foundation for such orders is also unclear.
1. Prerogative Relief Is Not Available Against a Superior Court

- [11] First, prerogative relief is not available in relation to the conduct or decisions of a superior court judge. The prerogative writs of mandamus and prohibition respond to jurisdictional errors, mandamus where the decision-maker has declined to exercise or has wrongly exercised their jurisdiction, prohibition where the decision-maker purports to exercise a jurisdiction they do not have. E.G. Ewaschuk's *Criminal Pleadings & Practice in Canada*, 3rd ed. (Toronto: Carswell, 2023) gives a helpful summary at § 26.79 and § 26.95:

Mandamus is the means whereby a superior court "compels an inferior court to exercise jurisdiction" which the inferior court has declined, or wrongly exercised, thereby "committing jurisdictional error". However, mandamus is not available to force the inferior court to exercise its discretion in a particular way when it is "under no obligation" to do so, so that mandamus may compel the inferior court or body to give proper consideration to a matter but may not dictate the result of the hearing of the matter.

Prohibition is the means whereby a superior court prevents (prohibits) a court of inferior jurisdiction from exercising, or attempting to exercise, a jurisdiction which it does not possess or which it has lost (exceeded) during the impugned proceedings.

- [12] Ewaschuk explains further that, as superior courts have plenary and original jurisdiction, they are incapable of assuming jurisdiction they do not possess, and are therefore not subject to prerogative writs: see also *R. v. Balfour Moss*, 2006 SKCA 35 at paras. 9-10; *Richardson v. Richardson*, 2021 CarswellSask 262, 337 A.C.W.S. (3d) 303 (S.K.C.A.) at paras. 21, 32; *R. v. Duong*, 1998 CarswellOnt 3449, [1998] O.J. No. 3546 (O.N.S.C.) at paras. 13-15, all of which recognize that prerogative relief is not available against a superior court.

2. A Court Does Not Grant Prerogative Relief In Respect of a Court of Equal Jurisdiction

- [13] Second, inherent to the notion of prerogative relief is that a "superior" court may grant it in relation to the conduct of an "inferior" body or public official. Prerogative relief has no place as between judges of equivalent jurisdiction.

- [14] It does not assist Mr. Ali that this application is directed to the Chief Justice or his designate, for the brief reasons I will give later.

3. Prerogative Relief Is Not Available When It Would Have No Utility

- [15] Third, prerogative relief generally will not be granted when it has no utility. In *Judicial Review of Administrative Action in Canada*, 4th ed (Toronto: Carswell, 2023), authors Donald J.M. Brown and John M. Evans, citing *Laidlaw J.A. in Karavos v. Toronto (City)*, 1947 CarswellOnt 398, [1948] 3 D.L.R. 294 (Ont. C.A.), elaborated on the nature and prerequisites for mandamus at § 1.21:

... since mandamus, like the mandatory injunction it resembles, is coercive in nature, the courts have carefully circumscribed the circumstances in which it will issue. By definition, it has been said not to be available as an interim form of relief. Furthermore, as with all of the prerogative remedies, it may also be denied in the exercise of the court's discretion, which includes consideration of whether there is any utility in issuing the order. [Emphasis added.]

[16] The present application seeks prerogative relief requiring the trial judge to make an interim order excluding the deceased's father from the proceedings.

[17] Moreover, prerogative relief is generally not granted when the applicant has other legal avenues for relief, such as by way of appeal. As stated in *Richardson* at para. 23 (in relation to certiorari, but for reasons equally applicable to mandamus and prohibition):

Even if it is possible to grant relief in the form of certiorari, that does not mean certiorari is necessarily an appropriate remedy. Where the decision from which relief is sought is one that can be appealed, or there is another adequate remedy, certiorari will generally be unavailable (*Bayne(Rural Municipality No. 371) v Saskatchewan Water Corp.*(1990), 90 Sask R102 (CA); and *Arch Transco Ltd. v Regina (City)*, 2002 SKCA 126 at para1, 227 Sask R 139).

[18] Mr. Ali has other legal avenues for relief. An application seeking an order that the deceased's father be excluded from the proceedings is currently before the trial judge. Also, a robust appeal process will be available to Mr. Ali in relation to the jury's verdict.

4. The Trial Judge's Jurisdiction Is Complete

[19] Fourth, the trial judge seized of the case has "complete" jurisdiction to determine all of the issues that arise, except those on appeal. No other judge has jurisdiction to determine issues in the case.

[20] In *R. v. Duong*, the Associate Chief Justice of the Ontario Superior Court of Justice (as she then was) refused an application to recuse a trial judge (of the same court) for bias. The Associate Chief Justice began by noting the inherent jurisdiction of a superior court trial judge in all civil and criminal matters. She then considered whether a judge's jurisdiction is thus "complete" in respect of a matter of which they are seized.

[21] The answer was in the affirmative:

[17] The superior court jurisdiction is not only inherent, but also complete. And such complete jurisdiction, to hear all matters relating to the trial, resides with the judge seized of the trial. [Emphasis in original.]

[22] For this reason, no other judge of the same court had jurisdiction to entertain the recusal application. The Associate Chief Justice also noted that to entertain such an application would run contrary to both the superior court's inherent jurisdiction and the Criminal Code's framework for appeals:

- [42] While the Rules of Criminal Proceedings do not expressly mandate that the trial judge must hear all pre-trial motions, or that they must all be heard by the same judge, to allow another superior court judge to hear an application for recusal of the trial judge seized would be inconsistent with the exhaustive appeal provisions of the Criminal Code and the inherent and complete jurisdiction of the superior court trial judge to determine all matters in the trial proceeding. The Rules cannot be inconsistent with the Code.
- [23] I note in general terms that the "complete" jurisdiction of a seized trial judge is now shared to an extent with that of a case management judge appointed under s. 551.1 of the Code, a provision introduced since *Duong and R. v. Mallory* (December 16, 1996), LeSage C.J.O.C. (Ont. Gen. Div.), an earlier recusal application referred to in *Duong* that was rejected on the same grounds. However, this has no bearing on this application for several reasons, including that it is Justice Bernard, the trial judge, who was appointed under s. 551.1 as case management judge for this case.
5. The Chief Justice Has No Special Jurisdiction to Hear the Application
- [24] It does not assist Mr. Ali that his application is to the Chief Justice of the Court.
- [25] The Associate Chief Justice in *Duong* considered whether jurisdiction to hear the recusal application arose from the special status of the chief justice, and agreed with the conclusion in *Mallory* that it did not. While chief justices have special administrative duties and functions, these do not confer or imply a different jurisdiction from the court's other judges in respect of the court's cases:
- [41] Chief Justice LeSage in *R. v. Mallory* (December 16, 1996), LeSage C.J.O.C. (Ont. Gen. Div.) stated that the motion for recusal of a superior trial court judge based on bias "to the extent that it is brought before me as Chief Justice, is without jurisdiction"; and to the extent it was brought before him or any other superior court judge, he found "no jurisdiction to entertain the motion which was properly returnable before the trial judge." The Chief Justice implied that his assignment duties, delegated to the Regional Senior Justice, were complete when the trial judge was assigned to the case.
- [42] . . . Finally, there is no special authority conferred on the Chief Justice which would allow him to override the express and implied provisions of the Code.

Conclusion

- [26] This Court has no jurisdiction to grant the prerogative relief Mr. Ali seeks. To the extent that he seeks Charter-based relief, the trial judge has complete jurisdiction to determine whether or not it should be granted.
- [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 deceased's father's interest in following the proceedings, and to determine the appropriate course of action, including form(s) of access to the courtroom.

"The Honourable Associate Chief Justice H. Holmes"

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Prepared on 27 October 2026 · Esheria