

CANADA / JUDGMENT

R. v. Ali, Boparai & Malonga-Massamba

2020 BCSC 1771

COURT

Supreme Court of British Columbia

DECIDED

12 November 2020

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2020 BCSC 1771 R. v. Ali, Boparai & Malonga-Massamba

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali, Boparai & Malonga-Massamba,

2020 BCSC 1771

Date: 20201112

Docket: 28709

Registry: Vancouver

Regina

v.

Mustapha Mohammed Ali, Pashminder Boparai,

Moeen Khan, and Noebin Jeffrey Malonga-Massamba

Before: The Honourable Mr. Justice Ehrcke

Oral Reasons for Judgment

Section 650(2)(b)

Counsel for Crown:

Counsel for Mr. Malonga-Massamba:

Rusty J. Antonuk

Andrew C. Nelson

Counsel for Mr. Ali:

Brent V. Bagnall

Troy D. Anderson

Counsel for Mr. Boparai:

Gloria M. Ng

T. Au (A/S)

Place and Date of Hearing:

Vancouver B.C.

October 30, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 12, 2020

I. introduction

- [1] The accused Mustapha Mohammed Ali, Pashminder Boparai, and Noebin Jeffrey Malonga-Massamba are jointly charged with conspiracy to commit murder between June 4 -19, 2018. Their trial by jury is set for five weeks in Vancouver, British Columbia, starting July 26, 2021. Mr. Boparai is currently in custody in the North Fraser Pre-Trial Centre. Mr. Ali and Mr. Malonga-Massamba are on judicial interim release, and are residing in Ontario and Quebec, respectively.
- [2] A number of pre-trial applications have been brought by the three accuseds, and I have been assigned by the Associate Chief Justice as Case Management Judge pursuant to s. 551.1 of the Criminal Code.
- [3] One of those pre-trial applications, Application #4, was heard in a voir dire in July 2020, during a time when the court was facing the challenge of maintaining access to justice despite the serious health concerns caused by the COVID-19 pandemic. In my July 2, 2020 reasons indexed at 2020 BCSC 996, I granted requests by Mr. Ali and by Mr. Malonga-Massamba for permission not to be physically present for the hearing of that voir dire. I also granted the request by Mr. Boparai to attend court on that voir dire from the North Fraser Pre-Trial Center by way of video-conferencing.
- [4] The time for the hearing of the next of the pre-trial application is now approaching. Application #6 is set to be heard November 23 - 27, 2020 in Vancouver. Like the previous application, this one will be heard in a voir dire at which witnesses will testify.

- [5] The three accused again request permission not to be physically present in court for that voir dire, despite the fact that evidence will be adduced at the hearing. Counsel for all three accused have advised me that they have discussed Application #6 with their clients and that their clients have no material evidence to give on the voir dire.

II. law

- [6] Section 650(1) of the Criminal Code provides that an accused shall, subject to certain exceptions, be present in court during the whole of his or her trial. Section 650(1) reads:

650 (1) Subject to subsections (1.1) to (2) and section 650.01, an accused, other than an organization, shall be present in court during the whole of his or her trial.

(1.1) If the court so orders, and if the prosecutor and the accused so agree, the accused may appear by counsel or by closed-circuit television or videoconference, for any part of the trial other than a part in which the evidence of a witness is taken.

(1.2) If the court so orders, an accused who is confined in prison may appear by closed-circuit television or videoconference, for any part of the trial other than a part in which the evidence of a witness is taken, as long as the accused is given the opportunity to communicate privately with counsel if they are represented by counsel.

(2) The court may;

- (a) cause the accused to be removed and to be kept out of court, where he misconducts himself by interrupting the proceedings so that to continue the proceedings in his presence would not be feasible;
- (b) permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper; or
- (c) cause the accused to be removed and to be kept out of court during the trial of an issue as to whether the accused is unfit to stand trial, where it is satisfied that failure to do so might have an adverse effect on the mental condition of the accused.

...

- [7] Subsections (1.1) and (1.2) have no application here because, the evidence of witnesses will be called on the voir dire for Application #6, and subsections (1.1) and (1.2) are limited to parts of a trial "other than a part in which the evidence of a witness is taken." For the purposes of s. 650(1), a voir dire is considered a part of the trial: see R. v. Edwardson, 2019 BCCA 259 at para. 9.

- [8] All three accused have framed their requests as applications under s. 650(2)(b) and each accused requests permission to be out of court during the hearing of Application #6.

III. discussion & decision

A. Mr. Boparai

- [9] In my previous reasons on July 2, 2020, indexed at 2020 BCSC 996, I held that while s. 650(2)(b) should be used sparingly and with caution, it may apply in circumstances where there is a valid and legitimate reason for the accused's absence that does not offend public policy, and that is beneficial to the accused without prejudicing his or her fair trial rights and the fair trial rights of the other trial participants.
- [10] I adopted as correct, the conclusion of Monahan J. in *R. v. Daley*, 2020 ONCJ 201, that s. 650(1.1) does not limit the broad discretion conferred by s. 650(2)(b), which includes the discretion, in appropriate circumstances, to permit an accused to appear by videoconference, even for a portion of the trial where the evidence of a witness will be taken.
- [11] As set out above, Mr. Boparai is currently in custody at the North Fraser Pre-Trial Center. He applies for permission to appear from that institution by videoconference. His application is supported by an affidavit of Trudy Au, sworn October 22, 2020, which describes the protocols that have been put in place by BC Corrections on account of the current COVID-19 pandemic. These include a requirement that an inmate who attends court on multiple days will, at the conclusion of the attendance, be placed in an induction unit at the remand center for a 14 day assessment period where their freedom of movement will be restricted to minimize the possible spread of the virus. Other inmates have advised that this may involve a "lockdown" of 21-23 hours per day. Ms. Au's affidavit also recites Mr. Boparai's health concerns. At para. 12 she deposes:
12. I've been further advised that the Applicant has concerns about contracting the COVID-19 virus as a result of repeated transport and movement in and out of the institution and the Courthouse. I'm advised that the Applicant is already dealing with a number of health issues due to the loss of his leg, mobility issues with his arm, and the overall challenges of living in an institution while needing to use a wheelchair.
- [12] Mr. Boparai has signed a waiver of his right to be present for the voir dire. That waiver includes an acknowledgment that if the Court grants his request, his personal absence from court will not form the grounds of any future appeal.
- [13] The Crown has confirmed that the equipment is available for Mr. Boparai to attend court from the North Fraser Pre-Trial Center by way of videoconferencing, and in light of the waiver he has signed, the Crown does not oppose his attendance at Application #6 by such video conference.
- [14] In light of all these circumstances, I order under s. 650(2)(b) that Mr. Boparai may be permitted to attend the voir dire on Application #6 by videoconference from the institution where he is held.

B. Mr. Ali & Mr. Malonga-Massamba

- [15] The circumstances of Mr. Ali and Mr. Malonga-Massamba are different from those of Mr. Boparai because neither of them is in custody. Mr. Ali is residing in Ottawa, Ontario, and Mr. Malonga-Massamba is residing in Gatineau, Quebec. Both are thousands of kilometres from Vancouver, BC. While that circumstance would not normally be a sufficient reason to be absent from court for the hearing of the application which they have brought, I am aware that the current COVID-19 pandemic poses a certain health risk for interprovincial travel.
- [16] In his affidavit in support of his application, Mr. Malonga-Massamba deposes that he is concerned about risking exposure to COVID-19 through travel to British Columbia for this application. He also says that he cannot afford to fly multiple times for the various pre-trial applications that are set. He acknowledges waiving any appeal rights that might arise from his non-attendance during voir dires. This is supported by the affidavit of his counsel, Andrew Nelson, sworn on November 10, 2020.
- [17] Mr. Ali's application is supported by an affidavit from his counsel, Brent Bagnall, on sworn October 23, 2020. He deposes that Mr. Ali is concerned that travel would put his health and that of people around him at risk, particularly his fiancée, who has asthma, and their 2-month old child. Mr. Ali has signed a waiver similar to those of Mr. Boparai and Mr. Malonga-Massamba, in which he affirms that he will not use his absence from court as the basis for any future appeal.
- [18] As the British Columbia Court of Appeal observed in *R. v. Edwardson*, accused persons can waive procedural rights for their benefit, including those protected by s. 650(1), so long as the waiver is informed, clear, and unequivocal. I am satisfied that the waivers signed by the three accused in this case are informed, clear, and unequivocal.
- [19] I am satisfied that both Mr. Ali and Mr. Malonga-Massamba have shown sufficient reason, on account of the COVID-19 pandemic, for granting them permission not to be physically present for the voir dire on Application #6, but rather to appear on the voir dire by way of computers using MS TEAMS software. Counsel have assured me that their clients have access to the necessary computers, software, and reliable internet connection. Counsel will liaise with court services about securing a suitable courtroom with the necessary technical equipment here in Vancouver.

C. Section 714.1 Application

- [20] Finally, I also have before me an application by the Crown for an order pursuant to s. 714.1 of the Criminal Code permitting Cst. Moawad to testify on the voir dire on Application #6 by videoconference.

[21] That application is supported by an affidavit of Angela Akerman sworn on October 23, 2020, where she deposes that Cst. Moawad is currently located in Montreal, Quebec, and that there would be a significant cost-saving if he were permitted to give his evidence on the voir dire by videoconference. None of the accused have expressed opposition to this application by the Crown.

[22] Section 714.1. of the Criminal Code provides:

714.1 A court may order that a witness in Canada give evidence by audioconference or videoconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances, including

- (a) the location and personal circumstances of the witness;
- (b) the costs that would be incurred if the witness were to appear personally;
- (c) the nature of the witness' anticipated evidence;
- (d) the suitability of the location from where the witness will give evidence;
- (e) the accused's right to a fair and public hearing;
- (f) the nature and seriousness of the offence; and
- (g) any potential prejudice to the parties caused by the fact that the witness would not be seen by them, if the court were to order the evidence to be given by audioconference.

[23] Taking account of all the circumstances, including those listed in s. 714.1 (a)-(f), I am satisfied that an order should be made permitting Cst. Moawad to give his evidence on the voir dire on Application #6 by videoconference.

IV. conclusion

[24] In summary, pursuant to s. 650(2)(b) of the Criminal Code, I grant permission to each of the three accused not to be personally present in court for the voir dire on Application #6 as set out above, but rather to appear by videoconference or by MS TEAMS.

[25] Pursuant to s. 714.1 of the Criminal Code, I order that Cst. Moawad may be permitted to give his evidence on the voir dire on Application #6 by videoconference.

[26] The present ruling applies only to Application #6 of this trial.

"Ehrcke, J."

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