

CANADA / JUDGMENT

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

2020 BCSC 996

COURT

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DECIDED

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IN THE SUPREME OF BRITISH COLUMBIA

Citation:

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

2020 BCSC 996

Date: 20200702

Docket: 28709

Registry: Vancouver

Between:

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:

Rusty J. Antonuk

Counsel for Mr. Ali:

Brent V. Bagnall

Troy D. Anderson

Counsel for Mr. Boparai:

Robert C. Claus

Gloria M. Ng

Counsel for Mr. Mr. Malonga-Massamba:

Andrew C. Nelson

Place of Application:

Vancouver, B.C.

Place and Date of Judgment:

Vancouver, B.C.

July 2, 2020

- [1] Mustapha Mohammed Ali, Pashminder Boparai, and Noebin Jeffrey Malonga-Massamba (the "accused") are jointly charged on Indictment 287901 with conspiracy to commit murder.
- [2] Although their jury trial is not scheduled to commence until July 26, 2021, the accused have brought a number of pre-trial applications, 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, which counsel have referred to as "Application #4", is set for hearing in a voir dire July 2-8, 2020. Each of the three accused have requested permission to be absent from court or to appear by video-conferencing for that voir dire.
- [4] The requests come at a time when the court is facing the challenge of maintaining access to justice in the context of serious health concerns occasioned by the current Covid19 pandemic. It is largely because of those health concerns that the accused have made their requests to be excused from personal attendance in court.
- [5] While not being unsympathetic to the concerns raised by the accused in their request, the Crown has urged caution in order to ensure that no step is taken which could subsequently lead to an argument, perhaps on an appeal, that the court lost jurisdiction by permitting the accused not to be personally present in court throughout the duration of their trial.
- [6] The challenging question now before me is the extent to which the court has the discretion to grant the request made by the accused, without risking a loss of jurisdiction.

[7] The starting point for a consideration of this request is s. 650(1) of the Criminal Code, which provides that an accused shall, subject to certain exceptions, be present in court during the whole of his or her trial. That section 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.

[8] Section 650(1) has been described as creating both a right and a duty.

[9] As noted, there are certain exceptions. Subsections (1.1) and (1.2) provide:

650 (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.

[10] Neither of those subsections has application here, because evidence of witnesses will be called on the voir dire for Application #4, 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, a voir dire is considered part of the trial: see *R. v. Edwardson*, 2019 BCCA 259 at para. 9.

[11] All three accused have framed their requests as applications under s. 650(2)(b) of the Criminal Code. For context, I set out the whole of s. 650(2), which provides:

650(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.

[12] The question here is the extent of the discretion afforded to the court under s. 650(2)(b), particularly in a case, like this one, where the accused requests permission to be absent during a part of the trial when the evidence of witnesses will be taken.

- [13] Although the plain wording of s. 650(2)(b) would appear to create an open-ended discretion, historically, the section has been applied with restraint. As Benotto J. observed in *R. v. Drabinsky* (2008), 235 C.C.C. (3d) 350 (Ont. S.C.J.) at para. 7:
- [7] The use of the word "permit" makes it clear that the court is being responsive to a request. An accused has no absolute right to be absent. Permission must be sought because the right of the accused to be present is also a duty.
- [14] Germain J. undertook a comprehensive review of the jurisprudence in *R. v. Pazder*, 2015 ABQB 493 at para. 241 et seq., and I have considered the helpful summary he provided of the applicable principles. At para. 249 he observed:
- [249] As is obvious from this survey, the first fundamental principle is that Criminal Code, s. 650(2)(b) should only be used sparingly, and with caution. An accused's absence should only occur where there is a valid and legitimate reason that does not offend public policy, and that is beneficial to the accused without prejudicing the fair trial rights of the accused and other trial participants.
- [15] With these principles in mind, I turn to the specific requests of each accused.
- [16] Mr. Boparai is in custody at the North Fraser Pre-Trial Center. He submits that he should be excused from personal attendance in court for Application #4 because he is not a party to that application. He points out that the application was not brought by him but rather by Mr. Ali and Mr. Malonga-Massamba, and that the impugned evidence relates only to them. He submits that if anyone's rights under s. 8 of the Charter were infringed, it was the rights of Mr. Ali and Mr. Malonga-Massamba. He submits that since he is not alleging any breach of his own Charter rights in obtaining that evidence, he should be permitted not to attend court or permitted to attend by videoconference on Application #4, even though the Crown will be calling evidence on that application.
- [17] Mr. Boparai's application is supported by an affidavit of his counsel, Gloria Ng, who describes the protocols that have been put in place by BC Corrections on account of the pandemic. At paragraphs 5-8 she deposes:
5. I have been advised through my interactions with other accused inmates and Corrections staff that any inmate who leaves the remand institution for court and returns to the institution will be process as a "new" admission and therefore have to enter a 14 day quarantine period on the COVID segregation unit.
 6. On the COVID segregation unit, inmates are on "lockdown" for 23 hours a day.
 7. As such, should the Applicant be transferred to attend court in-person he will be re-housed on this segregation unit and will be kept in isolation for 23 hours a day.

8. Given the harsh conditions of living on a segregation unit, the Applicant wishes to attend the voir dres by videoconferencing or wishes to be excused with counsel appearing on his behalf.

[18] 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.

[19] 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 #4 by such video conference.

[20] Despite the flexible position taken by the Crown, the question remains of whether the court has jurisdiction to grant Mr. Boparai's request to attend by videoconference.

[21] An order granting the request to attend by videoconference cannot be made under s. 650(1.2) because the evidence of witnesses will be called on Application #4. For this reason, Mr. Boparai makes his request under s. 650(2)(b). Yet some courts have held that s. 650(2)(b) cannot be invoked to permit attendance by videoconference.

[22] In *R. v. Walker*, 2004 ONCJ 271, Dean J. held at para. 40:

While paragraph 650(2)(b) allows the court to excuse the accused "on such conditions as the court considers proper", this must be read in its full statutory context. Given the limits on the use of video links, it would not be appropriate to interpret the broad, general discretion in paragraph 650(2)(b) as allowing what subsections 650(1.1) and (1.2) exclude.

[23] That passage was quoted with approval by Downes J. in *R. v. Candelaria*, 2020 ONCJ 194. At para. 13 of that decision, Downes J wrote:

But seen in its statutory context and in light of the caselaw on point, s. 650(2)(b) is about absence not presence by alternative means. Using it in Mr. Candelaria's situation, where he wants to be present and have his matter heard, would in my view be an artifice of statutory interpretation.

[Emphasis in original]

[24] That interpretation was rejected, however, in *R. v. Daley*, 2020 ONCJ 201, where Monahan J. held that s. 650(1.1) does not limit the broad discretion conferred by s. 650(2)(b). He wrote at para. 14:

Justice Downes in *Candelaria* quotes with approval the comments of Justice Dean in *R. v. Walker*, [2014] O.J. No. 2567 (Ont. C.J.) to the effect that "it would not be appropriate to interpret the broad, general discretion in paragraph 650(2)(b) as allowing what subsections 650 (1.1) and (1.2) exclude". With respect, it is my view that subsections (1.1) and (1.2) "exclude" nothing. They only enable. They do not and could not narrow the broad scope of subsection 650(2)(b). As I have already said, subsection 650(2)(b) contemplates precisely that which is not provided for in (1.1)

and (1.2) namely that evidence can be taken from a witness even when the accused is completely absent from the trial.

[25] Justice Monahan acknowledged that in the reported cases, s. 650(2)(b) had been used almost exclusively to deal with circumstances where an accused requested to be completely absent from his or her trial, but he reasoned that it would be anomalous to conclude that a court could permit an accused to be completely absent under s. 650(2)(b) but could not permit that same accused to participate by telephone or videoconference. He wrote at para. 15 (in reference to *R. v. Drabinsky*):

Having said that, can there be any doubt that if the defendant Mr. Drabinsky asked that he be permitted to be absent from his trial for a day but he requested that he permitted to listen to the trial by audio telephone, that subsection 650(2)(b) would have permitted the trial judge to allow such participation if she wished? The answer must surely be yes. Similarly, if Mr. Drabinsky or some other defendant in another case had indicated that for good reason (medical reasons for example) the defendant could not be present for the first day of trial but he nevertheless wished to have his trial go ahead in his absence, can there be any doubt that the trial judge could have permitted him to enter his plea of not guilty by audio telephone? In my view, the answer must be yes. In this regard, I note that subsection 650(2)(b) permits the trial judge to have the accused out of court during "the whole or any part of his trial" (which must include a plea) "on such conditions as the court considers proper" (which vests a broad discretion in the trial judge to impose or allow any conditions to ensure that justice is served and must permit the judge to have the accused participate by audio).

[Emphasis in original]

[26] Before me, defence counsel submits that although s. 650(1.2) cannot apply to a part of the trial where the evidence of a witness is taken, s. 650(1.2) does not constitute a limit on the court's broad discretion under s. 650(2)(b). According to counsel, this interpretation does not render s. 650(1.2) superfluous, because s. 650(2)(b) is limited to situations where the accused seeks the permission of the court, whereas s. 650(1.2) permits the court to order the appearance of an accused in custody by videoconference even if the accused would prefer to appear in person.

[27] I agree with that interpretation. As Monahan J. held in *R. v. Daley*, 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.

[28] I am satisfied that Mr. Boparai has established compelling reasons for his request, and in light of the waiver he has signed, I order under s. 650(2)(b) that he may be permitted to attend the voir dire on Application #4 by videoconference from the institution where he is held. I understand that while Ms. Ng will not attend the voir dire, Mr. Troy Anderson will appear as her agent. As well, Ms. Ng's articulated student, Ms. Au will attend throughout the voir dire. In addition, counsel will order transcripts of the proceedings during the voir dire

and will furnish them to Mr. Boparai.

- [29] The circumstances of Mr. Ali and Mr. Malonga-Massamba are significantly different from those of Mr. Boparai because unlike him, they are the applicants on Application #4, and their interests will be affected by voir dire. As well, neither Mr. Ali nor Mr. Malonga-Massamba are 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. Under normal circumstances, that would likely be an insufficient reason to permit them to be absent from court for the hearing of the application which they have brought, but these are not normal circumstances. We are in the midst of a global pandemic, and at least for the present time, that pandemic poses a health risk for interprovincial travel.
- [30] 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, and 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.
- [31] Mr. Ali's application is supported by an affidavit from his counsel, Brent Bagnall, who deposes that Mr. Ali has limited income because his work place was closed for 3 months and he is now working part time. If he must pay for travel to British Columbia, he would not be able to pay his rent. Mr. Ali lives with his fiancée, who is 32 weeks pregnant and suffers from asthma. If he travelled to British Columbia, he would have to self-quarantine for 14 days upon his return to Ontario. He is concerned that travel to British Columbia to attend court for this voir dire would put his health at risk and would also create a potential risk to his fiancée. Mr. Ali has signed a waiver similar to those of Mr. Boparai and Mr. Malonga-Massamba, in which he explicitly affirms that he will not use his absence from court as the basis for any future appeal.
- [32] 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, 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.
- [33] I am satisfied that both Mr. Ali and Mr. Malonga-Massamba have shown sufficient reason for granting them permission not to be present for the voir dire on Application #4. Because they are both out of custody, there is no videoconferencing system in place for them to attend by videoconference. There was some exploration of the use of computers with MS TEAMS software, but as Mr. Bagnall deposed in his affidavit and confirmed again today, the use of that software is subject to existing technical limitations that render it impractical for use in a case like this one where a witness is being called to testify in person in court.

- [34] Counsel for Mr. Ali and for Mr. Malonga-Massamba confirmed today that their clients' request is a request to be absent from court, and not a request to appear by videoconference. They also confirmed that their clients have no material evidence to give on the voir dire of Application #4 and their absence during the voir dire will not prejudice their fair trial rights or the fair trial rights of other trial participants.
- [35] In granting Mr. Ali and Mr. Malonga-Massamba permission to be absent during the voir dire on Application #4, I take account of the fact that they are both represented by senior counsel experienced in criminal law, who will be present during the voir dire. As in the case of Mr. Boparai, counsel for Mr. Ali and Mr. Malonga-Massamba will provide them with daily transcripts of the voir dire.
- [36] As I indicated during oral submissions, if counsel can find a way to permit Mr. Ali and/or Mr. Malonga-Massamba to listen to the voir dire proceedings by telephone, I would have no objection, but that option is only a possibility, and is not a condition that is being ordered by the court.
- [37] In summary, I grant permission to each of the three accused not to be personally present in court for the voir dire on Application #4 as set out above in these reasons. I find that each accused has shown valid and legitimate reasons that do not offend public policy, and that granting such permission is beneficial to each accused without prejudicing their fair trial rights or those of other trial participants. The granting of this permission is predicated on each accused waiving his procedural right to be personally present in court and acknowledging that this will not form a ground for any future appeal.
- [38] To be clear, the present ruling applies only to Application #4 of this trial.

"Ehrcke, J."

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