

CANADA / JUDGMENT

R. v. Alkhalil

2020 BCSC 1028

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Supreme Court of British Columbia

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alkhalil,

2020 BCSC 1028

Date: 20200709

Docket: 27393-56

Registry: Vancouver

Regina

v.

Rabih Alkhalil (a.k.a. Robby Alkhalil), Dean Michael Wiwchar and

Larry Ronald Amero

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Before: The Honourable Madam Justice Maisonville

Ruling Re Application No. 56 - Lost Evidence

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Place and Dates of Hearing:

Vancouver, B.C.

December 20, 2019

Written Submissions filed by the Crown:

December 18, 2019

March 17, 2020

May 1, 2020

Written Submissions filed by the Accused, Rabih Alkhalil (a.k.a. Robby Alkhalil):

April 14, 2020

Place and Date of Ruling:

Vancouver, B.C.

July 9, 2020

introduction

- [1] The applicants, Rabih Alkhalil and Larry Amero, seek a declaration that the loss of a July 2012 email (the "Email") to Cst. Nached of the Montreal City Police ("SPVM") infringes their rights under s. 7 and 11(d) of the Charter. As a remedy for the breach, they seek the excision of references to the Email from the information to obtain (the "ITO") filed in support of a warrant to search a residence in Montreal at which evidence against them was seized.
- [2] The Crown responds that the lost evidence application ought to be summarily dismissed pursuant to the principles of *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.), as the applicants' Charter claim has no reasonable prospect of success.

Background Facts

- [3] Between January and July 2012, the Vancouver Police Department ("VPD") received intelligence suggesting that Mr. Alkhalil, a suspect in the Project Reality investigation into the shooting death of Sandip Duhre at the Sheraton Wall Centre in Vancouver, was a resident of Montreal. The location of his residence, however, was unknown. As of July 19, 2012, the VPD believed that he resided with Mr. Amero at penthouse #6-555 Rene Levesque Est (the "Montreal Residence") but had not been able to confirm this. At a meeting on that date, confirmation of Mr. Alkhalil's residence was identified as a priority as execution of a search warrant on the Montreal Residence was tentatively scheduled for early August.
- [4] The following day, July 20, 2012, Cst. Nached of the SPVM attended at the Montreal Residence building. The applicants say his purpose was to establish in which unit Mr. Alkhalil resided; the Crown says he was there to assist another officer with respect to an unrelated matter potentially involving Mr. Alkhalil. In any event, late that evening, Cst. Nached filed a report in a hit and run investigation that contained information linking Mr. Alkhalil to the Montreal Residence. The report related to Cst. Nached's attendance on July 11, 2012 at the scene of a hit and run incident involving Mr. Amero, and it described his interactions with another individual at the scene and how he subsequently came to identify him as Mr. Alkhalil. This information had not been included in Cst. Nached's initial report about the hit and run prepared at the time of the incident but it did come to be included in para. 249 of the ITO in support of the warrant to search the Montreal Residence. Paragraph 249, entitled "Amero Arrested July 11, 2012: Address Confirmed as #6 of 555 Rene-Levesque Est, Montreal, Quebec", provides, in material part:
- f. Constable Nached attended the scene of the motor vehicle accident and was taking a witness statement when a male approached him and began asking questions about the owner of the black Mercedes;
 - g. The man asked in English where the owner of the Mercedes was. Constable Nached responded that he could not answer these questions;
 - h. The male then said that the owner of the Mercedes was his roommate and that they lived close by. The male also asked if the female that was with his friend was doing okay [I believe that the question about the female in the vehicle indicates an awareness of who was in the vehicle preceding the accident];
 - i. Constable Nached told the male that the male did not have to fear for his friends' safety but that he did not have any more information that he could provide;
 - j. Constable Nached described the male who approached him as being in his late 20s to early 30s with a dark tan and short black hair and an English speaker;
 - k. The male left the scene of the accident talking on his cellular phone;

- l. On July 17, 2012, Constable Nached received an email from the criminal intelligence unit which included a photograph of a male whom Constable Nached immediately recognized as the male who had asked him questions about the driver of the black Mercedes in regards to file number 21-120711-089;
- m. Constable Nached was 100% certain that the male in the photograph, Rabih ALKHALIL, was the male that he spoke to at the accident [therefore I believe that ALKHALIL identified himself as living in the same apartment as AMERO].

[Underlining added.]

- [5] The source document for this information was the report of Cst. Nached, which contained the following description of the Email:

On 2012-07-17, AGT NACHED checks his emails at work at police precinct pdq21. An email titled "Synopsis second part - Meeting of Agents of the police information unit 2012 shows a picture of a male whom AGT NACHED immediately recognized as the male who had asked him questions on the driver of black Mercedes during event 21-120711-089. AGT NACHED is %100 certain that the male on the picture is the same male he talked to, ALKHALIL Rabih. There is no date of birth information in the email. [English translation.]

- [6] Although the Crown disclosed the source documents for the ITO to the applicants, the Email was never disclosed and the applicants were advised that it had not been preserved. The applicants cast the Email as a source document.
- [7] According to the SPVM, the agency does not have a centralized email archive, and users either archive or delete their own emails. Emails are not deleted automatically by the system, and users control their emails. In response to a query as to why the Email no longer exists, the SPVM responded, "This email may have been deleted or moved to a .PST file by the user."
- [8] The applicants filed an application earlier in these proceedings seeking the exclusion of evidence seized during the search of the Montreal Residence, including on the basis of a Garofoli challenge (the "Montreal Search voir dire"). They sought leave to cross-examine the affiant, Sgt. Laurin, on a range of topics, including para. 249 of ITO and the officer's knowledge of events on or around July 20, 2012 with respect to confirming Mr. Alkhalil's residency at the Montreal Residence; for example, whether she had been aware that Cst. Nached had been at the Montreal Residence on July 20 investigating Mr. Alkhalil's address, the same day that he authored the report she relied upon in the ITO. Leave was denied on the basis that cross-examination on this issue would not assist the Court as the affiant was entitled to rely on reports prepared by other officers in preparing the ITO (indexed as 2019 BCSC 2031). Mr. Alkhalil's subsequent application for the Court to reconsider its ruling was also denied.

Positions of the Parties

- [9] The Crown characterizes the lost evidence application as yet a further attempt by the applicants to re-litigate an unfavourable ruling and challenge para. 249 of the ITO.
- [10] The Crown submits that lost evidence applications are predicated upon the Crown's obligation to preserve information that it is obliged to disclose and, thus, they necessarily only apply to first party records. Here, it contends, the Email was a third party record that was not in the hands of the investigating police and was never part of the investigative file. The Crown further argues that even if the Email was a first party record, there is no basis to conclude that the failure to preserve it rises to the level of unacceptable negligence.
- [11] Regardless of the Email's characterization as a first or third party record, the Crown says that the document is simply not relevant to either the Garofoli application or at trial. With respect to the latter, the Crown says that it is not leading evidence from Cst. Nached at trial, nor evidence of Mr. Alkhalil's attendance at the scene of the driving incident. Accordingly, it submits, the Email's only potential relevance is with respect to the Garofoli application and marshalling a subfacial challenge to the ITO.
- [12] The Crown relies on *R. v. McKay*, 2016 BCCA 391 for the proposition that the Crown's disclosure obligations are attenuated in the context of a Garofoli application. In that case, the Court of Appeal held that Stinchcombe does not require the Crown to obtain all of the police's operational files unrelated to a specific investigation. Evidence with respect to the manner in which the investigation was conducted only becomes relevant to a Garofoli application if the Crown becomes aware of some basis for concern with respect to police conduct in obtaining the warrant, or where the accused can establish a reasonable likelihood that the records will be of probative value to the issues on the application (paras. 133-134).
- [13] The Crown additionally relies upon *World Bank Group v. Wallace*, 2016 SCC 15 and *R. v. Phan*, 2020 ONCA 298. In the latter decision, Strathy C.J.O. confirmed that the focus in a Garofoli hearing is on the affiant's reasonable belief, which turns on what the affiant knew or ought to have known at the time the affidavit in support of the authorization was sworn, not on whether the allegations in support of the authorization are ultimately true (at para. 51).
- [14] The Crown maintains that the Email is irrelevant to the narrow issues to be decided on a Garofoli application, arguing that:
- (a) Sgt. Laurin was under no obligation to request materials reviewed by sub-affiants, including the Email;
 - (b) the Email was not part of the Project Reality investigative file and did not originate with the Project Reality investigative team;

- (c) Cst. Nached was never a member of the Project Reality team and there is no evidence he was aware that his identification of Mr. Alkhalil would be useful to the Project Reality investigation;
 - (d) Cst. Nached's purpose in being at the Montreal Residence was to assist another officer with respect to an unrelated matter potentially involving Mr. Alkhalil; and
 - (e) there is no evidence that Sgt. Laurin reviewed the Email or relied on it in preparing the ITO. As there is no reasonable possibility that the Email would be useful at the Garofoli hearing, the lost evidence application has no prospect of success.
- [15] The Crown additionally submits that the applicants failed to exercise reasonable diligence in seeking a copy of the Email and must, therefore, shoulder the consequences of their tactical decision to wait until this late stage to bring their lost evidence application.
- [16] The applicants strongly dispute the Crown's assertion that their lost evidence application is simply an attempt to revisit the Garofoli ruling, responding that they are asserting an independent Charter violation arising from the loss of an important source document relied upon by the affiant to establish Mr. Alkhalil's address. They emphasize that the threshold to survive a Vukelich challenge is low, and that they need only establish a basis upon which a breach of the Charter could, not will, be made out. In the present context, therefore, they need only demonstrate that the Email was disclosable and that it was lost.
- [17] The applicants submit that the Email was disclosable on a first party basis. They say that the VPD relied on steps taken by the SPVM in making investigative decisions, and that the two agencies had direct discussions with respect to the SPVM's assistance in matters related to Mr. Alkhalil. According to the applicants, the only reasonable inference from the facts is that notwithstanding that Cst. Nached's July 20 report bore the file number for the hit and run investigation, Cst. Nached authored the report for Project Reality purposes; indeed, the report was a key piece of information linking Mr. Alkhalil to the Montreal Residence in the ITO. Accordingly, the Email to which the report referred was subject to first party disclosure. The applicants submit that it is immaterial if the Court were to conclude otherwise since the loss of third party records can also ground a lost evidence application, in any event (citing *R. v. Carosella*, [1997] 1 S.C.R. 80).
- [18] The Email no longer exists. The applicants contend that since SPVM emails are not deleted from the system automatically, Cst. Nached necessarily took a positive step to delete the Email. They assert that cross-examination of the officer will be necessary to determine the circumstances in which he did so and the extent to which deletion of the Email has prejudiced Mr. Alkhalil.
- [19] With respect to relevance, the applicants submit that the Email is relevant to both the Montreal Search voir dire and the trial. They say that it is apparent, based on the evidence of Sgt. Laurin, that she was directing Det. St. Amant (of the VPD) to obtain information confirming Mr. Alkhalil's address and knew he was passing along those directions to SPVM

officers. According to the applicants, the Email is a key piece of evidence regarding the identification of Mr. Alkhalil and his residence, and its relevance to the voir dire is clear. They say that the Crown disclosed all other documents associated with the steps described in para. 249 of the ITO and, therefore, the obvious inference is that the Email would have been disclosed if it still existed. The Email is also relevant to trial issues, as the identification of Mr. Alkhalil in Montreal and his involvement in the hit and run to which the Email relates are a component of the Crown's case at trial.

- [20] In their oral submissions, the applicants elaborated upon how the Email was relevant to the identification of Mr. Alkhalil. They pointed to a misidentification by another officer that led to the detention and arrest of an individual wrongly believed to be Mr. Alkhalil two weeks after the date of the Email in submitting that it is not possible to assess the reliability of Cst. Nached's identification of Mr. Alkhalil without the Email.
- [21] The applicants say that it is not necessary that they demonstrate the precise prejudice occasioned by the Email's loss at the present Vukelich stage. Rather, prejudice is relevant to the appropriate remedy for the breach.
- [22] With respect to remedy, the applicants seek excision of references to the Email from the ITO. They say that s. 24(1) of the Charter confers broad discretion on courts to craft appropriate remedies for Charter breaches, and that excision is the appropriate remedy in the present case (citing *R. v. Ahmad*, [2009] O.J. No. 6162 (S. Ct. J.) and *R. v. Prince*, 2019 ONSC 5567).
- [23] Accordingly, the applicants submit that the Email was clearly relevant and disclosable, and that they have therefore demonstrated a basis for finding a breach of s. 7 sufficient to conduct an evidentiary voir dire. They propose to elicit evidence from Cst. Nached about the Email and the circumstances of its loss/destruction, as well evidence (either viva voce from another SPVM officer or by way of admission) to the effect that deletion of the Email was not automatic and required positive action on the part of the accountholder.

Discussion

- [24] Parties have no absolute right to a voir dire, and the purpose of a Vukelich hearing is to filter out proposed pre-trial applications where the remedy sought could not be reasonably granted, as shown on the submissions of counsel, assuming the allegations could be proven: *R. v. Fredrickson*, 2018 BCCA 2 at para. 26.
- [25] Thus, the question on this Vukelich application is whether an evidentiary hearing will assist the Court in deciding whether the applicants are entitled to the remedy they seek for the loss of the Email.
- [26] The applicants frame their claim as a lost evidence application. The principles that govern such applications are found in *R. v. La*, [1997] 2 S.C.R. 680 and were summarized in *R. v. Bero* (2000), 151 C.C.C. (3d) 545 (Ont. C.A.) at para. 30:

- [30] The proper approach where any accused claims that the failure to preserve material in the possession of the Crown results in a breach of a Charter right is found in *R. v. La*, supra. That approach is conveniently summarized by Roscoe J.A. in *R. v. B. (F.C.)* (2000), 142 C.C.C. (3d) 540 (N.S. C.A.) at 547-48:
- (1) The Crown has an obligation to disclose all relevant information in its possession.
 - (2) The Crown's duty to disclose gives rise to a duty to preserve relevant evidence.
 - (3) There is no absolute right to have originals of documents produced. If the Crown no longer has original documents in its possession, it must explain their absence.
 - (4) If the explanation establishes that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached.
 - (5) In its determination of whether there is a satisfactory explanation by the Crown, the Court should consider the circumstances surrounding its loss, including whether the evidence was perceived to be relevant at the time it was lost and whether the police acted reasonably in attempting to preserve it. The more relevant the evidence, the more care that should be taken to preserve it.
 - (6) If the Crown does not establish that the file was not lost through unacceptable negligence, there has been a breach of the accused's s. 7 Charter rights.
 - (7) In addition to a breach of s. 7 of the Charter, a failure to produce evidence may be found to be an abuse of process, if for example, the conduct leading to the destruction of the evidence was deliberately for the purpose of defeating the disclosure obligation.
 - (8) In either case, a s. 7 breach because of failure to disclose, or an abuse of process, a stay is the appropriate remedy, only if it is one of those rare cases that meets the criteria set out in *O'Connor*.
 - (9) Even if the Crown has shown that there was no unacceptable negligence resulting in the loss of evidence, in some extraordinary case, there may still be a s. 7 breach if the loss can be shown to be so prejudicial to the right to make a full answer and defence that it impairs the right to a fair trial. In this case, a stay may be an appropriate remedy.
 - (10) In order to assess the degree of prejudice resulting from the lost evidence, it is usually preferable to rule on the stay application after hearing all of the evidence.
- [27] Significantly, the application of lost evidence principles is attenuated in the context of information included in an ITO given the limited nature of a reviewing judge's function when the validity of a search warrant is challenged. As Justice Copeland observed in *Prince* at para. 74:

I accept, for purposes of argument, that if it could be shown that the loss of evidence underlying assertions in an ITO impaired the right to make full answer and defence in terms of challenging the warrant, it could give rise to a finding of a violation of s. 7 or 8 of the Charter. I pause to note

that it seems to me that the application of the principles regarding lost evidence would, as a practical matter, be somewhat attenuated in the context of information included in an ITO. I say this in light of the nature of a reviewing judge's function in a Charter claim based on allegations about the validity of a search warrant, and also the well-established law that hearsay information may be included in an ITO.

- [28] I note, as well, the comments of Willcock J.A. in McKay that disclosure is attenuated in the context of a Garofoli application.
- [29] The context of the Email as part of the ITO in which the report referring to it is sourced is a decisive factor in my conclusion that an evidentiary hearing will not assist in determining whether the applicants are entitled to the remedy they seek.
- [30] Assuming without deciding that the Email was a first party document subject to Stinchcombe disclosure and that it was deleted in circumstances of unacceptable negligence, a breach of s. 7 would be made out. However, the relevance of the Email must be considered in the context of the both the proposed use and the remedy sought. As noted, the applicants contend that the Email is relevant to both the Montreal Search voir dire and at trial.
- [31] In the Montreal Search voir dire, the applicants seek the exclusion of evidence seized during the search of the Montreal Residence on the basis of facial and sub-facial challenges to the warrant and ITO. As I held in the earlier Garofoli ruling when declining to permit cross-examination of Sgt. Laurin with respect to issues pertaining to confirmation of Mr. Alkhalil's address and para. 249 of the ITO, Sgt. Laurin was entitled to rely on Cst. Nached's report and set out the information it contained in the ITO. As I also noted in that ruling, when setting out the governing legal principles, while affiants cannot ignore signs that other officers may be misleading them or omitting material information, they are not required to conduct their own investigation into the accuracy of the information they rely on in the absence of an indication that it may be wrong (World Bank Group).
- [32] Sgt. Laurin did not review the Email in preparing the ITO. Accordingly, its loss is not capable of supporting a challenge to the ITO. Although the applicants maintain that the breach they allege is independent of the determination on a Garofoli review, it is not apparent to me from their submissions how the Email is otherwise relevant to the Montreal Search voir dire such that excision could be an appropriate remedy.
- [33] The applicants also submit that the Email is relevant to the trial since the Crown intends to lead evidence from the impaired driving investigation from which the Email is derived; accordingly, they say, the identification of Mr. Alkhalil in the Email and the steps taken by the SPVM during the impaired driving investigation are therefore clearly relevant. However, I note that the Crown advises that it does not intend to lead identification evidence from Cst. Nached at trial, and that its interest in the hit and run incident relates to Mr. Amero. Cst. Nached is not listed as a witness to identification at trial. Moreover, I am not satisfied that excision of references to the Email from the ITO would be an appropriate remedy to address

any prejudice that might be occasioned to the applicants at trial arising from the loss of the Email, in any event.

[34] For these reasons, I conclude that an evidentiary hearing will not assist in determining whether the remedy the applicants seek for the loss of the Email could be reasonably granted. Accordingly, I decline to embark upon an evidentiary hearing with respect to the applicants' lost evidence application.

"Maisonville J."

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