

CANADA / JUDGMENT

R. v. Alkhalil

2020 BCSC 1404

COURT

Supreme Court of British Columbia

DECIDED

18 September 2020

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2020 BCSC 1404 R. v. Alkhalil IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Alkhalil, 2020 BCSC 1404 Date: 20200918 Docket: 27393-5 Registry: Vancouver Regina v. Rabih Alkhalil (a.k.a. Robby Alkhalil), Dean Michael Wiwchar and Larry Ronald Amero Restriction on Publication: A publication ban has been mandatorily imposed under s. 648(1) of the Criminal Code of Canada, restricting the publication, broadcasting or transmission in any way of any portion of the trial at which the jury is not present. This publication ban applies until the jury retires to consider its verdict. Before: The Honourable Madam Justice Maisonville Ruling Re Application No. 5 - Vukelich Application re: Warrantless Search of Jarvis Street Apartment Counsel for the Crown, appearing via telephone/video conference: D.A. Jardine, Q.C. N. Gregoire A. Cochrane D. Darby A. La Bar S. Dworkin M. Sheardown Counsel for the Accused, Rabih Alkhalil (a.k.a. Robby Alkhalil), appearing via telephone/video conference: K. Blok A. Tolliday Counsel for the Accused, Dean Michael Wiwchar, appearing in person, and via telephone/video conference: S. Buck A. Dorin Counsel for the Accused, Larry Ronald Amero, appearing via telephone/video conference: M. Rock C. Gauthier Written Submissions filed by the Accused, Dean Michael Wiwchar: June 26, 2020 Written Submissions filed by the Crown: June 19 and July 3, 2020 Place and Dates of Hearing: July 9, 10, 15, 2020 Place and Date of Ruling: Vancouver, B.C. September 18, 2020

introduction

- [1] On May 24, 2012, members of the Vancouver Police Department (the "VPD"), along with members of the RCMP Technical Unit known as the Special Entry Section (the "SES"), entered the apartment of the applicant, Dean Wiwchar, at 108-1111 Jarvis Street in Vancouver. Mr. Wiwchar shared this apartment with his girlfriend, Juanita Hyslop. At the time of the police entry, Mr. Wiwchar was in Ontario and Ms. Hyslop had been taken to Whistler by an undercover operator.
- [2] The purpose of the police entry was to repair or possibly replace a judicially authorized listening device that was not operating properly. While the police were in the apartment, Ms. Hyslop told the undercover operator that there were firearms in the apartment. As a consequence, the police conducted a search of the apartment and discovered two firearms: a loaded semi-automatic Ruger handgun and a semi-automatic AK-47 assault rifle. The

firearms were taken off-site and rendered inoperable. They were then returned to the apartment and replaced in their original position so as not to reveal the ongoing investigation.

- [3] The applicant argues that the warrantless search of his apartment violated s. 8 of the Charter and that the evidence obtained should be excluded pursuant to s. 24(2).
- [4] The Crown, relying on the principles set out in *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.) and related cases, urges the Court to exercise its discretion to decline to embark upon the voir dire as it has no reasonable prospect of success. positionS of the parties The Crown
- [5] In arguing that the Court should decline to hear the proposed voir dire, the Crown relies heavily on the fact that the very search in question was the subject of a ruling in a firearms prosecution against the applicant, *R. v. Ley and Wiwchar*, 2015 BCSC 970. The Crown says that all but one of the Charter issues the applicant intends to raise were canvassed and addressed in Justice Bowden's thorough reasons that followed a voir dire spanning 12 days. The witnesses the applicant proposes to call are also the same, save for one. Accordingly, says the Crown, there is no basis to expect the result to be any different. While the Crown does not say that this Court is bound by Bowden J.'s ruling, it nevertheless maintains that the ruling is persuasive and would be determinative of the issues raised.
- [6] As for the issue not raised before Bowden J. (in relation to whether warrantless searches pursuant to ss. 117.04 and 487.01 of the Criminal Code, R.S.C. 1985, c. C-46 can be conducted covertly), the Crown submits that the matter does not justify an evidentiary voir dire and can be addressed by legal argument alone should the Court so decide.
- [7] The Crown additionally submits that s. 653.1 of the Criminal Code can usefully inform the Court's assessment of its application. That provision provides: In the case of a mistrial, unless the court is satisfied that it would not be in the interests of justice, rulings relating to the disclosure or admissibility of evidence or the Canadian Charter of Rights and Freedoms that were made during the trial are binding on the parties in any new trial if the rulings are made - or could have been made - before the stage at which the evidence on the merits is presented.
- [8] While obviously recognizing that the present case concerns a prior ruling in a related but separate prosecution, not a mistrial, the Crown maintains that the factors a court considers in assessing the "interests of justice" in this context (as set out in *R. v. Victoria*, 2018 ONCA 69) provide a useful framework to assess the issues in this case. The Applicant
- [9] The applicant disputes the Crown's position. He contends that a voir dire is necessary as it is the Crown who bears the onus of proving that the warrantless search was reasonable. The applicant further submits that although he was one of the accused in the earlier firearms prosecution, he now faces a much more serious charge of murder and the evidence seized from the Jervis residence, therefore, has different implications and importance. He has

received further disclosure in the intervening period, has the benefit of the prior testimony of the officers, and is pursuing different avenues of challenge upon that evidence. The applicant argues that findings of fact from one trial are not admissible at a subsequent trial, and that he has the right to have this Court consider the evidence against him on this indictment.

- [10] The witnesses the applicant proposes to call are Det. St. Amant, Det. Dykman, Det. Rychkun, and Det. Cst. Griffiths. He says that there will likely be admissions in relation to non-contentious aspects of the evidence.
- [11] The applicant submits that s. 653.1 of the Criminal Code is an exceptional authority that is not relevant to this case. Discussion
- [12] The Crown filed Notice of Application #5 in October 2018, seeking a declaration that the firearms evidence discovered at the Jervis Street apartment was admissible at trial. The Crown now says it was mistaken in doing so, and urges the Court to treat the applicant's reply to its Notice of Application #5 as the applicant's s. 8 Charter challenge to the search and to consider its Vukelich application in that context. I agree that the Vukelich determination here should not hinge on who brought the initial application and that it is appropriate to consider the application more broadly in assessing whether to exercise my discretion to decline to embark upon a voir dire.
- [13] The search of the Jervis Street apartment was warrantless and thus, presumptively, unreasonable. The Crown consequently bears the onus of establishing the reasonableness of the search.
- [14] Although the Crown strongly asserts that the reasons of Bowden J. are persuasive and would be conclusive in respect of virtually all of the issues raised by the applicant regarding the search, I am not persuaded that argument is a basis to decline to permit the voir dire to proceed. It is of note that findings of fact in one trial are generally not binding or admissible at a subsequent trial. As Justice Tammen stated in *R. v. Chol*, 2018 BCSC 2536 at para. 49: It is settled law that findings of fact in one trial are not binding nor even admissible, except in extremely rare and unusual circumstances, at a subsequent trial. It is thus open to the Crown to seek to persuade a different trier of fact, in this case a jury, that Chol's utterances in those telephone calls make him a party to the attempted murder. The trier of fact at Chol's trial is free to come to its own conclusion concerning what is said on those audiotaped calls and what meaning can be discerned from the words spoken.
- [15] While the previous ruling may well be persuasive, it is not binding on me and I am not prepared to simply adopt it without a voir dire, especially given that the impugned search is presumptively unreasonable.

- [16] I will not comment on the evidence from the earlier proceeding and will leave it for counsel to determine amongst themselves whether they can agree as to the witnesses required for the specific arguments that they wish to advance or whether this matter should be addressed in a case management conference.
- [17] As for s. 653.1 of the Criminal Code, that provision is an exceptional authority granted to a trial judge in specific circumstances that simply do not arise in the present case.
- [18] The Crown's Vukelich application is dismissed. "Maisonville J."

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