

CANADA / JUDGMENT

R. v. Alkhalil

2021 BCSC 1794

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 1794 R. v. Alkhalil IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Alkhalil, 2021 BCSC 1794 Date: 20210909 Docket: 27393-101 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. 101 - Application Re: Admissibility of the Proposed Videos Counsel for the Crown: M. Sheardown S. Dworkin N. Gregoire D. Darby A. Cochrane A. La Bar S. Wagner Counsel for the Accused, Rabih Alkhalil (a.k.a. Robby Alkhalil): R.S. Fowler, Q.C. K. Blok A. Tolliday Counsel for the Accused, Dean Michael Wiwchar: S. Buck A. Dorin J. Desbarats Counsel for the Accused, Larry Ronald Amero: M. Rock J. Oppal L.D. Myers, Q.C. J.V. Myers Place and Dates of Trial/Hearing: Vancouver, B.C. August 3,10-12, 17, 2021 Place and Date of Judgment: Vancouver, B.C. September 9, 2021

introduction

- [1] Dean Wiwchar seeks a ruling that video evidence the Crown intends to tender is inadmissible on the basis that its prejudicial effect outweighs its probative value. The Crown answers that the evidence carries no prejudicial effect and this application ought therefore to be dismissed.
- [2] Two sets of proposed videos are in issue on this application. The first comprises three videos in respect of a seized 2007 Toyota Avalon that were created on February 20, 2012 (the "proposed Avalon videos"). The second is a video in respect of a seized 2001 Mazda MPV that was created on March 16, 2012 (the "proposed MPV video").
- [3] For clarity, when the proposed Avalon videos and the proposed MPV video are referred to together in these reasons, they will simply be referred to as the "proposed videos".

BACKGROUND

- [4] Following the shooting death of Sandip Duhre at the Sheraton Wall Centre on January 17, 2012, investigators seized a 2001 Mazda MPV and a 2007 Toyota Avalon they believed to be associated to the offence. Officers subsequently drove the Toyota Avalon and the Mazda MPV by CCTV cameras associated with the 7-Eleven store in the 1100 block of Burrard Street, Vancouver and the building complex located at 808 Nelson Street, Vancouver on February 20 and March 16, 2012 respectively. The resulting videos are the proposed evidence.
- [5] The Crown intends to play the proposed videos at trial in order that the jury may compare the images of the seized vehicles with the images of the suspect vehicles depicted in CCTV video captured around the time of the shooting on January 17, 2012 (the "original CCTV video"); these latter recordings have already been played for the jury. The Crown will ultimately invite the jury to conclude that they are the same vehicles. The Crown will not be calling any opinion evidence on this point. The ORIGINAL january 17, 2012 cctv VIDEO
- [6] The original CCTV video was captured from the following locations: · CCTV video from 808 Nelson Street, a high-rise commercial building opposite the Hornby Street side of the Sheraton Wall Centre, which captured the loading bay, the lane, the Hornby Street alley, and the Nelson Street alley; and · CCTV video from the 7-Eleven located on Burrard Street, which had exterior cameras and captured the suspect vehicles on the street.
- [7] The original CCTV video captured a Toyota Avalon, which the Crown alleges was used by accomplices (the "accomplice vehicle") during the commission of the offence, at four general locations:
- a) at Burrard and Nelson Streets at 7:20 p.m.;
 - b) in the alley behind 808 Nelson Street at 7:21 p.m.;
 - c) travelling northbound in the 1200 block of Burrard Street at 7:57 p.m.; and
 - d) stopped outside the Burrard Motor Inn and the 7-Eleven, and travelling eastbound on Helmcken Street.
- [8] The original CCTV video also captured a Mazda MPV, which the Crown alleges was used as a getaway vehicle by Mr. Duhre's shooter (the "getaway vehicle"), at four general locations:
- a) travelling northbound in the 1200-block of Burrard Street at 7:57 p.m.;
 - b) travelling northbound in the 1100-block of Burrard Street, eastbound on Helmcken Street, and turning from Hornby Street into the alley behind 808 Nelson Street at 8:00 p.m.;
 - c) parking in an alcove in the alley; and
 - d) parked in the alcove until it departed. the Proposed Avalon videos

- [9] The proposed Avalon videos, made February 20, 2012, show the vehicle: · stopped outside the Burrard Motor Inn and outside the 7-Eleven; · driving eastbound on Helmcken Street; and · doing a three-point turn in the alley behind Nelson Street. The proposed MPV video
- [10] The proposed MPV video, made March 16, 2012, shows the vehicle driving by the 7-Eleven and parking in the alley behind Nelson Street. Specifically, it shows the vehicle: · travelling northbound in the 1200-block of Burrard Street; · travelling northbound in the 1100-block of Burrard Street; travelling eastbound on Helmcken Street; turning from Hornby Street into the alley behind 808 Nelson Street; and · parking in an alcove in the alley. POSITIONS OF THE PARTIES
- [11] Mr. Wiwchar opposes the admission of the proposed videos, submitting that their prejudicial effect outweighs their probative value.
- [12] With respect to the Mazda MPV, Mr. Wiwchar argues that it is impossible for the jury to draw a conclusion that the vehicle in the original CCTV video and the proposed MPV video are the same from viewing such features as colour, shape, type of wheels, or presence of damage. At most, the jury might conclude that both vehicles are minivans, a ubiquitous vehicle on the roads in 2012.
- [13] Mr. Wiwchar submits that the primary distinguishing feature of the seized Mazda MPV is that it is missing its rear wiper. However, the original CCTV video is not of sufficient quality to ascertain whether the Mazda MPV it depicts is also missing its rear wiper blade. As a result, Mr. Wiwchar argues, the proposed MPV video has no probative value.
- [14] Mr. Wiwchar additionally argues that the probative value of the proposed MPV video is then further undermined by the fact that it was taken in different circumstances than the original CCTV video; specifically, the light in the alley behind Nelson Street had been repositioned in such a way that visibility in the alley was improved and the images of the seized Mazda MPV correspondingly clearer, including the view of its rear where its wiper was missing. While acknowledging that it is not reasonable to expect precisely identical circumstances in the making of the proposed MPV video, Mr. Wiwchar says that this is a significant change in circumstance.
- [15] Mr. Wiwchar argues that in terms of prejudice, reasoning prejudice is the main risk. There is an additional concern that the proposed MPV video will have a greater impact on the jury's reasoning process because it is clearer and the jury will therefore focus on it rather than the poorer quality original CCTV video.
- [16] Finally, Mr. Wiwchar submits that the proposed MPV video is redundant since the Crown has already tendered photographs of the seized Mazda MPV from which the jury can draw the comparisons it seeks to have them draw.

- [17] As for the Toyota Avalon, Mr. Wiwchar contends that there is nothing distinctive about the two vehicles captured in the original CCTV video and the proposed Avalon videos. Moreover, similar to the Mazda MPV, the Crown has already tendered photographs of the Toyota Avalon from which the jury can draw comparisons.
- [18] Mr. Alkhalil submits with respect to the Toyota Avalon that it remains a live issue whether the vehicle depicted in the original CCTV video is a Toyota Avalon and that the Crown will be relying on opinion evidence about the identification of that vehicle. It is therefore circular for the Crown to rely on a proposed video involving a vehicle it will need to establish using circumstantial evidence was used in the commission of the offence to establish that the vehicle in the original CCTV video was used in the commission of the offence. In short, Mr. Alkhalil argues that the Crown is seeking to use the proposed Avalon videos in an attempt to confirm the conclusion that the seized vehicle is the vehicle in the original CCTV video. As a consequence, the probative value of the proposed Avalon videos is negligible.
- [19] The Crown responds that the probative value of the proposed videos is manifest. If the jury accepts that the seized vehicles were the vehicles used in the commission of the offence based on similarity and other evidence the Crown intends to lead associating them to the accused, then that is probative of the identity of the perpetrators. Identity, of course, is a material fact.
- [20] On the other hand, the Crown submits, the accused have not articulated any meaningful prejudice arising from the proposed videos. With respect to the change in quality of the proposed MPV video, the Crown explains that unbeknownst to the police, the angle of the CCTV camera had been changed. Nevertheless, it says that the improvement in image quality is marginal and certainly not so significant as to be prejudicial.
- [21] The Crown submits that despite Mr. Wiwchar's emphasis on the seized Mazda MPV's missing rear wiper, an absent wiper cannot be seen in either the original CCTV video or the proposed MPV video. It is a known fact that the seized vehicle was missing its rear wiper blade, as this is visible in several photographs. The apparent absence of the rear wiper in the original CCTV video is either because it was not there on January 17 or because it simply cannot be seen. GOVERNING LEGAL PRINCIPLES
- [22] The primary authority upon which the parties rely is *R. v. MacDonald* (2000), 49 O.R. (3d) 417 (C.A.). The case concerned a video re-enactment of a failed police takedown, reflecting the recollections of the officers involved, that had been admitted at trial. On appeal, the Court reviewed some of the concerns that arise with taped re-enactments, including the possibility that their immediate visual impact may induce jurors to give them more weight than they deserve and, correspondingly, to discount less vivid evidence that is probative of the facts in dispute; the possibility that the jury may confuse one party's reconstruction with objective fact; and, the reality that usually only the Crown has the resource to produce a re-enactment video. At para. 42, the Court held: In our view, the preferable approach recognizes the dangers of video re-enactments but adopts a case-by-case analysis. As with the admissibility

of other kinds of evidence, the overriding principle should be whether the prejudicial effect of the video re-enactment outweighs its probative value. If it does, the video re-enactment should not be admitted. In balancing the prejudicial and probative value of a video re-enactment, trial judges should at least consider the video's relevance, its accuracy, its fairness, and whether what it portrays can be verified under oath. See *R. v. Creemer* (1967), [1968] 1 C.C.C. 14 (N.S. C.A.) at 22. Other considerations may be material depending on the case. And as with rulings on the admissibility of other kinds of evidence, the trial judge's decision to admit or exclude a video re-enactment is entitled to deference on appeal.

- [23] The Court ultimately concluded that the trial judge had erred in admitting the re-enactment video. First, the probative value of the video was undermined by its many inaccuracies; it had been shot at a different time of day and year, at a different location, with a different vehicle at a different speed than the event in question. Second, the video was highly prejudicial because it portrayed only the police version of disputed facts.
- [24] Other authorities upon which the parties rely include *R. v. Collins* (2001), 160 C.C.C. (3d) 85 (Ont. C.A.), *R. v. Walizadah*, 2007 ONCA 528; and *R. v. Spezzano*, 2020 QCCS 553.
- [25] In *Collins*, the accused, who was charged with criminal negligence causing death for discharging his firearm into a lake and hitting a child nearby, claimed the victim was shot accidentally. The police conducted an experiment to determine whether a target would be hit if shots were fired as described by the accused. The trial judge held the experiment evidence was admissible as it was relevant, material and no prejudice had been demonstrated. This ruling was upheld on appeal, Charron J.A. writing (at paras. 21-22):
- [21] In a nutshell, experiment evidence, if it is relevant to an issue in the case, should generally be admitted, subject to the trial judge's residuary discretion to exclude evidence where the prejudice that would flow from its admission clearly outweighs its value. Beyond this, when the evidence requires the making of inferences from observed facts that require special knowledge, the test in [*R. v. Mohan*, [1994], 2 S.C.R. 9] will have to be met before the evidence can be admitted as expert opinion evidence.
- [22] In most cases, the relevance of the experiment evidence will depend on the degree of similarity between the replication and the original event. Consider the example given earlier where the experiment consists of the driving along a particular stretch of road to determine at what point a stop sign becomes visible. If the distance at which the stop sign becomes visible is in issue at trial, the experiment evidence will be material, but will only be relevant if the replication bears some similarity to the original event. For example, if the original event occurred in the summer when vegetation partly obstructed the driver's view but the experiment was conducted in winter after all the leaves had fallen, the relevance of the evidence will be greatly diminished. Depending on all the circumstances, it may not be worth receiving. Similarly, if the experiment evidence includes expert opinion evidence, variances between the replication and the original event, depending on their degree and importance, will affect the weight that can be given to the expert opinion evidence.

- [26] Justice Charron held that the appellant had failed to demonstrate any prejudice, and rejected his contention that the jury would not be able to properly interpret the results of the evidence without expert opinion evidence. The evidence had been introduced simply to show how bullets can ricochet off water, and it was entirely open to the jury to draw their own inferences from the results of the experiment.
- [27] In Walizadah, video surveillance had captured what was believed to be the killer's van entering and exiting a parking lot. Police created re-enactment videos to determine how four vans of different dark colours and shapes appeared on the video surveillance system. They also carried out a re-enactment using a van similar to that driven by the accused. The trial judge admitted the videos. On appeal, the Court cited both MacDonald and Collins in upholding the admission of the videos. The videos were relevant and the re-enactments were fairly accurate, not portraying a one-sided account of disputed facts. While there were some differences between the original surveillance video and the re-enactments in terms of film quality and lighting, they were not so great as to deprive the evidence of its probative value. As a result, the appellant had not established that the prejudicial effect of the evidence outweighed its probative value.
- [28] In Spezzano, the police drove the suspect vehicle in the same location and environmental conditions as several unknown vehicles captured on surveillance video around the time of the offence. An RCMP forensic video analyst conducted a comparison analysis and opined that "no unique features allowed for a firm conclusion in favour or against the proposition that the known vehicle was or was not the same as the unknown vehicles" (at para. 73).
- [29] The trial judge admitted the re-enactment video, finding that its probative value exceeded its prejudicial effect. The re-enactment was simple and did not unfairly advocate the Crown's theory of the case. It purported to establish that the unknown vehicles on the road at the time of the offence were similar to the accused's vehicle and that one was likely to have been that vehicle. While the trial judge admitted the expert's evidence as it pertained to forensic video analysis and the re-enactment, he did not permit him to give evidence of his comparison analysis, finding a comparison of the known and unknown vehicles based on general characteristics such as body shape, colour and shape of taillights was not beyond the capacity of the jurors to conduct. Comparative inferences are the province of the jury.
- DISCUSSION
- [30] It is important to observe at the outset that the proposed videos are not staged re-enactments. Rather, they are more accurately described as experiments or re-creations for purposes of comparison. Thus, they are simply evidence from which the jury can compare the images of the suspect vehicles depicted in the original CCTV video with the images of the seized vehicles. The Crown, of course, will invite the jury to conclude they are the same vehicles. Whether they are is a question of fact for the jury. Should the jury ultimately conclude that the suspect vehicles and the seized vehicles are in fact the same, then the evidence, together with other evidence the Crown will lead, has probative value in relation to identification. No expert evidence will be called in relation to the proposed videos.

Indeed, comparing the vehicles depicted in the videos is not an exercise that requires any specialized knowledge warranting expert opinion.

- [31] In Collins at para. 22 quoted above, Charron J.A. discussed how the relevance of experiment evidence will depend on the degree of similarity between the replication and the original event. In the present case, I am satisfied, given the consistent camera angles and lighting conditions as between the proposed Avalon videos and the original CCTV video, that the degree of similarity is sufficient for the proposed Avalon videos to be relevant. On the other hand, I can see no meaningful prejudice to flow from the videos. Accordingly, they are admissible.
- [32] I arrive at a different conclusion with respect to the proposed MPV video captured in the alley, the clarity and resolution of which is substantially enhanced as compared with the original CCTV video. While in the original video a bright light shines into the camera, in the proposed video the camera has been repositioned such that this is no longer the case. As a result, there is a much greater clarity to the images. While investigators cannot be expected to replicate circumstances precisely in this type of exercise, I am concerned that the degree of variance does not permit a fair comparison of the subject vehicles to be made. As a result, I find that the proposed MPV video in the alley is not relevant and is therefore not admissible.
- [33] In the result, the proposed Avalon videos are admissible.
- [34] The proposed video of the MPV parking in the alley is not admissible. The video depicting the MPV: · travelling northbound in the 1200-block of Burrard Street; and · travelling northbound in the 1100-block of Burrard Street; travelling eastbound on Helmcken Street; turning from Hornby Street into the alley behind 808 Nelson Street; is admissible.
"Maisonville J."

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