

CANADA / JUDGMENT

R. v. Alkhalil

2021 BCSC 1803

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 1803 R. v. Alkhalil IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Alkhalil, 2021 BCSC 1803 Date: 20210910 Docket: 27393-99 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. 99 - Application to lead ante mortem statements Counsel for the Crown: M. Sheardown S. Dworkin N. Gregoire D. Darby A. Cochrane A. La Bar S.L. 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. July 19-21, August 12, 2021 Place and Date of Judgment: Vancouver, B.C. September 10, 2021

introduction

- [1] The Crown seeks to lead ante mortem statements made by the deceased, Sandip Duhre to his friend, Ruben Vivar. These statements were made during two separate time periods: (a) on January 17, 2012, shortly before Mr. Duhre was shot and killed while dining at the Sheraton Wall Centre Hotel; and (b) in the months, and some cases, years preceding Mr. Duhre's death. The Crown seeks as well to lead a text message Mr. Duhre showed to Mr. Vivar immediately prior to his death, and Mr. Duhre's reaction to the message.
- [2] The Crown intends to lead a majority of these statements for non-hearsay purposes, including state of mind (specifically, Mr. Duhre's animus towards the Alkhalil family), present intention, narrative and context. Only two statements are sought to be led for their truth.

- [3] Mr. Alkhalil accepts that much of the proposed evidence is properly admissible for the purposes the Crown has identified. He takes issue only with evidence with respect to Mr. Duhre's belief that he was being harassed by police, submitting that it is irrelevant to the issues to be determined in this case. Upon being advised of Mr. Alkhalil's position, the Crown has agreed not to lead that evidence from Mr. Vivar: as outlined in the chart to follow, those portions are referred to in statements #1 and #13.
- [4] The Crown bears the burden of establishing the admissibility of hearsay statements on a balance of probabilities. While state of mind and present intentions evidence fall under traditional exceptions to the hearsay rule, the Crown must still establish, on a balance of probabilities, that the statements are admissible under the principled approach to the hearsay rule; that is, that the statements are reliable, and that their probative value outweighs their prejudicial effect.
- [5] For the reasons that follow, I am in agreement with the Crown that the ante mortem statements and text message are admissible on the bases identified by the Crown. THE PROPOSED EVIDENCE
- [6] Mr. Vivar testified on the voir dire. He said that as of January 2012, he had known Mr. Duhre for over 20 years; they met in the 1980s during the summer they went into high school. They soon became close friends and spent much time together. After high school, Mr. Vivar said Mr. Duhre was a mediator for criminal activity. Mr. Vivar was present for some of these "mediations", offering support or giving Mr. Duhre a ride. The two men spent time together at a youth detention facility in the early 1990s.
- [7] Mr. Vivar testified that during his friendship with Mr. Duhre, there was hostility between Duhre and other groups. In 2005, a friend of Mr. Duhre's was shot and killed while driving his vehicle. While his relationship with Mr. Duhre remained constant, Mr. Vivar said that he saw much less of Mr. Duhre since he did not wish to be around him given his dangerous lifestyle and the police attention. Nevertheless, they remained in contact over the phone, initially cell phones and later encrypted BlackBerrys.
- [8] Late in the afternoon on January 17, 2012, Mr. Duhre messaged Mr. Vivar saying that he needed a ride and was at the Sheraton Wall Centre Hotel. Mr. Vivar testified about what occurred when arrived there, his observations of Mr. Duhre's demeanour, and statements Mr. Duhre made to him.
- [9] Rather than review the balance of Mr. Vivar's evidence, I will instead reproduce a chart the Crown prepared summarizing Mr. Vivar's evidence about Mr. Duhre's statements and the basis upon which the Crown says the evidence is admissible: Topic Ante mortem statements of Sandip (Dip) Duhre to Ruben Vivar Basis for Admissibility 1. After the Kelowna shooting in 2011 After the Kelowna shooting in 2011: Statements by Duhre to Vivar: Dip did not want anyone visiting that Xmas; He did not want anyone around the house or visiting or coming over; police were harassing him [as noted earlier, the Crown will not lead this evidence], people out to kill him. Dip did not want anyone coming over. Narrative; Mr. Duhre's state of

mind at the time it was said; the fact it was said. 2. Method of communication Dip wanted contact only by PGP Phone; After Kelowna - he didn't want communication other than by encrypted BlackBerry. Narrative; State of Mind. 3. Duhre messages Vivar to come to Wall Centre "He sent me a message over my PGP encrypted BlackBerry saying that he needed a ride and that he was at the Wall". Narrative; Explains Mr. Vivar's conduct. 4. Duhre tells Vivar to come in He said for me to come in. Narrative; Present intention of Duhre to have friend come join him. 5. At coffee shop Duhre tells Viva "let's walk" Duhre says, "let's walk". Narrative; Present intention; Explains Vivar's conduct. 6. What Duhre told Vivar as to why he was at the Wall Centre I'm trying to question him a little bit on what's going on. He said, "Hold up, hold up." It took him a little bit of time, and then said, "Walk." And he starts telling me that he has a meeting with a private investigator, which he referred to as a P.I. At some point into our walks from the bridge that covers all three of the buildings, all three towers, we just walked back and forth, and he tells me about a private investigator that he has to meet. Narrative; Present intention; State of mind. 7. Reason for being at the Wall Centre - meeting PI Earlier meeting at the Four Seasons; The friends Duhre was with at the Four Seasons As we walked out of the bathroom, he tells me he was at the Four Seasons earlier that day with a few other people. The police walked in a few minutes after they had sat down, ID'd everybody and asked everyone to leave. It was a friend named Paul (Gutierrez), a friend named Adeel (Khan), and they were supposed to have met another person by the name of Rummy. Q: eventually he told you that he had an earlier meeting with a PI at a different hotel; he told you that, right? A: He said he had a meeting with other people and he was supposed to have met a PI. Q: Right. At a different hotel? A: Right. Q: The Four Seasons? A: Yes. Q: All right. And the police showed up, correct? A: Yes. For Truth of contents; Narrative; State of mind. 8. Additional information Mr. Duhre provided re this PI And as we were coming out of this bathroom, he hands me his BlackBerry. He had opened up a message and he wanted me to read the message he had received from this so-called P.I. I read most of it or some of it. It was a very, very long message. A: What I read was "Sensitive information for your eyes only." And I was looking through the message and it talked about the Alkhalil family. And this P.I. was going to provide some information on many members of the Alkhalil family once Dip met him. Q: When you say "once Dip met him", who do you mean by "him"? A: The supposed P.I. Q: Okay. Do you recall reading what kind of information was to be provided? A: He had named Nabil Alkhalil, Hisham Alkhalil, Rabiha Alkhalil, other Alkhalils. I don't remember the name. There was someone by the name of Louise or Louisa Alkhalil. And he was going to provide businesses information and flight records, property titles, offshore bank accounts, vehicle descriptions. He had gathered all this information. It was only for Dip. It was for his eyes only. It was sensitive information Narrative; Present intention; State of mind. 9. Duhre's reaction to the message Dip wasn't - he was very unsure of who was sending him this message. He was confused. He thought in the gist of, "Is it too good to be true?" He looked at me with confusion. He wanted to get some kind of confirmation from me, so I thought, knowing Dip. Duhre's state of mind; Animus in Duhre's mind between Duhre and the Alkhalils. 10. Camera purchase Q: Did you make a decision as to what to do, or did you have a plan as to what to do after you looked at

parts of that message? A: What we came up with while he was looking out the windows, looking into the roundabout in the front of the Wall Centre, trying to understand who was sending him the message is what I thought, he figured he would tell this person that a courier, which would have been me, would meet this P.I. to receive whatever information he was going to provide. He said, "Let's go and get a camera, a digital camera," and where we could go get one, where we could go buy one. That way I could take pictures of the information -- Q: Whose decision was it to get a camera? A: Dip's. Q: Did he tell you why? A: So I could record or take pictures of the information that the P.I. would be providing. Cross Ex: it was a long time ago. A: It was both of us talking about it, but yes, we wanted a camera. Him and I wanted a camera. (agrees previous statement to police was true that "I suggested Dip buying a camera, a digital camera). Narrative; Present intention. 11. Vivar did not end up meeting PI with camera I was going to take pictures or the P.I. was going to take pictures, but pictures would be taken of the information that would be provided, yes. I believed I was going to up until the P.I. said no. Q: who told you the P.I. said no? A: Dip told me he had to be there Present intention; Narrative; State of mind. 12. The reason for the camera purchase - Duhre thought it was a sting he thought it was a sting, it was a police sting. [he said] "Could it be the cops?" Q: Did he tell you what he thought could be the cops? A: The P.I. or the so-called P.I. sending him these messages. State of mind. 13. Harassment by Police prior to January 17, 2012 There was no talk of any sting prior - prior to January the 17th, but he was getting harassed a lot by the police [as noted earlier, the Crown will not lead this evidence.] He told me that everywhere he went he was getting stopped and harassed. State of mind. 14. Driving charge and curfew They placed him on probation, he had some type of driving charge, and curfew. Dip told me about a driving charge, sometime later in 2011, he had a curfew and not able to drink in public. For truth of contents. 15. Tells Vivar to leave his things in the car He wanted me to leave the BlackBerry in the car. "Just leave your things in the car," something like that he had said. Narrative; Explains what Vivar did; State of Duhre's mind. 16. Message from PI re meet and time for meet and to pick quiet spot and change of plan At some point Dip had messaged with a time, what time he would be meeting this private investigator. So once we entered the Wall Centre, after we came back from London Drugs, as far as I knew I was going to meet the so-called P.I. At some point the P.I. had convinced Dip that he had to be there. He said, "The P.I. is saying to pick a quiet spot." Dip told me that. So again Dip's on his Berry messaging or receiving messages. At some point he says, "Fuck it. Let's go," meaning Dip was going to come with and be at this meeting and ... sensitive info for his eyes only. State of mind; Narrative; Present intention. 17. Duhre thought it was a set up by the police "It's a sting, it's a sting. We're about to get arrested." State of mind; Narrative; Present intention. 18. Who was the PI I was trying to ask him who was this PI, how know, how contact the PI, he was not able to answer the questions I was asking, then he mentioned it was done through a friend. State of mind; Narrative. 19. Told Vivar what time PI said to meet 8 o'clock sharp. State of mind; Narrative. 20. Order food for anyone else the P.I. had asked for a Diet Coke and a steak. Q: How do you know that? A: Dip told me Fact it was said State of mind; Present intention; Narrative 21. Duhre pointing out a Murano driving around He was staring out the windows, he was looking at cars and people outside

the building. He kept pointing out cars, he kept using his Berry, kept reading messages. There is a bathroom that you can walk off from the hallway of this bridge that we walked, and it's all glass that leads onto Hornby Street, and he kept pointing out cars. He kept saying he had seen a silver Nissan Murano, kept driving around and driving by Hornby. State of mind; Narrative. 22. Duhre's Animus towards the Alkhalils I heard ... Dip and his brothers talk about the Alkhalils when we were younger. ... in mid 90's Vivar was present when Duhre's house got shot up and Dip told Vivar that he thought Nabil Akhalil was responsible. Vivar saw the aftermath of a vehicle that was torched and caught the garage and front pa[r]t of the house - Dip's dad's house. Dip told Vivar he believed the Alkhalils had torched his dad's car. State of mind and Animus.

- [10] Thus, only statements #7 (about an earlier meeting at the Four Seasons Hotel) and #14 (curfew) are sought for their truth. The Crown submits they are admissible hearsay because they meet the twin criteria of necessity and reliability as required by the principled exception to the hearsay rule (see, for example, *R. v. Bradshaw*, 2017 SCC 35 at para. 24).
- [11] I accept the Crown's submission that necessity is established by Mr. Duhre's death. I also accept the Crown's submissions regarding threshold reliability, which are as follows:
11. Threshold reliability is established by the close personal relationship between Mr. Duhre and Mr. Vivar and the fact Mr. Duhre shared confidences with Mr. Vivar. As to the two statements being led for their truth, reliability as to accuracy arises because both statements are corroborated. The statement about the earlier meeting at the Four Seasons was corroborated by Detective Patel. The statement about curfew is corroborated by the fact that Mr. Duhre was bound by a recognizance with a curfew condition which is being filed for the purpose of establishing threshold reliability on this *voir dire*.
 12. Detective Patel's testimony about attending at the Four Seasons is relevant as it demonstrates that Mr. Vivar is a reliable narrator of events; it shows the accuracy of his statement. The relevance of the recognizance with curfew is twofold: to show Mr. Vivar's reliability as a narrator as well as to corroborate the information in the PGP messages that the Crown intends to lead at trial. For example, messages 48 and 54 refer to the fact that Mr. Duhre was on a curfew, as follows
- [12] With respect to the balance of the statements, the Crown's submissions in the main are as follows:

ANALYSIS

45. As noted above, the admissibility of evidence often depends upon how it is intended to be used. Where evidence is being tendered for a non hearsay purpose, such as narrative or context, it is admissible. It is only hearsay if the evidence is being tendered for the truth of its contents.

46. In this case, the majority of the ante mortem statements made by the deceased are being tendered as part of the narrative, to give context to why Mr. Duhre was at the Wall Centre on January 17, 2012 and to explain Mr. Duhre's and Mr. Vivar's actions: 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 15, 16, 17, 18, 19, 20, 21 at tab 1. For example, Mr. Vivar described why he went to the Wall Centre (to give Mr. Duhre a ride), what occurred when he got there, his observations of Mr. Duhre's demeanour, and Mr. Duhre's statements about a meeting with the PI. These are not being led for a hearsay purpose. They are being led as narrative to provide context for the jury as well as to demonstrate the present intentions of the declarant, Mr. Duhre.
47. Other statements are also being tendered for the purpose of showing Mr. Duhre's state of mind/present intention: 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22.
48. Additionally, some of the ante mortem statements demonstrate Mr. Duhre's animus towards the Alkhalil family: #9, 22 at tab 1.
50. With respect to the statements giving rise to Mr. Duhre's state of mind, the relevance and reliability of the evidence must be considered in light of the relationship between Mr. Vivar and Mr. Duhre. Relationship between Mr. Duhre and Mr. Vivar
51. The evidence given by Mr. Vivar demonstrated that he had a long-standing close friendship with the deceased. This is relevant to an assessment of whether there are sufficient indicia of reliability for evaluating the inherent trustworthiness of the statement. Mr. Duhre shared confidences with Mr. Vivar. Mr. Vivar was aware of his criminal business activities, and as such, Mr. Duhre had no motive to lie.
52. As of January 17, 2012, Mr. Ruben Vivar had been a close friend of Mr. Sandip Duhre since the late 80's, the summer going into high school. They saw each other often and hung out almost every day. Mr. Vivar was 12-13 years old when he first started seeing Mr. Duhre. They travelled, they would hang out and go for dinners, share birthday parties, shared Christmases. It was a tradition that they would spend Christmas together throughout the years. They conducted business from time to time. They shared confidences. (T. p. 10 @31-43; p. 16, @ 32-35.). Mr. Vivar described Mr. Duhre as a mediator for criminal activity, which he explained as taking care of peoples' problems. Mr. Vivar was often present at these mediations, offering support, sometimes giving him a ride to and from the restaurant where these meetings would usually take place. Some days he would just happen to be there. (T: p. 12 @ 1-31).
53. Mr. Vivar and Mr. Duhre spent time together at YDC in the early 90's - around 15, 16 years old. T: p. 12 @ 41-43. After YDC, Mr. Duhre moved to Surrey but they continued to see each other. (T: p. @ 12-13). After a shooting in 2005 the frequency of contact between Mr. Duhre and Mr. Vivar changed. Mr. Vivar explained that many times he didn't want to be around Mr. Duhre, with him, or be seen out with him explaining that Mr. Duhre lived a dangerous lifestyle and Mr. Vivar did not want police attention: T. p. 14 @ 40-44. However, they still communicated by cell phones. After the shooting in Kelowna in 2011 the frequency of contact changed. They weren't seeing each other as often. They would talk to each other,

mostly by PGP encrypted BlackBerrys. (T: pp. 15-16).

54. Mr. Vivar described why he went to the Wall Centre to meet Mr. Duhre (to give him a ride), what occurred when he got there, his observations of Mr. Duhre's demeanour, and gave evidence of post mortem statements made by Mr. Duhre about the meeting with the PI. Much of this evidence is being led as narrative and to provide context for the jury.
55. Mr. Vivar's observations of Mr. Duhre, and his evidence that this behaviour was out of the ordinary, is not hearsay. Given their longstanding relationship/friendship, Mr. Vivar's evidence as to his friend's behaviour is relevant and reliable. There is no reason to doubt the truthfulness of the statements Duhre made to his friend.
56. The evidence of Mr. Vivar's observations of the message and Mr. Duhre's reaction is not hearsay as Mr. Vivar testified that he saw both. The content of the message is not being led for its truth: i.e. that the PI actually had information on the Alkhalils that he was going to give to Mr. Duhre. The message and Mr. Duhre's reaction to it are admissible as statements that give rise to an inference about the declarant's state of mind and are admissible as circumstantial evidence from which Mr. Duhre's state of mind may be inferred.
57. Similarly, the statements by Mr. Duhre to Mr. Vivar about the fact he thought the Alkhalils were responsible for the prior incidents of his house being shot and the car and garage being burned are not being led for the truth: i.e. that Nabil Alkhalil and his family actually shot at the Duhre's house and burned the family's garage. The evidence is being led for the purpose of demonstrating an inference of an animus that the deceased held for the Alkhalil family.
58. Evidence of Mr. Duhre's state of mind is admissible for the purpose of demonstrating an inference of animus towards an accused and as circumstantial evidence of motive of an accused and identity as articulated in the cases of Candir [2009 ONCA 915] at paras. 51-52 and Van Osselaer [2002 BCCA 464].
59. Mr. Vivar testified to a longstanding conflict between the Alkhalil family and the Duhres: that it began sometime after Duhre had moved to Surrey; that Duhre told Vivar that he thought Nabil Alkhalil was responsible for shooting at their house; that Duhre told Vivar that he believed the Alkhalil's had torched his dad's car/garage: T: pp. 34-37.
60. The dated conflict referred to by Mr. Vivar between Mr. Duhre and the Alkhalils is also corroborated by the following message in Where-is-Waldo (btb Alkhalil's phone):
61. Mr. Vivar provided direct evidence of seeing the aftermath of a car/garage burned at the Duhre's home and the fact that Mr. Duhre held the Alkhalil family responsible.
62. As noted above, in NOA 8, 2021 BCSC 1119, this Court found that the evidence of the Kelowna shooting and the evidence of text messages were relevant and admissible to motive for counts 1, 2 and 3 and to the identification of Mr. Amero as the user of the Birdman and SkullBuster BlackBerrys at ¶[40]. In para. 41, this Court stated:

- [41] With respect to the probative value of the Kelowna shooting as evidence of motive and considering the factors highlighted in Z.W.C., I find that the strength of the evidence that the extrinsic act occurred is obviously strong, given that the facts the Crown seeks to prove were the subject of admissions in the prosecution for the Kelowna shooting. In arguing that retaliation for Kelowna was the motive for the charged offences, the Crown relies on inferences from a small handful of PGP messages authored by Mr. Alkhalil and Mr. Amero. I find the inferences from the messages are strong and available to be drawn. Certainly, evidence of motive is material in this case since the shooting death of Mr. Duhre at the Sheraton Wall Centre Hotel would be seen as a random event without evidence of the Kelowna shooting. The message that the PI had information on the Alkhalils and Duhre's reaction to it
63. Mr. Vivar testified about a message Mr. Duhre showed him containing information about the Alkhalil family. Mr. Duhre's reaction to the message on his phone is, again, circumstantial evidence of a dispute between the Alkhalils and Duhre.
64. Mr. Vivar's observation of the message itself is not hearsay and he is available for cross-examination on this point.
65. Mr. Duhre's ante mortem response, the gist of which was whether it was "too good to be true", goes to his state of mind - the animus that he held for the Alkhalil family. As outlined in the cases above, evidence of the deceased's state of mind may constitute a link in a chain of reasoning that could lead a trier of fact to conclude that an accused bore the deceased some animus or had a motive to kill. To repeat, Mr. Justice Hill, in R. v. S.B. (20 March 1996), Ont. H.C. (unreported), as cited in Van Osselaer at ¶23: "to deny the triers-of-fact complete information regarding the prior history of the parties runs the risk of presenting an entirely sterile and antiseptic record devoid of the realities of the individual circumstances of the participants." Corroboration: PGP Messages - Longstanding conflict between the Alkhalils and Mr. Duhre
66. As this Court has heard in previous applications, the Dhak/Duhre group were blamed for the Kelowna shooting and that Alkhalil, Amero and Wiwchar made plans, with others, to murder Duhre and/or Dhak as retaliation. The evidence in the text messages supports an animus and motive on the part of Mr. Amero, Mr. Alkhalil, and others towards Mr. Duhre. The evidence of the animus of Mr. Duhre which the Crown seeks to lead from Mr. Vivar is corroborated through those same messages.

conclusion

- [13] I accept the Crown's submissions and agree that the statements the Crown seeks to lead are admissible for the reasons and on the basis of the arguments submitted as agreed by defence counsel. "Maisonville J."

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