

CANADA / JUDGMENT

R. v. Alkhalil

2021 BCSC 2008

COURT

Supreme Court of British Columbia

DECIDED

13 October 2021

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2021 BCSC 2008 R. v. Alkhalil IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Alkhalil, 2021 BCSC 2008 Date: 20211013 Docket: 27393-106 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. 106 - Admissibility of Mustafa Rudrug's Evidence Counsel for the Crown: M. Sheardown S. Dworkin N. Gregoire A. Cochrane S. Wagner D. Darby A. La Bar 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 J. Desbarats A. Dorin Counsel for the Accused, Larry Ronald Amero M. Rock J. Myers J. Oppal L. Myers, Q.C. Place and Date of Hearing: Vancouver, B.C. September 29, 2021 Place and Date of Ruling: Vancouver, B.C. October 13, 2021

Introduction

- [1] The Crown seeks to lead certain evidence from a witness, Mustafa Pudrug. Mr. Alkhalil takes the position that the evidence is inadmissible either because it is hearsay or, if not led for a hearsay purpose, then because it is irrelevant.

Background

- [2] In 2008, Mr. Pudrug was the building manager of an apartment in downtown Vancouver. The thrust of his proposed evidence is that in April of that year, he was conducting a move-out inspection for a suite rented by James Riach and Barry Espadilla. A man attended at the appointed time and identified himself to Mr. Pudrug as Mohammad Shakil Khan. He advised Mr. Pudrug that he was a representative of Mr. Riach and was there to finish checking Mr. Riach and Mr. Espadilla out of the suite. Mr. Khan had with him a power of attorney document purportedly signed by Mr. Riach and, on that basis, Mr. Pudrug completed the move-out inspection with Mr. Khan. Mr. Khan turned in the keys to the unit. Positions of the Parties

- [3] The Crown submits that the proposed evidence is admissible:
- a) under the self-identification exception to the hearsay rule: *R. v. Farah*, 2016 ONSC 2081; *R. v. Davani*, 2017 ONSC 2326;
 - b) for a non-hearsay purpose, namely, circumstantial evidence of an association between Mr. Khan and Mr. Riach. The Crown argues:
17. In the circumstances of this case, the mere fact that the person with whom Mr. Pudrug dealt with identified himself as Mohammad Shakil Khan has probative value. The Crown would tender the evidence simply to establish how the person identified himself to Mr. Pudrug. Even setting aside whether the person accurately identified himself, of all the names that could have been chosen, the person chose a distinctive name - Mohammad Shakil Khan. It so happens that this name is also strikingly similar to that of the principal owner of the Toyota Avalon (see Ex. 15A, page 19 - the name listed is Mohammad S Khan), located and searched by the police. In combination with other evidence, this circumstance is evidence of an association between Mr. Khan and James Riach. There is evidence of an association between Rabih Alkhalil, James Riach and Larry Amero. There is also evidence of an association between Mr. Khan and Rabih Alkhalil. In combination, all of these circumstances tend to make it more probable that the person of interest depicted in the CCTV images from the Wall Centre on January 17, 2012, was Rabih Alkhalil.
- c) because evidence of Mr. Pudrug's dealings with Mr. Khan is not hearsay as the events are within his direct knowledge. With respect to this last point, the Crown says that it is necessary that it be able to lead the evidence concerning the power of attorney so that the jury is able to understand why Mr. Pudrug was prepared to allow a third party to complete the checkout inspection for the suite.
- [4] Mr. Alkhalil accepts that if the evidence is otherwise relevant and admissible, then the self-identification exception applies. However, he maintains that the self-identification is irrelevant unless Mr. Khan's additional statement that he was a representative for Mr. Riach and the power of attorney document are also admitted for their truth. Mr. Alkhalil contends that in arguing that that evidence is being led simply to enable the jury to understand why Mr. Pudrug was prepared to deal with Mr. Khan, the Crown is attempting to disguise hearsay as narrative. He submits that the reason why Mr. Pudrug permitted Mr. Khan to complete the move-out inspection is only capable of establishing an association between Mr. Riach and Mr. Khan--the Crown's asserted basis for the relevance of the evidence--if admitted for its truth; otherwise, it is irrelevant why Mr. Pudrug allowed Mr. Khan to complete the inspection. Discussion

- [5] It is uncontentious, and I accept, that the self-identification exception to the hearsay rule applies to the individual's identification of himself to Mr. Pudrug as Mohammad Shakil Khan. Where the parties part company is with respect to whether the balance of Mr. Khan's statement--that Mr. Riach had granted him a power of attorney--is being sought for a hearsay or non-hearsay purpose.
- [6] Mr. Alkhalil contends that the Crown intends the jury to rely on the statement for its truth as it is only on that basis that it has any probative value in relation to an association between Mr. Khan and Mr. Riach. However, putting the statement aside, the fact that an individual who gave his name as Mohammad Shakil Khan attended at Mr. Riach's move out inspection and had keys to his suite is alone some circumstantial evidence of association between Mr. Khan and Mr. Riach. While the Crown submits that it is not leading the statement about the power of attorney for its truth, I am concerned there is a very real danger that the jury will use it for that purpose, even with the Crown's proposed mid-trial instruction as to the limited use it can make of Mr. Pudrug's evidence.
- [7] The relevance of Mr. Pudrug's proposed evidence as a whole, and the reason the Crown seeks to lead it, is as evidence of association between Mr. Khan and Mr. Riach. In that context, to instruct the jury that they may not rely on Mr. Khan's statement about the power of attorney, powerful evidence of association between the two men, for its truth is not realistic. Especially since an explanation as to why Mr. Pudrug would have dealt with a third person in regards the move out inspection is not necessary for the jury's understanding of events, I conclude that the statement about the power of attorney is inadmissible.

Conclusion

- [8] In the result, the proposed evidence of Mr. Pudrug with respect to the self-identification of Mr. Khan and what he himself did with Mr. Khan is admissible.
- [9] Mr. Pudrug's evidence about Mr. Khan's statements about being granted power of attorney and the power of attorney document are inadmissible. "Maisonville J."

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