

CANADA / JUDGMENT

## R. v. Alkhalil

2022 BCSC 1488

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2022 BCSC 1488 R. v. Alkhalil

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alkhalil,

2022 BCSC 1488

Date: 20220824

Docket: 27393-170

Registry: Vancouver

Regina

v.

Rabih Alkhalil also known as Robby Alkhalil and

**Larry Ronald Amero**

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Before: The Honourable Madam Justice Maisonville

Ruling re Application No. 170 - Application for an Order Permitting An Inquiry of the Jury Resulting from Alkhalil Absconding

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Place and Date of Trial/Hearing:

Vancouver, B.C.

August 2, 2022

Place and Date of Ruling:

Vancouver, B.C.

August 24, 2022

## introduction

[1] On the evening of July 21, 2022 at 6:48 p.m., Mr. Alkhalil was confirmed to have escaped North Fraser Pre-trial institution in a white Econoline van with the assistance of two other men who had posed as repairmen.

[2] On July 22, 2022, on the application of the Crown, I held that Mr. Alkhalil had absconded, and I found that he had waived his right to be present at the trial, and ordered that the trial would continue in his absence. I instructed the jury as follows:

By now, some, or all of you will have heard that Mr. Alkhalil has absconded. I will instruct you later on what use, if any, you can make of that fact. I remind you again that both accused, including Mr. Alkhalil, who is not before you, is presumed innocent until the Crown has proven their guilt beyond a reasonable doubt. The trial will continue in the absence of Mr. Alkhalil, and the Crown will have to prove his guilt to you beyond a reasonable doubt, as well as Mr. Amero. I am instructing all of you now not to pay any further attention to any media accounts [or] anything that you read or hear on the internet, social media or otherwise. This direction is in accordance with my initial directions to you that you must decide this case on the basis of

evidence that is presented in this courtroom. And so that will conclude our court day today, and I am going to be asking that you return again on Wednesday at ten o'clock. Thank you.

- [3] Following that ruling, counsel for Mr. Amero indicated that he needed some time to consider his position. The next time this matter was in court, counsel for Mr. Alkhalil indicated that they would stay on the record. Mr. Amero still needed time to consider his applications. This matter has since been in court but adjourned twice at the request of counsel for Mr. Amero.
- [4] On Friday, July 29, 2022, Mr. Amero filed an application for a mistrial and a severance from this trial. He also sought that an inquiry be held in respect of the jurors.
- [5] I dismissed Mr. Amero's applications on August 2, 2022, with reasons to follow. These are the reasons concerning Mr. Amero's application that there be a jury inquiry in respect of determining if the jurors were exposed to any news media or other information about the abscondment of Mr. Alkhalil that could prejudice their ability to try the case solely on the evidence presented in court. For example, Mr. Amero proposes that the jury be questioned as to whether the jurors had read newspaper articles that refer to the Raposo murder, of which both Mr. Alkhalil and Mr. Wiwchar were convicted.
- [6] A Toronto Star newspaper online article referred to the Raposo murder in the course of reporting on the escape of Mr. Alkhalil. It was on the internet the morning that the jury returned to hear the last day of the Crown closing.
- [7] The Crown opposes the application. It argues that:
  - a) the jurors have been repeatedly instructed to make decisions based only on the evidence and not what they hear outside the courtroom; and
  - b) there was a previous inquiry of the jurors where they received further instruction from the Court to only consider evidence they hear in the courtroom and not to consider external sources of information.

## background

- [8] On several occasions, the Court instructed the jurors on their obligations not to consult outside sources and to decide the case solely on the basis of the evidence they hear inside the courtroom.
- [9] The Court first instructed the jurors of their obligations during the selection process when the Court gave potential jurors the usual instruction about not consulting outside sources and deciding the case solely on the basis of the evidence they heard inside the courtroom.

- [10] Potential jurors were also screened by means of a challenge for cause concerning the fact that "the evidence in this case may include allegations or suggestions of gang involvement, organized crime or drug trafficking". Then, once the trial began, the Court's introductory remarks included the usual instruction about deciding the case solely on the evidence heard in the courtroom: *R. v. Alkhalil*, 2021 BCSC 2423 at paras. 4-5.
- [11] In the Court's introductory remarks at the commencement of the trial, the Court instructed the jury that they must decide this case solely on the evidence that they hear in the courtroom. The things that they see or hear in the media are not evidence, and they must ignore them. They were told to not consult other people or other sources of information, printed or electronic. (Emphasis added.)
- [ ]
30. Apart from the *Wolfpack* book, there has already been a significant amount of media coverage surrounding the accused. There is a substantial body of publicly available material which casts the accused in an unfavourable light.
- [12] In addition, this Court has previously conducted an inquiry of the jurors. This happened on the fourth day of trial, when one of the jurors advised the Court that another juror had spoken about information he said he had heard about the accused. An inquiry was conducted, and the juror was discharged. The remaining jurors were polled. They were asked whether they had heard what had been discussed and, if so, whether it would affect their ability to judge the case impartially. None of the jurors indicated that their impartiality would be affected.
- [13] The Court also instructed the jury on this matter in late October 2021, after a book about the *Wolfpack* was published. The book was on prominent display in stores under signs promoting "Big New Releases", as well as online. The book purported to be an authoritative account of a criminal organization called the "Wolfpack". It named various members of the organization, including the three accused in this case, and detailed the organization's activities and offences it had committed, including murder and drug trafficking. It contained a substantial amount of discreditable information about the accused. The book also included exhibits and photographs that would be filed at trial. Canadian media outlet CTV published an article about the *Wolfpack* book on October 26, 2021.
- [14] Following the release of the *Wolfpack* book, the defence made an application to reopen the voir dire concerning extrinsic misconduct that had previously been ruled upon. One of the aspects of that voir dire and the ruling made in relation to it, *R. v. Alkhalil*, 2021 BCSC 1119, concerned evidence the Crown intended to lead about the "Wolfpack".
- [15] Following discussion with counsel, the Court gave the jury the following mid-trial instruction on November 4, 2021:

I just want to talk briefly, given that we're now several months into this trial, that it's a good time to remind you, members of the jury, of certain things, and those include that under our system of law an accused can only be found guilty of an offence on the basis of evidence that is presented in open court. The things that you see or hear or read about in the media or in books or in other publications are not evidence, and you must ignore them.

The same applies to any rumours that might circulate about this case, and there's good reason for the rule. You see, neither the prosecution nor the accused would have an opportunity to reply to those rumours or accusations from the media or elsewhere. Nor can they cross examine the sources of such rumours or accusations. Also, sometimes what is reported and published in media or books can be inaccurate and mistaken. Therefore, you should pay no attention to any such reports, remarks, or accusations if you hear or read anything about them.

I'm going to mention now a specific publication that has come to my attention. It is a book with a title that includes the word "Wolfpack". You may come across this book inadvertently while you're out shopping on the internet, particularly as we approach the holiday season, or in a bookstore. If you come across this book, or any reports about this book, you must - either in a store, in the media, or on the internet, you must ignore it, and any reports about it. You should pay no attention to it or those reports if you hear or read anything about it.

More specifically, I am directing you not to read this book or listen to an audio version of this book. If you see this book online, please do not look at that book or what is said about the book. If you see the book in the bookstore, you cannot pick up the book or flip through it or look at the covers or at the inside cover. You cannot read anything in the media about the book. You cannot speak to anyone about the book or its contents. And this direction is in accordance with my initial directions that you must decide this case on the basis of evidence presented in this courtroom. And I trust that none of you have knowledge about the content of this book. If you do have knowledge about the content of this book please let the sheriff know, and they will bring it to my attention.

[Emphasis added.]

See R. v. Alkhalil, 2021 BCSC 2423 at para. 12.

law on Polling the jurors

[16] Section 644 of the Criminal Code, R.S.C. 1985, c. C-46 provides:

### Discharge of juror

644 (1) Where in the course of a trial the judge is satisfied that a juror should not, by reason of illness or other reasonable cause, continue to act, the judge may discharge the juror.

## Replacement of juror

(1.1) A judge may select another juror to take the place of a juror who by reason of illness or other reasonable cause cannot continue to act, if the jury has not yet begun to hear evidence, either by drawing a name from a panel of persons who were summoned to act as jurors and who are available at the court at the time of replacing the juror or by using the procedure referred to in section 642.

## Trial may continue

(2) Where in the course of a trial a member of the jury dies or is discharged pursuant to subsection (1), the jury shall, unless the judge otherwise directs and if the number of jurors is not reduced below ten, be deemed to remain properly constituted for all purposes of the trial and the trial shall proceed and a verdict may be given accordingly.

## Trial may continue without jury

(3) If in the course of a trial the number of jurors is reduced below 10, the judge may, with the consent of the parties, discharge the jurors, continue the trial without a jury and render a verdict.

[17] In *R. v. Budai*, 2001 BCCA 349, our Court of Appeal held:

[38] As indicated in the passages quoted from *R. v. Barrow* and *R. v. R.D.S.*, *supra*, the right to an impartial jury and a fair process is a right which enures to the Crown and the public at large as well as to the accused. This is exemplified by the provisions of the Criminal Code referred to above which do not distinguish between the rights of the accused and the Crown in this regard.

[39] A trial judge who becomes aware of circumstances which raise a question as to the impartiality of a juror is empowered to discharge that juror pursuant to s.644 of the Criminal Code or to dismiss the jury and declare a mistrial. Whether to take such a step is a matter which falls within the discretion of the trial judge and an appeal court will generally exercise caution before interfering with the exercise of that discretion. See: *R. v. Horne* (1987), 35 C.C.C. (3d) 427 (Alta. C.A.); *R. v. Andrews, Farrant & Kerr* (1984), 13 C.C.C. (2d) 207 (B.C.C.A.); *R. v. Hanna* (1993), 80 C.C.C. (3d) 289 at 312 (B.C.C.A.).

[40] However, the trial judge must exercise that discretion in accordance with the applicable legal principles that govern the exercise of the discretion. Specifically, if an issue of potential bias of a juror arises from reports made to the trial judge he or she must, in order to properly exercise his discretion.

[1] apply the proper legal test for determining whether the information gives rise to a reasonable apprehension of bias. See: *R. v. Spencer*, *supra*, at pp.279-80 and 290-91; *R. v. Gough*, *supra*, at p.669; *R. v. Blackwell*, [1995] 2 Cr. App. 625 (C.A.) at p.635 (paras. B/C);

- [2] at a minimum, conduct an inquiry into the circumstances in order to obtain the necessary information upon which to exercise his or her discretion. This is his duty. See: *R. v. Blackwell*, supra, at pp. 633-64; *R. v. Hertrich* (1982), 67 C.C.C. (2d) 510 at 541; *R. v. Andrews, Farrant & Kerr*, supra, at pp. 212-13 and see: with regards to the obligation of "obtaining ... the required information": *R. v. R.D.S.*, supra, at para. 111 and *R. v. Afghanzada*, supra. Regardless of the positions taken by counsel, the court has an independent duty to ensure the fair conduct of the trial. See *R. v. Hodgson*, [1998] 2 S.C.R. 449; 127 C.C.C. (3d) 449 at paras. 41 (per Cory J.) and 100 (per L'Heureux-Dubé J., concurring).
- [41] It should be noted here that *R. v. R.(D.S.)*, *R. v. Curragh* and *R. v. Hodgson*, all in the Supreme Court of Canada, were in 1997. *R. v. L.(H.S.) (B.C.C.A.)* was in 1999, and *R. v. Afghanzada (Ont.C.A.)* in 2000. This trial was in 1995. These cases collectively did not change the law but they did emphasize that where a juror is involved that juror must be inquired of and the obligation to initiate such an inquiry and to carry it through is on the trial judge without reference to the views or submissions of counsel.
- [42] In this case the trial judge received reports of "improper and continuous eye contact" in the courtroom between a juror and an accused, to which the juror had made an "improper response". He was advised that this eye contact was "not an isolated incident" but had "been going on for one or two months". He was advised that there was "nodding and a recognition of each other at lunchtime in the Robson Square area." This was noticed by many people and reported to the trial judge by officers of the court. The nature of the reports was such as to make the trial judge concerned about the "appearance of impropriety", and he saw the situation as "quite a serious problem indeed."
- [43] The Crown contends that upon receiving this information, the trial judge was required to consider whether it raised a reasonable apprehension of bias on the part of Guess and apply the appropriate legal test. By failing to do so he committed an error of law that requires this Court to consider the question.
- [44] The question (employing the language from *Committee for Justice and Liberty v. Canada*, supra), is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through conclude? ...The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining the required information ...".
- [Emphasis added.]
- [18] More recently, in *R. v. Chouhan*, 2021 SCC 26, the Court addressed the issue of impartiality and the critical role that jury instructions play in ensuring that jurors approach their deliberations free from bias. The Court held:

[49] In our view, jury instructions have a critical role to play in ensuring that jurors approach their deliberations free from bias. Jury instructions can respond to a significant danger of biased reasoning, which is that many biases are unconscious: individuals often do not recognize they hold a particular bias and would likely, and honestly, deny having it if asked.

[19] In *R. v. Tutiven*, 2022 ONCA 97, the accused appealed his conviction for second degree murder arguing, inter alia, that the trial judge failed to inquire into evidence of juror impartiality. During the challenge for cause process in the selection of jurors, a prospective juror said that this case "actually did bother me a lot" given her work with new immigrants to Canada. The prospective juror said she did not know whether she would be able to set aside her preconceived notions and decide the case fairly. The two jurors acting as triers found the prospective juror acceptable. The defence exercised a peremptory challenge to exclude the prospective juror. On appeal, the appellant submitted that the conduct of the two jurors in finding the prospective juror to be acceptable, created a reasonable apprehension of bias on the part of the two jurors. He therefore submitted that the trial judge should have conducted an inquiry into their impartiality and possibly discharged them.

[20] In dismissing their appeal, the Court stated:

[24] The threshold for establishing reasonable apprehension of bias is high: *S. (R.D.)*, at paras. 112-113. Further, safeguards are in place to protect against potential sources of juror partiality. In *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863, at para. 107, the Supreme Court explained these safeguards as follows:

[T]he safeguards of the trial process and the instructions of the trial judge are designed to replace emotional reactions with rational, dispassionate assessment. Our long experience in the context of the trial of other serious offences suggests that our faith in this cleansing process is not misplaced. The presumption of innocence, the oath or affirmation, the diffusive effects of collective deliberation, the requirement of jury unanimity, specific directions from the trial judge and counsel, a regime of evidentiary and statutory protections, the adversarial nature of the proceedings and their general solemnity, and numerous other precautions both subtle and manifest - all collaborate to keep the jury on the path to an impartial verdict despite offence-based prejudice.

[21] The Court in *Tutiven* also commented that the trial judge had done everything necessary to ensure juror impartiality by:

- instructing the jurors that, having preconceptions about a case does not necessarily disqualify a potential juror and that what is important, is whether the potential juror "would likely be able to put their opinions aside and decide the case fairly and only on the evidence and legal instructions": para. 27.
- Each juror swore an oath or made an affirmation to decide the case impartially: para. 28.

· After all the jurors were selected, the trial judge reminded the jury panel of their duty to decide the case only on the basis of the evidence they saw and heard and to make their decision without "sympathy, prejudice or fear": para. 29.

· The appellant's experienced defence counsel raised no concerns and neither party asked the judge to conduct a further inquiry into the conduct of the triers: para. 30.

[22] In *R. v. Kinkead* (2003), 67 O.R. (3d) 57 (C.A.) the accused, Mr. Kinkead, and his cousin and close friend, R, were charged with the first-degree murder of R's former girlfriend, M, and her sister. The accused became a suspect when DNA analysis linked the person responsible for two sexual assaults and the murder of a Toronto Transit Commission (TTC) collector to the male DNA found under M's fingernails. Kinkead was arrested for those offences and subsequently pleaded guilty to two counts of aggravated sexual assault and to the murder of the TTC collector. After the completion of several days of evidence at trial, reports appeared in the media, which mentioned that the accused had pleaded guilty to the murder of the TTC collector. The defence requested a mistrial on the basis that it was likely that at least some of the jurors might have learned inadvertently of the accused's murder conviction.

[23] The trial judge decided to ask the jurors individually whether they had seen or heard anything regarding the matter reported on in the paper. Six jurors responded that they had heard something and based on their responses and expressions, the trial judge concluded that at least two or three of those six jurors were likely aware of the appellant's prior murder conviction. After further submissions, the trial judge denied the request for a mistrial. He concluded that the jury would be able to set aside anything they may have heard about the murder conviction. In particular, he noted that the defence had challenged prospective jurors for cause based on pre-trial publicity and that all of the jurors had been accepted by the triers. The trial judge instructed the jury not to discuss anything they may have seen or heard, reminded them of their oath to decide the case based solely on the evidence adduced at trial and told them to disregard anything they may have seen or heard. He instructed them to ignore any future stories that they might see. Following his ruling, the trial judge gave the jury a three-part instruction. The accused was convicted of first degree murder.

[24] In dismissing Mr. Kinkead's appeal, the Ontario Court of Appeal wrote:

[54] Second, I do not agree with the suggestion that the trial judge failed to focus on the real issue or that the circumstances made either additional inquiries or a mistrial mandatory.

[55] The trial judge's conclusion as set out in his ruling was that he was satisfied that the jurors could set aside anything they may have heard. That is the precise issue that he was required to determine.

- [56] Further, the issue in this case is distinguishable from the issues that arose in the authorities upon which Kinkead relies. Here, the circumstances did not involve investigating the possibility or effects of juror tampering, nor did they involve assessing whether prospective jurors could abide by an oath. This jury had already been sworn. The circumstances were more akin to the situation presented by the inadvertent admission of inadmissible evidence.
- [57] Where inadmissible evidence is inadvertently admitted, the trial judge does not question the jurors to assess whether they can disregard the inadmissible evidence; rather, he makes that determination as a matter of common sense, taking account of all of the events that have taken place and his observations of the jury. In this case, the trial judge adopted the same approach.
- [58] In my view, the trial judge directed his mind to the correct issue and took appropriate steps to assess what the remedy should be. The trial judge noted that some of the jurors may well have heard of the appellant's criminal history before the trial, that they were challenged for cause on the ground of pre-trial publicity, and that they had been accepted by the triers as being capable of setting aside what they had heard. Moreover, he had been observing the jury since they were selected and he had the opportunity to observe their expressions and responses when he questioned them.
- [ ]
- [62] Moreover, the trial judge was satisfied that, despite the mid-trial publicity, the jury would decide this case based solely on the evidence adduced at trial. It is implicit in his ruling that he determined that the mid-trial publicity was not incurably prejudicial. The fact that he subsequently decided that it was unnecessary to risk the possibility that the jury would misuse admissible evidence of the murder conviction, does not undermine the correctness of his original determination. I see no other basis for concluding that the trial judge erred in his original assessment of the prejudicial effect of the mid-trial publicity.
- [63] Third, in my view, the trial judge gave the jury a clear sharp warning that was appropriate in the circumstances. Because not all of the jurors had learned of Kinkead's previous murder conviction, it was necessary that the trial judge walk a fine line between cautioning those who had, to disregard it; and not drawing unnecessary attention to the problem, for those who had not. I see no basis for concluding that the trial judge's instruction was not specific enough. It would have been obvious to any juror who had learned of Kinkead's prior conviction that the trial judge's instruction was directed to that aspect of the mid-trial publicity. My conclusion is reinforced by the fact that defence counsel at trial did not object to the instructions that were given or request that they be clarified.

## analysis

- [25] I find that there is no evidence before me that would support an inquiry such as that suggested by Mr. Amero.

- [26] Unlike the situation before the Court in Budai, there has been no report received by the Court that would suggest that there is any basis for an inquiry into the impartiality of the jurors. In Budai, there had been reports by the Sheriffs and court officials to the trial judge of improper and continuous eye contact between the accused and the juror, as well a nod of recognition when they encountered each other in an area near the courthouse. The behaviour had been going on for one or two months.
- [27] Nor is this a case like *R. v. Afghanzada* (2000), 149 C.C.C. (3d) 349 (Ont. C.A.), where there had been allegations of discussions between the jurors and an officer involved in the investigation.
- [28] As part of the justification for an inquiry, Mr. Amero points to a Toronto Star article referring to Mr. Alkhalil's conviction in the Toronto trial for the murder of Mr. Raposo. However, this Court has already instructed the jury to ignore media articles about the case. As a result, no further instruction is required.
- [29] The Court ruled that the trial would proceed in absentia and the jurors were instructed that the trial would proceed in absentia. The jurors were instructed that the accused were still entitled to the presumption of innocence and further that the Crown had the burden of proving beyond a reasonable doubt that the guilt of the accused had been proven. No adverse inference is being sought by the Crown in respect of Mr. Alkhalil having absconded.
- [30] These jurors have been warned numerous times that the accused are entitled to the presumption of innocence and that they are only to consider the evidence presented in the courtroom. They have been directed numerous times to not read anything in the press, internet, and social media.
- [31] The seriousness of considering matters not in this courtroom has been emphasized time and again--notably, in my opening, in the challenge for cause, in the opening of the trial, at the discharge of the juror and the polling that took place on July 5, 2021, and at the mid-trial instruction on November 4, 2021.
- [32] Here, the jurors were told at the first possible moment of Mr. Alkhalil absconding, and reminded of the presumption of innocence and instructed not to read any media accounts, anything on the internet, social media or otherwise of the event. I find I have no evidentiary basis to embark on an inquiry.
- [33] The jurors have been warned many times in the course of this trial not to read any news articles concerning this matter. They have been warned not to conduct research. They have been instructed numerous times that in accordance with their oath they are to judge the accused based only on the evidence presented to them in this trial. In the circumstance, I exercise my discretion not to poll the jurors.

[34] The polling suggested is simply to inquire whether the jury members are following their oath. As the Court made clear in *R. v. Vermette*, [1988] 1 S.C.R. 985, a jury is quite capable of disabusing itself from information it is not entitled to consider.

"Maisonville J."

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