

CANADA / JUDGMENT

R. v. Alkhalil

2023 BCSC 840

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Alkhalil,

2023 BCSC 840

Date: 20230516

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Registry: Vancouver

Rex

v.

Rabih Alkhalil (a.k.a. Robby Alkhalil) and

Larry Ronald Amero

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Before: The Honourable Justice Maisonville

Ruling re: Admissibility of the Victim Impact Statement of

Mr. Baljit Pabla

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J. Oppal

Place and Dates of Hearing:

Vancouver, B.C.

April 24, 25, and 27, 2023

Place and Date of Judgment:

Vancouver, B.C.

May 16, 2023

Introduction

- [1] Is a victim impact statement referring to a murder victim admissible in circumstances where the person to be sentenced was not convicted of the actual murder but rather was found guilty of conspiracy to commit murder? Does the fact that the author of a victim impact statement has a criminal past preclude admissibility of their victim impact statement? This ruling addresses the admissibility of victim impact statements in those circumstances.
- [2] Larry Amero is before the Court for sentencing for two counts of conspiracy to commit murder. The intended targets of the two conspiracies were Sukveer Dhak (Count 3) and Sandip Duhre (Count 2).
- [3] The Crown seeks to tender a four-page typed victim impact statement of Baljit Pabla (the "Victim Impact Statement") in respect of Count 3. Mr. Dhak was a cousin of Mr. Pabla. Defence counsel opposes the admissibility of the Victim Impact Statement. Briefly stated, the Victim Impact Statement outlines the emotional impact of the murder of Mr. Dhak on Mr. Pabla. Mr. Dhak was murdered on November 26, 2012. His murder remains unsolved.
- [4] As edited by the Crown, the Victim Impact Statement sets out:

[Deleted] thank you for this opportunity. I could stand here, and say all the warm and loving things about my brother Sukh. I could say everything that all of us have inside us, love, care, romance, fun joy and-or happiness. Yes, it (sic) true we decide who we want to share it with, or how, and I could also talk about that other half of Sukh. I'm rather going to make this unique, to my opinion, because, I don't want to constantly feel that pain in my heart, the sadness. I will always have a moment, my most dearest brother Gurm, my Ex fiancé, and brother Sukh.

I lost the three people I loved the most, and who also loved me. [deleted]

I lost my brother [deleted] Sukhveer Dhak, [deleted] because of these guy's actions and this ordeal. [Deleted]

Nothing will ever be the same, nothing, not Christmas, festivals in my other religions, not the movie theatre, not even a simple drive, Sir, I can't even listen to music with out my heart feeling that pain going up and down and/or side to side around my chest. It's normal now, I'm use (sic) to it Sir, it's okay. I'm still breathing in this short life. I've lived a lot. [deleted]

[Deleted] I was pretty mature for my age, I would say, I was about 10 years ahead, smarter than the age I was at. Now because of what was happening and what's happened, my maturity stopped. I stopped (sic) developing myself, and my knowledge. I'm scared of the fact that I may not recover fully from this. Yes, I'm hopeful and law of attraction is one of my values. There's no doubt in my mind that I'm having a hard time because of this. I pray, and hope I succeed to being myself again. I haven't grown for a long time until recently, when I saw a change in the summer of 2022 I've started to grow. So it's really hard to say at this moment how much I will recover. It's been slow but given everything that's happened, I'm happy that started recovering (sic). I assume, a little is better than nothing.

[Deleted]

Anyways, I slowly gained my values back. I know I'll grieve a little forever. The coping strategies I learned will help me through the hard times I face. Thoughts aren't permanent, However, if it wasn't for this trauma I wouldn't have went to get help at [vetted]

[Deleted]

I thought I was healing, by doing drugs and finding negative ways to cope with being traumatized. I was simply just putting a bandage over my problems. I didn't want to live with myself, I wanted to commit suicide, and I was hospitalized 3 times. It was a miracle, and I mean miracle that I never ever over dosed once, I never died. Yet I managed to not give positive attention to a relationship of 14 years and 3 months with someone I wanted to marry. I stopped being romantic, I stopped with self-care, and I stopped with my values. Every time I thought about marriage, I thought about how brother Sukh wouldn't be there, even though I say he's with me everywhere I go, and he will always be in my heart. However, I would always think this way. Along with these thoughts, I also did not focus on lots and lots of conversations, either they be with my girlfriend, friends, family, or being in class, I couldn't. I stopped my leisure activities. I wasn't having fun anymore. I wasn't paying attention to my work, cancelling meetings, falling

asleep at work, having headaches, and crying in my bed before sleeps, or not even sleeping at times. I was not living up to my potential, I was like this since this whole ordeal. I never realized how this never only effected(sic) me, but it effected everyone around me (sic).I used to say I put yself through all this, the fact is I was put through this another fact is I put the people around me through trauma, my partner, and my lived ones. Yes, it has changed as I started recovering to some level. However, I forgive you Larry.

[Deleted]

Honesty, Justice, safety, trust, trusted, love, loved, freedom, and loyalty, are just some of my values, I have several more. However, I actually stopped living up to every single core value. I took baby steps towards recovering, and now, I'm a little faster, but I had to also want it along with the help. Me losing my touch on my values, could have been worse, I very well could have ended up in jail or simply dead. I'm not saying I'm perfect, oh no. Im(sic) still not completely living up to my values, I'm scared to. I constantly look over my shoulder. [Deleted]

Further Sir I go on to say, I thank you, [deleted] Because, had you guys not brought this trauma into my life, I wouldn't have known who my true friends are. [Deleted]

[Deleted] sorry For the long read. Again everyone, thank you for this opportunity.

- [5] The deleted passages of Mr. Pabla's Victim Impact Statement refer to a number of different topics including conflicts and consequences of gang life. Notably, Mr. Pabla made comments directed at Mr. Amero, including an apology for a shooting that rendered one of Mr. Amero's friends paralyzed.

THE POSITION OF THE PARTIES

- [6] The Crown submits the Victim Impact Statement, with the proposed deletions falls within s. 722 of the Criminal Code, R.S.C. 1985, c. C-46. While it is true that during the entire prosecution of this matter, there was no suggestion that Mr. Amero was in any way responsible for the murder of Mr. Dhak, it is difficult, if not impossible, to separate the loss from the conspiracy. And while there is no reference to the crime of conspiracy to murder Mr. Dhak in the Victim Impact Statement, there are still references to the effect of crime and gang life on Mr. Pabla.
- [7] Mr. Amero argues that his conviction was not for the murder of Mr. Dhak, nor has it ever been suggested that Mr. Amero, or indeed any of the co-accused, were in any way responsible for carrying out the murder of Mr. Dhak. As a result, Mr. Amero says that the Victim Impact Statement does not comply with s. 722 of the Criminal Code. In short, the Victim Impact Statement does not speak to emotional loss arising from the conspiracy conviction and, instead, it suggests that rather than being a victim, Mr. Pabla is involved in criminal activity.

the law

[8] Victim impact statements are governed by s. 722 of the Criminal Code. The pertinent sections are:

722 (1) When determining the sentence to be imposed on an offender or determining whether the offender should be discharged under section 730 in respect of any offence, the court shall consider any statement of a victim prepared in accordance with this section and filed with the court describing the physical or emotional harm, property damage or economic loss suffered by the victim as the result of the commission of the offence and the impact of the offence on the victim.

[]

(4) The statement must be prepared in writing, using Form 34.2 in Part XXVIII, in accordance with the procedures established by a program designated for that purpose by the lieutenant governor in council of the province in which the court is exercising its jurisdiction.

[9] The definition of "victim" includes a member of the victim's direct family who is directly affected in an emotional way: *R. v. Duffus* (2000), 40 C.R. (5th) 350 (Ont. S.C.J.).

[10] In *R. v. Bremner*, 2000 BCCA 345, the Court of Appeal considered the decision of Justice Hill in *R. v. Gabriel* (1999), 137 C.C.C. (3d) 1 (Ont. S.C.J.). At para. 27, Proudfoot J.A. wrote:

[27] In *Gabriel*, Mr. Justice Hill set out what should be presented to the court when victim impact statements are submitted. I reproduce them here as I think they are extremely useful (at paras. 29-33):

Impact statements should describe "the harm done to, or loss suffered by, the victim arising from the commission of the offence". The statements should not contain criticisms of the offender, assertions as to the facts of the offence, or recommendations as to the severity of punishment.

Criticism of the offender tilts the adversary system and risks the appearance of revenge motivation.

Attempts to state, or presumably to restate, the facts of the offence usurps the role of the prosecutor and risks inconsistency with, or expansion of, prior trial testimony, or facts read in, and agreed to, on the guilty plea appearance. Such was the case in *R. v. McAnespie* (1993), 82 C.C.C. (3d) 527 (Ont. C.A.) (reversed (1993), 86 C.C.C. (3d) 191 (S.C.C.)) where additional disclosure by the complainant, relating to the offence, was made by the complainant in her victim impact statement.

The Attorney General represents the public interest in the prosecution of crime.

Recommendations as to penalty must be avoided, absent exceptional circumstances, i.e., a court-authorized request, an aboriginal sentencing circle, or as an aspect of a prosecutorial submission that the victim seeks leniency for the offender which might not otherwise reasonably be expected in the circumstances. The freedom to call for extraordinary sentences, beyond the limits of appellate tolerance, unjustifiably raises victim expectations, promotes an appearance of court-

acceptance of vengeful submissions, and propels the system away from necessary restraint in punishing by loss of liberty (s. 718.2(d) of the Code; *R. v. Gladue*, supra at para 40, 41, 57, 93). It has been suggested that frequently the victim's limited knowledge of available sentencing options may lead the victim to rely on more severe options: H.C. Rubel, *Victim Participation in Sentencing Proceedings* (1985-86), 28 C.L.Q. 226 at 240-241. The independent neutrality of the judiciary requires that the court not react to public opinion as to the severity of sentences: *R. v. Porter* (1976), 33 C.C.C. (2d) 215 (Ont. C.A.) at 220 per Arnup J.A. [Footnotes omitted.]

Regrettably, when taken together, the statements before the trial judge contained all those matters referred to by Mr. Justice Hill, matters that should not have been before the court at a sentencing hearing.

- [11] In *R. v. Berner*, 2013 BCCA 188, the Court of Appeal confirmed this view when considering the admissibility of a video used in a presentation by a father whose child was killed in a dangerous driving causing death and impaired driving sentencing. The sentencing judge had admitted a video of the child performing at a concert as well as a photograph presentation of the child's father. The Court of Appeal noted:
- [24] Counsel for both the appellant and the Crown acknowledged on this appeal that the day in provincial court was already a sombre and difficult one. Watching the presentation that accompanied the father's victim impact statement would have been a profoundly emotional experience for all who saw it. But it is the heightening of those emotions, in a courtroom, which carries the risk of unjust consequences. One of the harms which could result from permitting victims to pay tribute to their loved ones in the public forum of the courtroom is that their expectations may be raised and their belief that the tribute will influence the length of a sentence may be encouraged.
- [12] In *R. v. Benjumea*, 2022 ABQB 44, Justice Michalyshyn helpfully reviewed the law relating to victim impact statements. He then noted:
- [46] The role of victim impact statements was recently revisited in *R v Friesen*, 2020 SCC 9 at para 85:
- [85] When possible, courts must consider the actual harm that a specific victim has experienced as a result of the offence. This consequential harm is a key determinant of the gravity of the offence (see *M. (C.A.)*, at para. 80).
- [47] However, as noted by Renke J in *R v Pettitt*, 2021 ABQB 773 at para 62, the court must take care that victim impact statements are not used improperly to aggravate or increase the length of sentence. Justice Renke cited *R v Theriault*, 2020 ONSC 6768, aff'd 2021 ONCA 517 at para 17 (SC, per Di Luca J):

[17] ... I am mindful that when properly considered, victim impact statements provide important and potentially aggravating context to the sentencing process. They inform the seriousness of the offence committed and the harm caused. However, they cannot be used to improperly aggravate or increase the length of sentence ...

Justice Renke went on to cite Blair JA in *R v Taylor*, 2004 CanLII 7199, at para 42 that "victim impact statements, like criminal records, do not justify double punishment -- once for the crime against society, and again to counterbalance the harm done to the victims (a sort of criminal revenge in lieu of civil damages)," and *R v AG*, 2015 ONCA 159 at paras 72 and 73, that a victim impact statement cannot be used to increase a sentence to an inappropriate level. Proportionality remains the governing sentencing principle.

[48] In *R v CC*, 2018 ONCJ 542, the court noted at paras 12-14:

[12] In conformity with the principles in this legislation, sections 718 and 722 of the Criminal Code were amended to facilitate the informed involvement of victims of crimes in the criminal process, ensuring that their rights are respected, their harm considered and that they are treated with compassion and dignity. Section 718 states that one of the fundamental purposes of a sentencing is to denounce the harm done to the victims and the community at large and to provide reparations for the harm done to the victims:

The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

- (a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
- (b) to deter the offender and other persons from committing offences;
- (c) to separate offenders from society, where necessary;
- (d) to assist in rehabilitating offenders;
- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

[13] Although the sentencing provisions in the Criminal Code have changed and there are a couple of decisions that have found that these provisions cannot be applied retrospectively, these concepts are hardly new in criminal law. Rather, for the most part, it is a codification of what Judges have done for decades. During a sentencing hearing, a Judge has to engage in balancing the aggravating and mitigating features of the offender and the offence. An important consideration is how the conduct of an offender and the nature of an offence has harmed the victims, how their lives have been impacted and the consequences that criminal conduct has visited on innocent people. This essential information is provided by the

victims of crimes. In addition, one of the goals of sentencing has always been to make reparations for the harm done to victims. Providing victims with a voice in the proceedings is one means to make reparations.

- [14] While some parts of the victim impact statements that were submitted in this case may be improper and I will not consider any fact that is not in evidence nor will it impact the outcome of the sentencing, this sentencing hearing is not just about the outcome. The process itself is an invaluable experience for all of the participants. It is an opportunity for [the offender] to hear directly from the victims about the immense harm that his actions have caused which may achieve some of the principles of sentencing by deterring this offender from harming other children, promoting a sense of responsibility and encouraging rehabilitation. It is an opportunity to treat these victims with compassion and dignity by allowing them to voice their pain and suffering. It is a means to begin making reparations and a chance to start the process of healing. As result, the sentencing provisions allow for some flexibility to achieve a just result and a fair hearing while permitting the victims a fulsome opportunity to express themselves within some boundaries. [Emphasis of Michalyshyn J.]
- [49] The comments above are consistent with what author Elizabeth Janzen describes (in "The Dangers of a Punitive Approach to Victim Participation in Sentencing: Victim Impact Statements after the Victims Bill of Rights Act" 2020 Manitoba Law Journal Volume 43 Issue 4 85-106; also 2020 CanliiDocs 2571) as the "communicative" or "expressive" role that victim impact statements properly have, as distinct from the so-called "instrumental" role -- by which victim impact statements are treated as evidence of harm meant in a concrete way to impact the sentence imposed on the offender.
- [13] In *R. v. Millington*, 2015 BCSC 1612, a similar issue to that facing the court was raised. Mr. Millington was before the court for sentencing having been convicted for knowingly making false statements under oath at the Braidwood Inquiry into the death of Robert Dziekanski at YVR airport. The Crown sought to tender a one-page victim impact statement of Mr. Dziekanski's mother. Her statement included a reference to her loss. She wrote "Because my son is no longer here I felt I had a responsibility to attend all the trials and court proceedings to represent my son's memory. This had a huge impact on my financial and more importantly, emotional well-being." The victim impact statement, however, went on to note in several passages specifically how Mr. Millington's lies impacted her. She noted "my faith in the honesty of the RCMP has forever been shaken. Justice Ehrkhe noted:
- [8] I am satisfied that Mr. Dziekanski's mother is a person to whom harm was done or who suffered physical or emotional loss as a result of the commission of the offence of perjury by Kwesi Millington when he knowingly made false statements under oath at the Braidwood Inquiry into the October 2007 death of Robert Dziekanski. Her statement is admissible on these sentencing proceedings pursuant to s. 722 of the Criminal Code.

- [14] In *R. v. Darby*, 2016 ABQB 352, the court was considering the admissibility of victim impact statements in circumstances where the accused had been convicted of conspiracy to commit murder and accessory after the fact to murder but was not charged with the murders themselves as he had not carried them out. The Crown sought to tender the victim impact statements from families of the deceased. Defence counsel opposed the victim impact statements on the basis that there was an insufficient nexus between the commission of the offence and the impact of the offence on the victim. The defence also argued that the statements had the potential to be quite prejudicial.
- [15] Justice Tilleman admitted the victim impact statements, setting out his reasoning:
- [44] The role of victims in the criminal justice system was clarified in the Victims Bill of Rights Act, SC 2015, c 13 ("VRBA"). The VRBA created substantive rights for victims of crime in Canada and amended the Criminal Code. Parliament clearly intended to give a wide voice for victims when passing the amendments to the Criminal Code contained in the VRBA.
- [45] Under the Code, a victim for the purposes of admitting a victim impact statement is "a person who has suffered physical or emotional harm, property damage or economic loss as the result of the commission of an offence against any other person."
- [46] If the families of the deceased are not the victims of this offence, then it begs the question "who are the victims?" Accessory after the fact to murder is not a victimless crime. Darby's actions in cleaning up the car to remove trace evidence were an attempt at concealment of any such evidence. Any assistance to the murderers impacts the police's ability to investigate and detect the persons responsible for them. This creates a direct relationship between Darby's actions and the victimization of these families, who were even more directly affected by the deaths of a loved family member.
- [47] Defence counsel's interpretation of the victim impact provisions is far too restrictive. If there is a lack of nexus between the offender's act and the impact on the victim, it becomes a question of the weight to be given to the victim's statement, not a question of its admissibility.

analysis and conclusion

- [16] There is no issue that Mr. Pabla is a member of Mr. Dhak's family and, thus, a victim as captured in that aspect of the legislation governing victim impact statements in accordance with Duffus. Furthermore, having a criminal past does not in itself preclude, either legally or morally, a victim impact statement from being admissible. A criminal past should not foreclose someone from being a victim, thereby denying them of the benefit of the victim impact statement regime.

- [17] I have accepted the deletions proposed by the Crown, as reflected in the statement reproduced above at paragraph four. The deleted portions of the Victim Impact Statement were improper in that they did not discuss the physical or emotional harm to Mr. Pabla as a result of the loss of Mr. Dhak. Many of the deleted portions would also have introduced new or unproven facts that are not before this Court.
- [18] Rather, the question before me is whether, in the circumstances of a conspiracy to commit murder where a murder was in fact carried out, but not by the person being sentenced, is a victim impact statement which refers to the loss of the person who was the object of the conspiracy, inadmissible?
- [19] I find the reasoning of Tilleman J. in Darby helpful and persuasive. While it is true that the Victim Impact Statement does not directly refer to the conspiracy as being tied to what Mr. Pabla has experienced, it is important to note that, in these circumstances, it is practically impossible to separate his loss from the offence. The offence is not divorced from Mr. Dhak who was the object of the conspiracy. I am satisfied that Mr. Pabla has suffered emotional loss as a result of the loss of the deceased. Mr. Dhak was the object of the conspiracy to commit murder. Mr. Pabla's Victim Impact Statement reflects on his loss of Mr. Dhak.
- [20] I find that the Victim Impact Statement is admissible. Insofar as there is a lack of nexus between the statement and the offence for which Mr. Amero is being sentenced, that goes to the weight to be given the statement, not the admissibility.
- [21] I am mindful, however, that I must not use the statement for an improper purpose such as to improperly aggravate or increase the length of the sentence. To the extent that a victim impact statement describes harm flowing from a different offence, the court must bear that in mind when sentencing the offender, and keep it distinct.
- [22] The Victim Impact Statement provides important context to the sentencing process. However, at sentencing, I will review the Victim Impact Statement with care and consideration, and bearing in mind that Mr. Amero was convicted of conspiracy to commit murder and not murder.

"Maisonville J."

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