

CANADA / JUDGMENT

R. v. Bhoondpaul

2020 BCSC 2042

COURT

Supreme Court of British Columbia

DECIDED

29 October 2020

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2020 BCSC 2042 R. v. Bhoondpaul

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Bhoondpaul,

2020 BCSC 2042

Date: 20201029

Docket: 41642

Registry: Duncan

Regina

v.

Kamal Bhoondpaul

Restriction on publication: pursuant to s. 486.4(1) of the Criminal Code of Canada

Before: The Honourable Mr. Justice Mayer

(via telephone)

Oral Reasons for Judgment

Counsel for the Crown

(appearing via telephone):

J. Blazina

Counsel for the Accused

(appearing via telephone):

B. Movassaghi

Place and Date of Trial/Hearing:

Duncan, B.C.

October 29, 2020

Place and Date of Judgment:

Duncan, B.C.

October 29, 220

- [1] The accused Mr. Bhoondpaul is charged with the sexual touching of the complainant. His five-day trial is set to commence on November 2, 2020 in Duncan.
- [2] Ms. Bhoondpaul applies for an order, pursuant to s. 650(2)(b) of the Criminal Code, R.S.C. 1985, c. C-46 to allow him to appear at the trial by closed-circuit television from the Vancouver Island Correctional Center ("VICC").
- [3] The grounds for this application include the following:
- a) Mr. Bhoondpaul has been detained in custody at VICC since October 31, 2019;
 - b) As a result of the COVID-19 pandemic protocols every time an accused enters a correctional facility they are placed in a segregated unit for 14 days.
 - c) Mr. Bhoondpaul is currently in a regular unit and has employment working in the kitchen. If he is required to attend his trial in person, at the conclusion of each scheduled day of trial, he will be placed in a segregated unit, and following the last day of his trial, he will remain there for up to two weeks. He will also lose his employment.
- [4] The relevant portion of s. 650 of the Criminal Code reads as follows:

Accused to be present

650 (1) Subject to subsections (1.1) to (2) and section 650.01, an accused, other than an organization, shall be present in court during the whole of his or her trial.

Exceptions

- (2) The court may
 - (b) permit the accused to be out of court during the whole or any part of his trial on such conditions as the court considers proper; or

- [5] Mr. Bhoondpaul relies upon the decision of Mr. Justice Ehrcke in *R. v. Ali, Boparai, Khan & Malonga-Massamba*, 2020 BCSC 996. In the application before him, Justice Ehrcke considered the accuseds' requests to attend at a pre-trial application set to take place early in July 2020, prior to commencement of a jury trial later the same month.
- [6] Justice Ehrcke considered whether the court had the discretion under s. 650(2)(b) to allow three accused to be absent during part of a trial when the evidence of witnesses would be taken - as was expected during the pre-trial application to be heard.
- [7] Justice Ehrcke referenced the decisions in *R. v. Drabinski* (2008), 235 C.C.C. (3d) 350 (Ont. S.C.J.) in which the court indicated that the right of an accused to be present during his or her trial also includes a corresponding duty to be present during the trial.
- [8] He also referenced the decision in *R. v. Pazder*, 2015 ABQB 493 in which the court observed that s. 650(2)(b) should only be used sparingly and with caution - and where there is a valid and legitimate reason that does not benefit public policy, that is beneficial to the accused without prejudicing the fair trial rights of the accused and other trial participants.
- [9] Justice Ehrcke considered decisions in Ontario - *R. v. Walker*, 2014 ONCJ 271 and *R. v. Candelaria*, 2020 ONCJ 194, in which the court found that the court did not have the discretion to excuse an accused from attendance at trial when witness testimony was to be called.
- [10] Ultimately, relying on the decision in *R. v. Daley*, 2020 ONCJ 201 in which Monahan J. held that despite the prohibition in s. 650(1.1) against an accused participating by video link, Justice Ehrcke found that s. 650(2)(b) did not limit the broad discretion of a trial judge, in appropriate circumstances, to permit an accused to appear by video link, even for a portion of the trial where the evidence of a witness will be taken.
- [11] It is apparent that Justice Ehrcke's decision in respect of one of the applicants was based on the fact that this accused was not impacted by the pre-trial application to be brought. With respect to the remaining two applicants, Justice Ehrcke considered that in light of the global pandemic, the location these accused in Ontario and the fact that they would have to travel to British Columbia for the pre-trial applications and that the accused were out of custody, and therefore would not have access to video teleconferencing equipment, that the order was warranted. He noted that all accused had signed the necessary waivers and were represented by senior counsel. He was very clear that his order only applied to the hearing of the pre-trial application.

Issues

- [12] A number of issues have been raised by Crown counsel, Mr. Blazina, in this case with respect to the granting of an order allowing Mr. Bhoondpaul to attend by video conference during the trial that is to take place next week.

- [13] First the obvious result will be a reduced ability and perhaps an inability of Mr. Bhoondpaul to be able to consult effectively with his counsel during the trial. Further as Mr. Blazina has pointed out no waiver has been provided at this time by Mr. Bhoondpaul as is required by the authorities. Those authorities demonstrate that evidence of a clear and unequivocal waiver is essential in order for the court to consider an application such as this.
- [14] I appreciate that counsel for Mr. Bhoondpaul, Mr. Movassaghi, has advised the court that Mr. Bhoondpaul is prepared to allow him to speak to the terms of a potential waiver, but a waiver has not been provided. In addition, Mr. Blazina points out and I consider this to be a very significant issue that the question of identity remains a live issue at this time in respect of the charge against Mr. Bhoondpaul. If identity continues to be an issue, having Mr. Bhoondpaul attend at trial in person would certainly make simpler the issue of identity to be dealt with through witness testimony.
- [15] Mr. Blazina has indicated, I presume after consulting with VICC, that it is likely that there will be videoconferencing capability at the correctional facility. VICC has three rooms for video conferencing; two are designated for remand court and one is set aside for trial use. Mr. Blazina has indicated that the requirements for video capability for remand purposes may not be extensive next week but I am not sure if that in fact will be the case.
- [16] With respect to the one video conferencing unit that has been designated for trial use it appears as though it may be required for at least a one-day hearing next week. In my view I am concerned that allowing Mr. Bhoondpaul to attend via video conference for the entirety of this trial may effectively reduce the video capacity for those detained at VICC by up to 50% during the currency of this trial.
- [17] The same concerns expressed by Monahan J. in Daley apply here. In that case Justice Monahan noted, that as a result of COVID-19 related issues:
- 37 it is a challenge to get any prisoner to appear by audio or video because the justice system, which previously operated almost entirely by in person hearings, is now seeking to operate entirely by audio or video hearings.
- 38 Mr. Daley is but one person who finds himself in custody in the circumstances outlined above. As indicated, I pre-tried the case at least three times. In order to have Mr. Daley appear by video, there would have had to be some delay in arranging for that to happen because video attendances are at a premium with multiple courthouses and detainees "competing" for both video and audio appearance time.
- [18] The same capacity issues arise in VICC where I understand there are only two video link units available for use. Granting one to Mr. Bhoondpaul for five days effectively reduces the video capacity for those detained at VICC by 50% during this period.

Ruling

- [19] The impact on the justice system, with respect to the scarcity of video link capacity at VICC cannot be overlooked. In addition, I am not satisfied on the evidence that Mr. Bhoondpaul has legitimate reason for his reluctance to attend in person at a trial to take place in Duncan.
- [20] In this case I am advised that the commuting distance from VICC to the Duncan Courthouse is approximately 45 minutes, which is not excessive. With respect to Mr. Movassaghi's submission that any additional transportation will incur additional risk and that Mr. Bhoondpaul will have to be transported from the jail into the sheriff's vehicle and then to the Duncan courthouse that may be the case, but nonetheless the risk of transmission of the COVID-19 virus within VICC will probably continue to exist and may in fact be higher than exists when Mr. Bhoondpaul is removed to a somewhat more isolated location within the Duncan Courthouse.
- [21] In addition, and this goes to the issue of trial fairness for Mr. Bhoondpaul himself, having Mr. Bhoondpaul attend at the trial by video will require him to observe the proceedings in the Duncan Courthouse by a video screen. Mr. Blazina is concerned that Mr. Bhoondpaul will not have a clear view of everything that is going on within the Duncan Courthouse. In addition, there is an expectation that certain evidence will be called within the courtroom and will be displayed on a video screen. The result Mr. Bhoondpaul would be required to look at a screen through a screen and it is exceedingly unlikely that he would be able to clearly see the evidence that will be presented in court.
- [22] Mr. Bhoondpaul may not fully appreciate the impact this will have on the fairness of trial to him but it is the court's obligation to ensure that trial fairness is maintained despite his willingness to proceed by video conference only.
- [23] I find that Mr. Bhoondpaul has not shown valid and legitimate reason that does not offend public policy for granting of the orders sought. Although granting the permission sought may be of questionable benefit to him, in my view it prejudices the right of other trial participants and members of the public who may wish to witness the proceedings.
- [24] For all of those reasons Mr. Bhoondpaul's application to attend at the trial by video link is denied.

"Mayer, J."

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