

CANADA / JUDGMENT

R. v. Christhurajah

2017 BCSC 1355

COURT

Supreme Court of British Columbia

DECIDED

3 January 2017

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2017 BCSC 1355 R. v. Christhurajah IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Christhurajah, 2017 BCSC 1355 Date: 20170103 Docket: 26117 Registry: Vancouver Regina v. Kunarobinson Christhurajah Lesly Jana Emmanuel Nadarajah Mahendran Thampeernayagam Rajaratnam Before: The Honourable Mr. Justice Ehrcke Oral Ruling on Voir Dire #8 Counsel for the Crown: C.F. Hough C. Tait Counsel for the Accused K. Christhurajah: C.L. Leggett, Q.C. Counsel for the Accused L.J. Emmanuel: R.A. (Sandy) Ross Counsel for the Accused N. Mahendran: M. Nohra Counsel for the Accused T. Rajaratnam: V.M. Williams A.S. Wong, Articled Student Place and Date of Hearing: Vancouver, B.C. January 3, 2017 Place and Date of Judgment: Vancouver, B.C. January 3, 2017

- [1] THE COURT: The Crown seeks to tender in evidence the testimony of Venita Costello, a civilian employee of the RCMP who works as an open source analyst for the E Division in Surrey. As her testimony was the subject of an objection by the defence, her evidence was heard in a voir dire. This is the ruling on that voir dire.
- [2] Ms. Costello testified that on December 22, 2016, she did a Facebook search of the name Sokan Rajaratnam, and she has printed off from the Internet eight pages that represent the results of that search. Those eight pages have been marked as Exhibit 1 on the voir dire. She indicated that pages 1 through 4 are the timeline of an account bearing the name Sokan Rajaratnam and pages 5 and 6 are pages related to the account in the name of Sokan Rajaratnam. The remaining two pages are enlargements of photographs that are screenshots obtained when one clicks with one's mouse on the smaller photographs from the preceding pages. She noted that on one of the photographs, if one places the computer's mouse over the picture of the male on page 8, a tag appears with the name Sokan Rajaratnam.
- [3] The Crown submits that this evidence is relevant because it wishes to establish for the jury that the accused in these proceedings, Thampeernayagam Rajaratnam, in fact uses the nickname Sokan. This is relevant to the Crown's theory because two of the migrant witnesses in these proceedings, number B241 and number B158, have testified about the activities of an individual that they referred to either as Sokan or as Shokan.

- [4] I agree with the Crown about the potential relevance of this evidence as an admission against interest; namely, an admission by the accused that he uses the name Sokan. For example, if there had been testimony from a witness in Toronto who knows the accused, that witness could come and testify, "Oh, yes, I know Thampeernayagam Rajaratnam and I can tell you that I refer to him all the time as Sokan and indeed I hear him use that name referring to himself frequently". So the issue here is not about the potential relevance of evidence that Ms. Williams' client uses the name Sokan. Rather, the issue is whether the evidence of Ms. Costello, and in particular the computer printout that has been marked as Exhibit 1 on the voir dire, are admissible in evidence to prove that Ms. Williams' client in fact uses the nickname Sokan.
- [5] The critical issue in this case is whether there is evidence before the Court that the Facebook account represented in Exhibit 1 on the voir dire is, in fact, an account that was created by Ms. Williams' client. The theory of the Crown is that there is evidence that makes it more likely than not, in other words there is evidence to satisfy me as the trial judge on a balance of probabilities, that this Facebook account was created by Ms. Williams' client. The Crown points out that the surname is the same; Ms. Williams' client's surname is Rajaratnam, and the name associated with the Facebook account is Rajaratnam. In addition, there are photographs posted to the website as shown in Exhibit 1 which look similar to the accused who is present in Court. The Crown takes the position that although it is conceivable that someone else could create a Facebook account in the name Rajaratnam and post those photographs, the most plausible hypothesis is that it was the accused who created the account and posted those photographs.
- [6] The Crown relies on a decision of Madam Justice Bruce, *R. v. Moazami*, 2013 BCSC 2398, to support its argument. In that case, evidence of Facebook communications was admitted into evidence, and the Crown submits that the situation is similar here and I should come to a similar conclusion. It is a trite proposition that the principle of stare decisis applies to principles of law articulated by another court of concurrent or superior jurisdiction, but there is no principle of stare decisis that applies with respect to findings of fact. I do not disagree with the analysis of the law made by Madam Justice Bruce in *Moazami*, but the critical issue here relates to a finding of fact. In *Moazami*, Madam Justice Bruce came to the factual conclusion that there was in the case that she was hearing, as she put it at para. 13: In my view, there is ample evidence to conclude on a balance of probabilities that Mr. Moazami is the author of the statements contained in the Facebook messages sought to be entered into evidence. That is a factual finding that depends on the particular body of evidence that was led in that case.
- [7] The evidence before me is significantly different. First, in *Moazami* the Crown had called a Det. Shook who testified as an expert in the operation and function of Facebook as a social media portal and the interpretation of Facebook account records. In the present case the Crown called no evidence to testify in an expert witness capacity. In *Moazami* the expert witness gave evidence about how a Facebook account is created and what are the

prerequisites for creating a Facebook account. The witness testified about the safeguards that are built into the design of the software to make it unlikely that a fictitious account will be created. None of that evidence is before me. The expert in Moazami testified about the security settings that may be adjusted on a Facebook account. In the case before me, although Ms. Costello referred to security settings, she gave virtually no explanation as to what the various options are and what the consequences of adopting certain settings are. In addition, she gave no evidence as to what the particular security settings were for the account in question.

- [8] In Moazami, Madam Justice Bruce described in exhaustive detail a large number of circumstantial links in the evidence to establish the likelihood that the author of the Facebook account in question there was in fact the accused. Those circumstantial links are detailed in paras. 13, 14, 15, and 16 of her reasons for judgment. I need not recite them all here. Suffice it to say that the body of evidence before me is meagre indeed in comparison to the body of evidence that was present in that case.
- [9] Essentially the Crown's position in the case before me is that there are two items in Exhibit 1 that the Crown says link this Facebook account to the accused in court. First, there is the fact that the same surname is used, Rajaratnam; and second, that some of the photographs posted to that account bear a resemblance to the accused who is in Court. There are other details that do not exactly match. For example, in Exhibit 1 the account holder is described as living in Toronto, Ontario, whereas the evidence before me is that Ms. Williams' client lives in Markham, Ontario.
- [10] In her testimony on the voir dire Ms. Costello admitted that she cannot say who created the Facebook account that is represented in Exhibit 1. She conceded that Sokaan Rajaratnam could be a false name. She testified that she cannot say when or where the account was created. In my view, the circumstantial links between the information in Exhibit 1 and the accused who is present in court are too weak to establish on a balance of probabilities that this account was more likely than not created by Ms. Williams' client.
- [11] As I suggested to Crown counsel during submissions, an equally likely hypothesis would be that Mr. Rajaratnam, that is the accused Thampeernayagam Rajaratnam, has a relative who is named Sokaan Rajaratnam and that relative bears a family resemblance to him, making the photograph look similar. That, of course, is pure speculation, but it is equally pure speculation that Thampeernayagam Rajaratnam would create a Facebook account and instead of giving his real name as the owner of the account would give some other name, namely, Sokaan Rajaratnam.
- [12] In all the circumstances, I am not satisfied that the evidence before me establishes on a balance of probabilities that the accused, Thampeernayagam Rajaratnam, created the Facebook account that is represented in Exhibit 1 on this voir dire, and that being the case, there is no basis for the admission of this evidence. The Honourable Mr. Justice W.F. Ehrcke

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