

CANADA / JUDGMENT

R. v. Dalia

2025 ONCA 772

COURT

Court of Appeal for Ontario

DECIDED

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COA-23-CR-1277

Judges

van Rensburg, Katherine; Roberts, Lois B.; Gomery, Sally A.

Subject

Criminal

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Dalia, 2025 ONCA 772

DATE: 20251114

DOCKET: COA-23-CR-1277

van Rensburg, Roberts and Gomery JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Michael Dalia

Appellant

R. Craig Bottomley and Alison Shields, for the appellant

Victoria Rivers, for the respondent

Heard: October 16, 2025

On appeal from the conviction entered by Justice Andrew J. Goodman of the Superior Court of Justice, on November 14, 2022.

Gomery J.A.:

- [1] Michael Dalia appeals his convictions for possession of fentanyl and cocaine for the purpose of trafficking and for possession of the proceeds of crime. The police discovered and seized the evidence supporting the charges as the result of the execution of a search warrant for the appellant's car and his parents' residence. The warrant was obtained based on a police investigation of a complaint by the appellant's former girlfriend, who alleged that the appellant had assaulted her and threatened her by texting her a photo of a gun.
- [2] The appellant applied to exclude the evidence seized. First, he applied for leave to cross-examine the affiant who swore the information to obtain ("ITO") the search warrant. Second, he sought leave to relitigate this issue after his application was denied. Third, he challenged the validity of the search warrant under s. 8 of the Canadian Charter of Rights and Freedoms. Fourth, he argued that the evidence should be excluded due to a violation of his rights under s. 10(b) of the Charter. These efforts were all unsuccessful. As a result, at trial, the appellant pled not guilty but conceded that the Crown had proved the facts necessary to ground the offences for which he was convicted.
- [3] In this appeal, the appellant advances four grounds of appeal.[1] I would reject the appeal, for the reasons that follow.

The first case management judge did not err in dismissing the appellant's application for leave to cross-examine

- [4] The appellant contends that the first case management judge, Krawchenko J., erred in denying him leave to cross-examine the affiant who swore the ITO.

- [5] In his application, the appellant argued that the affiant had not disclosed relevant evidence with respect to the appellant's current place of residence and vehicle. In particular, the affiant failed to mention that, according to the complainant, the appellant had been kicked out of his parents' residence a few months earlier.
- [6] Krawchenko J. concluded that the appellant had not raised a reasonable likelihood that cross-examination of the affiant would produce probative evidence. At the end of his ruling, he expressed the view that the affiant provided a full, frank, and fair summary of the information available at the time and that, based on the ITO, there was "a strong, credibility-based probability that the items sought would be located in the residence."
- [7] Defence counsel questioned whether this last comment was appropriate, arguing it provided an opinion on the ultimate validity of the warrant. A few weeks later, Krawchenko J. recused himself from continuing as the case management judge. His endorsement stated:
1. The matter was before me on 04 February 2022 on a pretrial motion.
 2. In my reasons on that motion, I may have strayed into providing an opinion or view on a separate and distinct issue not properly before me, without the benefit of having heard submissions from counsel.
 3. On my own motion and to avoid any question of bias on my part, I recuse myself from this matter, in so doing, allowing it to proceed without delay.
- [8] In this appeal, the appellant contends that Krawchenko J. did not apply the correct principles in determining whether leave should be granted to cross-examine and that his comment at the end of his ruling gives rise to a reasonable apprehension of bias.
- [9] These arguments should be rejected.
- [10] I do not agree that Krawchenko J. conflated the test for leave with a determination of the overall validity of the warrant or that he committed any reviewable error. His reasons show that he appropriately considered whether the appellant had met the threshold set out in *R. v. Phan*, 2020 ONCA 298, 387 C.C.C. (3d) 383.
- [11] Leave is required to cross-examine an affiant or sub-affiant. The discretionary granting of leave is based on the test set out in *R. v. Garofoli*, [1990] 2 S.C.R. 1421, at p. 1465:
- Leave should be granted when the trial judge is satisfied that cross-examination is necessary to enable the accused to make full answer and defence. A basis must be shown by the accused for the view that the cross-examination will elicit testimony tending to discredit the existence of one of the pre-conditions to the authorization, as for example the existence of reasonable and probable grounds. [Emphasis added.]
- [12] In *Phan*, at paras. 67-68, Strathy C.J.O. reviewed the principles informing the decision to grant leave:

The focus on a motion for leave to cross-examine “is on the reasonableness and honesty of the affiant’s belief about the existence of the requisite grounds, and not on the ultimate accuracy of the information the affiant relies upon”: *R. v. Victoria*, 2018 ONCA 69, 359 C.C.C. (3d) 179, at para. 80. A proposed cross-examination directed to show only that some of the information relied upon by the affiant is false is unlikely to warrant leave unless it can also support an inference that the affiant knew or ought to have known it was false: [*R. v. Pires*; *R. v. Lising*, 2005 SCC 66, [2005] 3 S.C.R. 343, at para. 41.]

When an accused seeks evidence in support of a Garofoli application, that narrow test must be kept in mind. In *R. v. Imam*, [2012] O.J. No. 6543 (C.J.), at para. 14, Paciocco J., as he then was, indicated that an accused must demonstrate a “threshold factual basis ... raising a reasonable likelihood that cross-examination will produce probative evidence tending to discredit a material precondition to the authorization being granted or tending to show significant police misconduct in securing the search order”.

[13] Krawchenko J. concluded that the appellant had not met this threshold. He reviewed each of the four areas of proposed cross-examination and determined that the appellant had mischaracterized the allegations in the ITO regarding them. The appellant alleged that the affiant had failed to mention that he no longer lived at his parents’ residence. Krawchenko J. noted, however, that the affiant acknowledged in the ITO that the appellant was believed to be staying at a hotel, although he had previously resided at his parents’ address. Krawchenko J. also noted the affiant’s reference to police surveillance indicating that a person with the appellant’s build and appearance had been seen earlier that day exiting the residence and opening the door to a truck outside, which was the same model as the truck registered to the appellant at that same address.

[14] I likewise reject the argument that Krawchenko J.’s decision reasoned backwards from his conclusion. There is nothing in the reasons that suggests this.

The second case management judge did not err in dismissing the motion to relitigate the application to cross-examine

[15] The appellant contends that Goodman J., who took over as the case management judge, should have granted his application for leave to relitigate the application to cross-examine. In particular, the appellant contends that, given Krawchenko J.’s self-recusal, it was axiomatically in the interests of justice that he be given a fresh opportunity to argue the application.

[16] I would reject this argument for two reasons.

[17] First, I see no error in Goodman J.’s reasons for dismissing the application to relitigate. He applied the appropriate principles and concluded that the appellant had not met the criteria articulated by this court on an application to relitigate.

- [18] The parties agreed that the application to relitigate should be determined by analogy to s. 653.1 of the Criminal Code, R.S.C. 1985, c. C-46. This section provides that rulings on the admissibility of evidence are presumptively valid in new proceedings following a mistrial. Goodman J. accordingly applied the test set out by this court in *R. v. Victoria*, 2018 ONCA 69, 359 C.C.C. (3d) 179, with respect to s. 653.1 applications.[2] To rebut the presumptive incorporation of prior rulings in subsequent proceedings, a party must demonstrate, on a balance of probabilities, that “it would not be in the interests of justice” that the prior rulings bind the parties in the later trial: *Victoria*, at para. 52.
- [19] Goodman J. correctly noted that the factors relevant to the “interests of justice” listed at para. 55 in *Victoria* do not include any reference to a possible legal error as the basis for relitigating a motion. But even if a legal error were an avenue available to permit relitigation under s. 653.1, he was not persuaded that Krawchenko J.’s ruling disclosed an error. Goodman J. furthermore declined to find that the ruling was “so intertwined with the impugned commentary about the strength of the warrant itself, that it is impossible to divorce one from the other and as a result the entire ruling must be relitigated.”[3]
- [20] The appellant contends that *Victoria* is distinguishable, because the motion to relitigate in that case was not premised on a reasonable apprehension of bias. I disagree.
- [21] As Goodman J. observed, this case is factually on all fours with *Victoria*. At the outset of his trial, Mr. Victoria applied for leave to cross-examine the author of the ITO used to obtain the search warrants. After dismissing the application from the bench, the trial judge undertook to provide written reasons for his ruling. A few weeks later, however, he instead gave reasons explaining why he had determined that the evidence obtained through the search warrants should be admitted. This was problematic because no arguments had yet been heard either on this issue or on the validity of the warrants. Mr. Victoria’s counsel sought a mistrial, which the trial judge granted.
- [22] When the trial resumed before a new trial judge, the Crown sought a ruling that he was bound by the first trial judge’s dismissal of the application to cross-examine. The defence argued otherwise. The trial judge found in the Crown’s favour on this issue. He ultimately convicted Mr. Victoria after determining that the search warrants were valid and that the evidence obtained through their execution was admissible.
- [23] Mr. Victoria appealed his convictions, arguing the trial judge erred in concluding he was bound by the ruling made prior to the mistrial refusing leave to cross-examine. This court dismissed the appeal. It deferred to the trial judge’s decision, finding that he had not erred in law, erred in principle, failed to consider a relevant factor or considered an irrelevant factor, and that his decision was not plainly unreasonable: *Victoria*, at para. 57.

- [24] In Victoria, the defence sought a fresh opportunity to argue for leave to cross-examine an affiant, in part on the basis that the application judge had expressed a view on the ultimate validity of the warrant prior to hearing argument on it. Mr. Victoria did not propose to rely on any fresh evidence or argument. This court characterized this as an attempt at “relitigation, pure and simple in the hope of achieving a different result, the very consequence Parliament sought to avoid when it enacted s. 653.1”: Victoria, at para. 59.
- [25] Goodman J. reached the same conclusion here, on the same reasoning. He noted this court’s determination in Victoria, at para. 54, that the “interests of justice” to be considered under s. 653.1 include not only the parties’ interests but the “interests of the public, including its interests in timely and efficient criminal trials, the effective use of limited court resources, finality and the integrity of the criminal trial process”. [4] He found that, as in Victoria, the basis for seeking leave to cross-examine remained “essentially the same”; “there [was] no new evidence that ha[d] arisen in this matter” nor were there any “substantive, new arguments to be advanced.” He further found that, as in Victoria, there was “no articulable prejudice to the applicant in denying re-litigation”, given the appellant’s right to appeal Krawchenko J.’s ruling. [5]
- [26] The potential bias of the judge who dismissed the application for leave to cross-examine in Victoria was, as here, a premise of both the motion to relitigate and on appeal. In his submissions on the mistrial motion, Mr. Victoria contended that “dismissal of [the] s. 8 challenges to the searches and [the] motion to exclude the evidentiary fruits of those searches under s. 24(2), without having heard argument on either issue, gave rise to a reasonable apprehension of bias”: Victoria, at para. 13. The second trial judge found that the denial of an opportunity to relitigate would not prejudice the defence: Victoria, at para. 33. Before this court, Mr. Victoria argued that the proceedings preceding the mistrial were procedurally unfair, and this procedural unfairness warranted departure from the presumptive application of prior rulings in later proceedings and required a new trial: Victoria, at para. 36. This is the same broad argument advanced by the appellant in this appeal, which, as in Victoria, I would also reject.
- [27] Second, there is no basis to find that, following Krawchenko J.’s self-recusal, Goodman J. erred in concluding that relitigation was not in the interests of justice. The appellant contends that Krawchenko J.’s remarks at the end of his decision refusing leave to cross-examine indicate bias and cannot be severed from the rest of his decision. I disagree.
- [28] Judges are presumed to act with integrity and impartiality. This presumption can be overcome only based on cogent evidence that something a judge did or said gives rise to a reasonable apprehension of bias: R. v. Richards, 2017 ONCA 424, 349 C.C.C. (3d) 284, at para. 45. In other words, “a reasonable person, properly informed and viewing the matter realistically and practically, would conclude that the decision-maker could not decide the case fairly”: R. v. Jaser, 2024 ONCA 448, 172 O.R. (3d) 1, at para. 311, leave to appeal refused, [2025] S.C.C.A. No. 127, citing Committee for Justice and Liberty et al. v. National Energy Board et al., [1978] 1 S.C.R. 369, at p. 394, per de Grandpré J. (dissenting); Yukon

Francophone School Board, Education Area #23 v. Yukon (Attorney General), 2015 SCC 25, [2015] 2 S.C.R. 282, at paras. 20-21.

- [29] A recusal does not automatically impugn all earlier decisions. As Goodman J. noted at para. 49 of his ruling: “[I]n both the present case and Victoria, the basis for recusal was not an inherent prejudice against the accused personally, or a pre-existing conflict of interest. The appearance of bias only arose as a result of expressing a view on the ultimate strength of the warrant prior to arriving at that point in the litigation.”
- [30] This distinguishes this case from the circumstances in *R. v. Davis et al.*, 2012 ONSC 5526 and *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484. In *Davis*, the judge who recused himself for reasonable apprehension of bias had discovered mid-trial that a personal issue he previously believed to be resolved with the Canada Revenue Agency (a participant in the proceeding) was ongoing. As a result, he acknowledged that his pre-trial rulings might appear tainted by this conflict. In *S. (R.D.)*, a judge acknowledged a potential bias against a category of persons. Both these cases gave rise to circumstances where a reasonable apprehension of bias could taint all the judge’s prior decisions in respect of a matter. As a result, the interests of justice merited relitigating them.
- [31] There is no spectre of past bias here. Krawchenko J. instructed himself on and applied the correct principles governing the application. In recusing himself, his sole concern was whether he had gone too far by expressing his view on the ultimate issue. He did not suggest that his ruling ought to be invalidated or that his past decisions might have been tainted. He removed himself as case management judge to avoid creating an appearance of bias going forward. In this situation, a reasonable person would not be concerned that his comment about the overall merits of the warrant demonstrated a bias that put in doubt the justice of his ruling on cross-examination.

The application judge did not err in rejecting the appellant’s application to invalidate the search warrant

- [32] The appellant contends that the application judge, Arrell J., erred in rejecting his s. 8 challenge to the search warrant based on the alleged insufficiency and misleading nature of the ITO.[6] He argues that the application judge focused unduly on whether the affiant intentionally misled the justice who issued the search warrant, instead of determining more broadly whether the affiant’s disclosure had been full, frank, and fair.
- [33] I see no error in the application judge’s analysis. He identified and applied the appropriate legal principles. He found that the affiant did not omit relevant facts in the ITO and that the complainant’s allegations were credible and compelling.
- [34] The application judge did not focus unduly on the affiant’s lack of intention to mislead. His comments about the affiant’s credibility responded to the appellant’s submission that the police and the affiant were attempting to mislead or withhold vital information in the ITO, and to the appellant’s argument that the police deliberately lost evidence.

[35] Examining the evidence as a whole, the application judge concluded that there was “more than sufficient credible evidence” to justify the issuance of the search warrant for firearms, ammunition and cellphones.[7] There is no basis to interfere with this determination.

The application judge did not err in admitting the evidence notwithstanding a violation of the appellant’s s. 10(b) rights

[36] The appellant contends that the application judge erred in failing to exclude the evidence obtained in the execution of the search warrant, despite finding that his right to counsel under s. 10(b) was violated.

[37] The appellant was arrested outside his truck at 6:30 p.m., half an hour before the police executed the search warrant. After being advised and cautioned, he told the officer in charge, Sgt. Rizzo, that he wanted to call his lawyer. Sgt. Rizzo instructed another officer taking the appellant to the station to hold off on calling the lawyer until the search warrant had been executed. He assumed that the officer would call the lawyer upon learning via the police radio that the house and truck were secured. The officer, however, assumed that he should delay any call to the lawyer pending further instructions from Sgt. Rizzo. Sgt. Rizzo learned at 8:10 p.m. that the appellant’s lawyer had not yet been called. A call was made to the lawyer one minute later.

[38] The application judge accepted Sgt. Rizzo’s testimony that he delayed the call to the appellant’s lawyer pending execution of the search warrant based on legitimate concerns about police safety and the preservation of evidence. The police did not know who was in the house and had reason to believe that there might be a firearm. On this basis, the application judge determined that some of the delay in calling the appellant’s lawyer was justified. Given how long it should have reasonably taken for police to secure the house after the search was executed, he found that a call should have been placed to the appellant’s lawyer by no later than 7:30 p.m., as opposed to at 8:11 p.m. He concluded that the 41-minute delay violated the appellant’s s. 10(b) rights.

[39] In weighing the first factor in *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, to determine whether the evidence should be admitted under s. 24(2), the application judge found that the breach was not serious: it was inadvertent rather than deliberate, it did not reflect either any bad faith or pattern of conduct by the police, and, once it was discovered, it was rectified immediately. On the second factor, he found the impact of the breach on the appellant’s Charter-protected interests to be “moderate” insofar as it was “significant but much less so than many that come before the court where the evidence has been admitted”. [8] On the third factor, the application judge found that society’s interest in the adjudication of the case on its merits favoured admitting the evidence found during the search: the appellant was charged with extremely serious offences and the evidence was both reliable and essential to the Crown’s case.

- [40] Weighing the three Grant factors, the application judge determined that excluding the evidence “would punish the police for a simple miscommunication” and that this “would damage, rather than vindicate, the long-term reputé of the criminal justice system.”[9] He accordingly concluded that the evidence should be admitted.
- [41] Relying on *R. v. Rover*, 2018 ONCA 745, 143 O.R. (3d) 135 and *R. v. Jarrett*, 2021 ONCA 758, 498 C.R.R. (2d) 38, the appellant contends that the application judge erred in his assessment of the seriousness of the breach of the appellant’s s. 10(b) rights and its impact on the appellant’s interests.
- [42] I see nothing in the application judge’s analysis that is inconsistent with the principles set out in *Rover* or *Jarrett*.
- [43] At issue in *Rover* was a routine practice by police in Whitby of preventing arrested persons from accessing counsel if the police intended to obtain a warrant to search for drugs in a place connected to the arrested person. As a result of this practice, Mr. Rover was not put in touch with counsel for six hours after his arrest. As Doherty J.A. emphasized, the “right to counsel is a lifeline for detained persons” and detaining a person for hours without explanation for a refusal to call counsel and with no indication of when they might speak to a lawyer is a serious breach of their s. 10(b) rights: *Rover*, at paras. 45-46. In light of this, “concerns of a general or non-specific nature applicable to virtually any search cannot justify delaying access to counsel”: *Rover*, at para. 27. Doherty J.A. found that the application judge in *Rover* understated the seriousness of a police practice that systematically deprived detainees of their s. 10(b) rights and its impact on such persons as well as on the justice system as a whole. Mr. Rover’s appeal was allowed, his convictions were quashed and acquittals were entered.
- [44] The application judge was alive to the principles in *Rover*, which were set out in a passage in *R. v. Griffith*, 2021 ONCA 302, 408 C.C.C. (3d) 244, at para. 38, excerpted in his reasons. Citing *R. v. Keshavarz*, 2022 ONCA 312, 413 C.C.C. (3d) 263, at paras. 74-75, another decision that relied on *Rover*, the application judge instructed himself that “to fall within the exception of the requirement that an arrested person be allowed to speak to counsel without delay, the police must turn their minds to the specific circumstances of the case and must have reasonable grounds to justify delay such as police, or public safety or the risk of the destruction of evidence.”[10] In applying this rule, the application judge found that the s. 10(b) violation occurred in circumstances that are factually distinct from those in *Rover*. He accepted Sgt. Rizzo’s evidence that, when the appellant was arrested, the police were searching for a gun, and they had no idea who was in the house. He concluded at para. 57 of his judgment that:

[Sgt. Rizzo] had indeed turned his mind to these specific facts in this particular case and concluded officer and public safety, as well as evidence protection, justified a delay in counsel being called until the warrant had been executed and the house secured. There is nothing in the record before me to indicate such delays were systemic or the policy of the Hamilton Police. Indeed, Sgt. Rizzo testified that this was the first time he had given an instruction to delay calling counsel.

- [45] It was on this basis that the application judge concluded that there was no s. 10(b) violation during the time that the police reasonably required to execute the search warrant and secure the house.
- [46] In Jarrett, arresting officers made no effort to contact a detainee's lawyer after leaving him a single voicemail message. As a result, following his arrest, Mr. Jarrett had no contact with counsel for 30 hours, 20 of which he spent handcuffed to a hospital bed. Zarnett J.A. concluded that, although there was no evidence that the failure to follow up on the initial effort to contact Mr. Jarrett's lawyer reflected a systemic practice, "the sheer length of the delay, and the fact that over that lengthy period, nothing was done to inform the appellant that any effort to contact counsel was made, or to follow up on the contact, should have led the application judge to conclude that the breach was serious and favoured exclusion of the evidence": Jarrett, at para. 50. He also found that the application judge understated the impact of the breach on Mr. Jarrett's Charter-protected interests while his right to counsel was suspended, even though no attempt was made to question him.
- [47] The situation in Jarrett is again factually distinguishable. The unjustified delay in implementing the appellant's s. 10(b) rights lasted 41 minutes, not 30 hours. The appellant was not handcuffed to a bed. The application judge explained why he accepted Sgt. Rizzo's evidence that the delay was inadvertent and not the result of either a misguided policy or police negligence.
- [48] Finally, the appellant argues that, in considering the first and second Grant factors, the application judge failed to give weight to the failure by police to tell the appellant that no attempt would be made to contact his lawyer pending the execution of the search warrant.
- [49] I am not persuaded that the application judge failed to take into consideration the failure to inform the appellant of the reason for the delay in implementing his s. 10(b) rights when he assessed the Grant factors. In summarizing the parties' positions, he adverted to the appellant's argument that his s. 10(b) rights were seriously breached "as a result of the delay in contacting his lawyer and in not being told that there was going to be a delay." [11] The application judge nevertheless concluded that the breach was not serious and only had a moderate impact on the appellant, given the relatively short delay, and the fact that it was the product of miscommunication.
- [50] It was open to the application judge to make the findings he did on the evidence, notwithstanding the arguments advanced by the defence at the time. It is not this court's role to revisit such determinations in the absence of an error of law or principle. No such

error has been identified here. As stated in *R. v. Hamouth*, 2023 ONCA 518, 167 O.R. (3d) 682, at para. 38, leave to appeal refused, [2023] S.C.C.A. No. 387, it does not fall to this court “to substitute its own views respecting the seriousness of state conduct for those of the trial judge”. The same holds true for a trial or application judge’s views regarding the impact of a Charter breach on an accused’s protected interests, in the absence of an error of law or principle.

Disposition

[51] I would dismiss the appeal.

Released: November 14, 2025 “K.M.v.R.”

“S. Gomery J.A.”

“I agree. K. van Rensburg J.A.”

“I agree. L.B. Roberts J.A.”

- [1] The appellant only advanced the first two grounds in his notice of appeal. The Crown did not, however, object to the appellant’s reliance on additional grounds in his factum and oral argument.
- [2] Goodman J.’s ruling is reported at *R. v. Dalia*, 2022 ONSC 2416 (“Dalia (Goodman J.)”).
- [3] *Dalia (Goodman J.)*, at para. 45.
- [4] *Dalia (Goodman J.)*, at para. 28.
- [5] *Dalia (Goodman J.)*, at para. 44.
- [6] Although the parties referred to Arrell J. as the trial judge in their factums and oral argument, I refer to him as the application judge because Goodman J. entered the appellant’s conviction.
- [7] Arrell J.’s ruling is reported at *R. v. Dalia*, 2022 ONSC 4803 (“Dalia (Arrell J.)”).
- [8] *Dalia (Arrell J.)*, at para. 62.
- [9] *Dalia (Arrell J.)*, at para. 66.
- [10] *Dalia (Arrell J.)*, at para. 55.
- [11] *Dalia (Arrell J.)*, at para. 49.

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