

CANADA / JUDGMENT

R. v. Saad

2021 BCSC 949

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Supreme Court of British Columbia

DECIDED

17 May 2021

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2021 BCSC 949 R. v. Saad

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Saad,

2021 BCSC 949

Date: 20210517

Docket: 31146

Registry: Vancouver

Regina

v.

Susy Yasmine Saad

Restriction on publication: Pursuant to s. 648(1) of the Criminal Code, no information regarding this portion of the trial shall be published in any document or broadcast or transmitted in any way before the jury retires to consider its verdict.

Before: The Honourable Madam Justice Duncan

Oral Reasons for Judgment

Re Application No. 1, Ruling on Defence Application for Particulars

Counsel for the Crown:

C.J. Smith

M. Myhre

Counsel for the Accused:

J. Narwal

A.M. Boldt

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 28, 2021

Place and Date of Judgment:

Vancouver, B.C.

May 17, 2021

Introduction

[1] The accused, Susy Yasmine Saad, is charged with two counts of failing to provide the necessities of life and one count of fraud. The two counts of failing to provide the necessities of life are drafted as follows:

Count 1

Susy Yasmine SAAD, from the 11th day of January, 2017 to the 18th day of January, 2017, inclusive, at or near Vancouver, in the Province of British Columbia, did fail without lawful excuse to provide necessities of life to Macallan Saini, a child under her charge, who was unable to withdraw himself from that charge and unable to provide himself with necessities of life by reason of age, and so endangered the life of Macallan Saini, contrary to Section 215(2)(b) of the Criminal Code.

Count 2

Susy Yasmine SAAD, from the 3rd day of January, 2017 to the 18th day of January, 2017, inclusive, at or near Vancouver, in the Province of British Columbia, did fail without lawful excuse to provide necessities of life to Clara Burns, Asher Chawrun, Averie Hogden, Ellen Liu, Miles Lum, Leah Simpson, Lucy Spence-McFadyen, and Connor Steel, children under her charge, who were unable to withdraw from that charge and unable to provide themselves with necessities of life by reason of age, and so endangered the lives of the said children, contrary to Section 215(2)(b) of the Criminal Code.

[2] The allegations arise in the context of a daycare center that Ms. Saad operated in her home. Count 1 relates to a child who died while in Ms. Saad's care. Count 2 relates to eight other children who were in Ms. Saad's care in early 2017.

[3] This is a defence application for particulars pursuant to s. 587(1)(f) of the Criminal Code, R.S.C. 1985, c. C-46 [Code], in relation to Count 2. The section provides:

587 (1) A court may, where it is satisfied that it is necessary for a fair trial, order the prosecutor to furnish particulars and, without restricting the generality of the foregoing, may order the prosecutor to furnish particulars

(f) further describing the means by which an offence is alleged to have been committed;

[4] Before the Crown was required by *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, to provide disclosure to the defence, an application for particulars was an important way for an accused to know the case he or she had to meet. It also facilitated the administration of justice by enhancing the court's ability to properly assess the relevance of evidence adduced at trial: *R. v. Canadian General Electric Co. Ltd. (No. 1)* (1974), 17 C.C.C. (2d) 433 (Ont. H.C.J.).

[5] In the post-Stinchcombe era, Crown disclosure is not necessarily a substitute for particulars, but is often the answer to a defence application: *R. v. Elite Farm Services Ltd.*, 2021 BCSC 657 at para. 17.

[6] Finally, if particulars are ordered, the Crown is bound to prove them as an essential element of the offence. For example, if the Crown particularizes one narcotic, an accused cannot be convicted if a different narcotic than the one specified has been proven: *Morozuk v. The Queen*, [1986] 1 S.C.R. 31 at p. 37.

[7] The elements of the offence of failing to provide the necessities of life

[8] In *R. v. Turley*, 2012 BCSC 397, Justice Stromberg-Stein, as she then was, summarized the elements of the offence of failing to provide the necessities of life:

[143] Section 215 of the Criminal Code reads in part:

(1) Every one is under a legal duty

(c) to provide necessities of life to a person under his charge if that person

(i) is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and

(ii) is unable to provide himself with necessities of life.

(2) Every one commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse, the proof of which lies on him, to perform that duty, if

(b) with respect to a duty imposed by paragraph (1)(c), the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.

[144] A duty under s. 215(1)(c) arises when a person who is under the charge of another is unable to withdraw from that charge and is unable to provide himself or herself with necessities of life: *R. v. Peterson* (2005), 201 C.C.C. (3d) 220, 34 C.R. (6th) 120 (Ont. C.A.), at para. 34.

- [145] The relevant positions of the parties and the existence of an element of control exercised by one person and a dependency on the part of the other are factors to consider in determining whether a person is under the charge of another: Peterson, at paras. 40-43.
- [146] What is included in the concept "necessaries of life" is determined by the circumstances of each case: R. v. Lewis (1903), 7 C.C.C. 261, 6 O.L.R. 132 (C.A.), at p. 136, R. v. Pertab, 27 C.R. (6th) 126, [2004] O.J. No. 5109 (S.C.J.), at para. 35. In determining whether the duty to provide medical aid as a necessary of life is triggered, consideration must be given to the severity of the injury and the knowledge that it occurred: R. v. Alexander, 2011 ONSC 980, at para. 14.
- [147] Once the duty is engaged, the Crown must prove first that the accused's acts or omissions which led to the failure to provide necessaries of life were a marked departure from the conduct of a reasonably prudent person in similar circumstances, and second that it was objectively foreseeable that the failure to provide necessaries would lead to a risk of danger to the life or permanent endangerment to the health of the person under the charge of the accused: R. v. Naglik, [1993] 3 S.C.R. 122, at para. 148.
- [148] The above test is objective and onerous: Alexander, at para. 9. The concept of a "duty" is indicative of a uniform societal minimum level of care: Naglik, at p. 141. The personal characteristics of the accused, falling short of capacity to appreciate the risks, are not a relevant consideration: Naglik, at p. 148. The objective basis of liability includes an assessment of whether the person in charge could have acted other than as he or she did: Naglik, at pp. 142-143; Peterson, at para. 36.

The Defence Position

- [9] Mr. Narwal, counsel for Ms. Saad, seeks an order for particulars outlining the specific necessaries of life referenced in Count 2 and the legal duty and minimal standard of care owed by Ms. Saad to the named complainants in Count 2.
- [10] Counsel submits the primary function of particulars relates to trial fairness. An accused person must be able to answer the question "what is it that I am supposed to have done?" An accused person must be reasonably informed of the transaction alleged against him or her, thus giving the possibility of a full defence and fair trial, per *The Queen v. Côté*, [1978] 1 S.C.R. 8.
- [11] Mr. Narwal also emphasizes the secondary function of particulars, which is to facilitate the administration of justice, especially where the relevance of evidence may be in issue. Particulars will be of assistance to the trial judge in defining issues, determining the relevance of evidence and assisting with the scope of a jury charge: R. v. Armour Pharmaceutical Co., [2006] O.J. No. 137 (O.N.S.C.) at para. 20.

- [12] In *Armour*, a case of criminal negligence relating to tainted blood products, the allegations covered a range of possible acts, omissions and failed legal duties. The case was complex, with a trial estimate of over a year, 116 possible witnesses, a broad date range and voluminous disclosure. Justice Benotto (now J.A.) ordered particulars, finding the allegations were framed generically as criminal negligence: at paras. 22-24.
- [13] Mr. Narwal maintains that the need for particulars is more apparent in a case where an omission can constitute the offence. The accused must be given sufficient warning in the charging document to identify which act or omission constitutes the Crown's core allegation. While disclosure can provide some details, it is not necessarily a full answer to an application for particulars. Mr. Narwal relies on *R. v. Punko*, 2008 BCSC 568, where Justice Groberman as he then was said:
- [25] While disclosure may be of great assistance in ensuring that the accused knows the case he or she has to answer, particulars may nonetheless be necessary in order to tell him or her what essential elements are alleged; in other words, how the Crown alleges that the evidence adds up. Even beyond this function, however, particulars also serve the administration of justice generally by giving the court a basis for making determinations as to relevance of evidence and. (importantly, for conspiracy counts) a basis for determining the scope of the charge when instructing a jury.
- [14] The issue in *Punko* concerned two conspiracy counts. The Crown's theory was that the two conspiracies were directed by different accused and could not be merged into one count. Justice Groberman dismissed the application for particulars, but warned the Crown that if its theory changed it would have to amend the indictment and notify the accused.
- [15] Mr. Narwal acknowledges that an application for particulars that simply request the Crown's theory should not be granted. Similarly, particulars may not be granted where they do not relate to a core element of the charge. But he maintains that this application for particulars engages core elements of the offence of failure to provide the necessities of life.
- [16] In most prosecutions under s. 215, Mr. Narwal submits that the legal duty, the minimum standard of care and the necessary of life are not difficult to identify. Two examples are the failure to obtain timely medical attention or a failure to properly feed an infant over an extended period of time. Mr. Narwal maintains that Count 2 does not articulate the necessary of life, the minimum standard of care or the legal duty. The disclosure does not assist the Crown, as it focuses on criminal negligence. Requiring the particularization of the necessary of life, the minimum standard of care and the legal duty would not unduly fetter the Crown and would be of assistance to the accused and the court.
- [17] I pause to observe that at the outset of this application, the Crown attempted to amend the Indictment to specify the necessary of life in question as "a safe environment". Mr. Narwal objected to the amendment, maintaining that I should decide the defence application first. I will return to this subject later in these reasons.

The Crown Position

[18] Mr. Myhre says that in the context of the disclosure provided, no further particularization of the necessities of life is required for a fair trial. Ms. Saad is charged pursuant to s. 215(2)(b), which specifically refers to the duty imposed in s. 215(1)(c):

215(1) Every one is under a legal duty

(c) to provide necessities of life to a person under his charge if that person

(i) is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and

(ii) is unable to provide himself with the necessities of life.

(2) Every person commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse to perform that duty, if

(b) with respect to a duty imposed by paragraph (1)(c), the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.

[19] The persons under the accused's charge are named in the Indictment. They are identified as children who were unable to withdraw from her care and provide themselves with necessities of life due to their age.

[20] Mr. Myhre says it would have been clear to Ms. Saad upon reading the charges that the Crown alleged that she failed to ensure the conditions necessary for life existed for the children in her care, in a way that endangered their lives. He refers to the Crown synopsis, filed with this Court on December 17, 2020. In the synopsis, the Crown states:

Saad was under a legal duty to provide necessities to the children in her care including providing a safe environment; her conduct, viewed in its totality, constituted a marked departure from the standard of care of a paid childcare worker and resulted in objectively foreseeable endangerment of the children. Evidence of Saad's failure to provide a safe environment and her breach of the standard of care for a paid childcare provider includes: caring for up to six toddlers at one time; repeatedly exceeding the legally allowable limit of two children despite prior warnings by licensing authorities; insufficient childproofing of the care facilities and the improper use of restraint; providing insufficient supervision by leaving young children in playpens two floors up without and audio/video monitor; and placing a string of lights, a clear hazard, within reach of a playpen used for a child.

[21] The Crown submits it is not required to set out every way in which the environment was unsafe for the children. That is a matter of proof, not particulars. Without conceding the need for particulars, however, the Crown has offered to particularize the necessary in this case as "a safe environment".

- [22] The Crown also resists the assertion that the indictment fails to articulate the standard of care. The Crown must prove that Ms. Saad's conduct was a marked departure from the conduct of a reasonably prudent person in similar circumstances - a paid caregiver. This will require evidence concerning relevant legislation and licensing guidelines, the number of caregivers present, the layout of the facility, agreements made with and promises made to parents, ages and health of the children, the equipment present and basic logic and experience regarding what is safe or unsafe. The Crown has disclosed the evidence it will rely on to prove Ms. Saad's conduct was a marked departure from the conduct of a reasonably prudent person in similar circumstances and has provided summaries of expert evidence it intends to call.
- [23] Mr. Mhyre analogizes to the offence of dangerous driving, which also requires proof of a marked departure from the conduct of a reasonably prudent person in similar circumstances. Guilt can be proven by showing that an accused person drove through a city intersection at 150 km/h. Particularizing the speed at which a reasonably prudent person in similar circumstances would drive is not required for full answer and defence.

Analysis

- [24] As Stromberg-Stein J. observed in *Turley*, the necessities of life are determined by the circumstances of each case. In *Turley*, the allegation was a failure to obtain medical assistance for a teenager who died after ingesting drugs at a party at which the accused, a parental figure, was present. The necessary of life in that case was not particularized. Other decisions focus on a parental failure to provide sufficient food to children as the relevant necessary of life. Mr. Narwal did not draw my attention to any cases where the necessary of life, the standard of care or the legal duty were particularized.
- [25] The matter before me involves an allegation that Ms. Saad, a paid caregiver, failed to provide a safe environment for the children in her care. While I agree with the Crown that the relevant necessary of life - a safe environment - is clear from the synopsis, the Crown's application to amend to Indictment to particularize it in both Counts 1 and 2 makes good sense, and I so order.
- [26] Turning to the legal duty, s. 215(1)(c) states that everyone is under a legal duty to provide the necessities of life to a person under his/her charge if that person is unable to withdraw from that charge due to, among other things, age and is unable to provide himself with the necessities of life. The Crown states in its synopsis that all but one of the children present in the daycare on January 18, 2017 were under the age of 18 months. Ms. Saad was providing paid daycare services for those children. They were not of an age where they could withdraw from her care. The legal duty to provide the necessities of life is set out in the relevant section of the Code and need not be further particularized.

- [27] Finally, Mr. Narwal seeks particularization of the minimum standard of care. The Crown must prove beyond a reasonable doubt that Ms. Saad's conduct was a marked departure from the conduct of a reasonably prudent person in similar circumstances and that it was objectively foreseeable that the failure to provide necessities would lead to a risk of danger to the life or permanent endangerment to the health of the children: Turley at paras. 147 and 148.
- [28] The Crown intends to call evidence to demonstrate what a reasonably prudent person would do, or not do, in similar circumstances to those of Ms. Saad. The evidence they intend to call is set out in the synopsis and ranges from evidence to be called from people who work as paid caregivers to the application of common sense as to what is safe or unsafe for children of the same age as those Ms. Saad was looking after.
- [29] I return to the question Mr. Narwal posed in his submissions, from the perspective of an accused person: "What is it that I am supposed to have done?" The answer can be found in the indictment, as amended; the section of the Code; and the disclosure. Ms. Saad is alleged to have failed to provide a safe environment to the children in her care as a paid caregiver (the duty), the failure to do so was a marked departure from the conduct of a reasonably prudent person in the circumstances (the standard of care), and it was objectively foreseeable that the failure would lead to a risk of danger to the life or permanent endangerment to the health of the children in her care (the alleged consequences). Nothing more is required by way of particulars. The defence application is dismissed. The Crown application to amend the Indictment to specify the necessary of life as a safe environment is allowed.

"Duncan J."

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Prepared on 26 October 2026 · Esheria