

CANADA / JUDGMENT

R. v. Saed

2024 BCSC 772

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 772 R. v. Saed

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Saed,

2024 BCSC 772

Date: 20240412

Docket: 34399

Registry: Vancouver

Rex

v.

Howjeen Saed, Hemen Hewa Saed, Diego Maradona Saed,

Vinod Kanna Aruldevarajan and Roger Alfredo Bardales Medina

Corrected Judgment: The text of the judgment was corrected at paragraph 32 on September 11, 2024.

Before: The Honourable Mr. Justice Crossin

Oral Reasons for Judgment Re: Voir Dire #2, Part 1:

Leave for Garofoli Hearing

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No other appearances.

Place and Date of Hearing:

Vancouver, B.C.

April 10-11, 2024

Place and Date of Judgment:

Vancouver, B.C.

April 12, 2024

Introduction

- [1] The accused are before the court charged in an indictment alleging offences relating to drug trafficking, firearms and conspiracy. The investigation was wide-ranging over the course of almost a year commencing in and around the summer of 2020 and culminating in the arrest of the accused in May 2021.
- [2] The investigation employed a number of investigative techniques. The theory of the investigation, and indeed the theory of the Crown, is that the accused used a number of units in a number of condominium buildings and apartments throughout Vancouver as stash houses or sites to move drugs and money with the assistance of alleged co-conspirators. One such location was 1121 Homer Street.
- [3] In or around December 17, 2020, a judge received and reviewed a 127-page affidavit containing information to obtain a number of judicial authorizations (the "ITO"). Two such authorizations were, firstly, for a General Warrant relating to 1121 Homer Street authorizing entry and surveillance of various places in the building. The second was for a Production Order authorizing the seizure of CCTV video from various places in and around the building, and the seizure of information from various FOBs used to access the building.

- [4] The accused have brought an array of applications concerning almost all aspects of the investigation. One such application seeks to exclude the evidence obtained pursuant to the General Warrant and Production Order. It is alleged the police in obtaining the evidence breached s. 8 of the Charter rights of the accused. The application asserts the ITO in support could not have supported the issuance of the authorizations and the accused seek certain consequent relief. The application now before the court for this purpose is commonly referred to as a Garofoli application.
- [5] The Crown, however, raises a threshold issue. The Crown says the accused must seek leave to bring the application. This is, in my view, somewhat of a novel proposition. I was provided no authority that an application seeking Charter relief also must be accompanied by an application seeking leave. In any event, it became apparent during submissions that the real issue and objection was in the nature of a Vukelich application: see *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193. The Crown did not file such an application but raised the same propositions as found in the Vukelich jurisprudence.
- [6] The defence took exception to what the defence suggested was not the most helpful procedure, but nevertheless did not insist the Crown file such an application and have responded to the threshold issue.
- [7] The Crown submits the accused have not met the Vukelich test and the court ought to exercise its discretion and not embark upon the voir dire. The Crown states the accused has not demonstrated there is a reasonable likelihood the voir dire would assist in the assessment of the issues; being the admissibility of certain evidence.
- [8] The accused submits that there is no authority for the proposition there exists an additional obligation of seeking leave to bring the application. The accused submits the Vukelich standard has now been firmly established by the Supreme Court of Canada in *R. v. Haevischer*, 2023 SCC 11; namely that unless the Crown, by application, can establish the proposed application of an accused is manifestly unreliable, the proposed application ought to be heard. The accused say clearly it has not been established the proposed Garofoli application is manifestly unreliable.
- [9] The Crown in response submits the Haevischer test of manifestly unreliable has no application to a Vukelich hearing concerning a proposed Garofoli application; and the test or standard in relation to a proposed Garofoli application remains as found in the Vukelich jurisprudence prior to the decision in Haevischer.

Analysis

[10] Historically the purpose of a Vukelich application or assessment was easily pronounced but often difficult to apply. Vukelich, of course, was not the first pronouncement concerning summary dismissal of applications in the criminal law context. The Court in Vukelich in fact cited with approval the earlier decision of *R. v. Hamill* (1984), 14 C.C.C. (3d) 338. There Justice Esson put the proposition this way:

It is not in every case in which an accused applies to exclude evidence under s. 24(2) that it will be necessary to conduct an inquiry as to the reasonableness of the search, or that it will be necessary to hear evidence at all. Where an accused applies for an order to exclude evidence on the ground that there has been a breach of s. 8 of the Charter, the onus is on him to assert and establish:

1. that the evidence was obtained in a manner which infringed or denied his right to be secure against unreasonable search or seizure;
2. that, having regard to all the circumstances, the admission of the evidence would bring the administration of justice into disrepute.

In those cases where the accused does apply to exclude the evidence, it will be for the trial judge to decide what procedure should be followed but, at the least, counsel for the accused should be required to state with reasonable particularity the ground upon which the application for exclusion is made. That much is essential for an orderly trial of the issue. It follows that, if the statement of grounds does not disclose a basis upon which the court could make an order excluding the evidence, the application may be dismissed without hearing evidence.

[Emphasis added.]

[11] The cases of *Hamill* and *Vukelich* contain the foundational considerations that underpin the approach to the issue, namely, the discretion to be exercised in this regard is a tool available to the court to oversee the orderly unfolding of criminal trials; it is a mechanism to avoid inquiries that will be of no assistance to the court in determining the issues.

[12] Chief Justice McEachern put it this way in *Vukelich*, 'that the trial judge must control the course of proceedings through the exercise of this discretion in the sense that he or she need not embark upon an inquiry that will not assist the proper trial of the real issues'.

[13] More recently, our Court of Appeal in *R. v. M.B.*, 2016 BCCA 476 has stated, albeit in obiter, that in a *Vukelich* hearing, the court should determine 'whether there is a reasonable likelihood the hearing of the issue within the context of a voir dire would assist in determining the issues before the court'.

[14] In a most recent case, *R. v. Orr*, 2021 BCCA 42, Justice DeWitt-Van Oosten took the opportunity to revisit what she referred to as well-established principles in the context of a *Vukelich* hearing:

[46] Third, there is no automatic entitlement to an evidentiary voir dire in a Charter claim. As a result, where there is no reasonable likelihood that a voir dire can assist in determining the issues before the court, or no reasonable prospect of success in proving an infringement or obtaining the sought-after relief, a trial judge has clear jurisdiction to decline an evidentiary voir dire and to summarily consider and dismiss the application.

[Citations omitted. Emphasis added.]

[15] The Justice, in her overview of *Vukelich*, comments as follows:

[56] The trial judge in *Vukelich* summarily dismissed a challenge to a search warrant, as well as a subsequent application to reconsider that decision. This Court upheld the dismissals, confirming that a judge "need not embark upon an enquiry that will not assist the proper trial of the real issues".

[57] Writing for the Court, McEachern C.J. emboldened trial judges to conduct a threshold screening of Charter-based challenges and noted that they have considerable flexibility in doing so. In most cases, the utility of a voir dire to test admissibility can be determined from the "statements of counsel". Counsel can explain the basis for the claim, particularizing the right or guarantee said to have been breached by the impugned state conduct; the manner of that breach; the anticipated evidence in support (arising from the Crown's case or otherwise); and the remedy sought. Where there has been advance notice of the Charter application, it will logically assist in framing the discussion

[16] The Court goes on:

[58] If the "statements of counsel" prove insufficient for a threshold screening, greater material may be necessary, such as an affidavit setting out the evidence likely to support the constitutional challenge. In some cases, "there would be nothing to prevent the defence from advancing its full position in the first instance". What is required in a given case to justify an evidentiary voir dire will depend on the circumstances, including the breadth and complexity of the issues raised and the legal tests governing their review and resolution. In a *Vukelich* hearing, "there must be sufficient substance put before the court to enable the trial judge to properly exercise [their] discretion", and the threshold analysis is contextual

[Citations omitted. Emphasis added.]

[17] And finally the Court as well relies on the Supreme Court of Canada decision in *R. v. Cody*, 2017 SCC 31:

[64] In *Cody*, the Supreme Court made it clear that trial judges not only have jurisdiction to engage in a *Vukelich* hearing, but a positive obligation to use their case management powers to minimize delay:

[38] For example, before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success. This may entail asking defence counsel to summarize the evidence it anticipates eliciting in the voir dire and, where that summary

reveals no basis upon which the application could succeed, dismissing the application summarily. And, even where an application is permitted to proceed, a trial judge's screening function subsists: trial judges should not hesitate to summarily dismiss "applications and requests the moment it becomes apparent they are frivolous"

[Citations omitted. Emphasis in original.]

- [18] That said, notwithstanding the apparent consistency of our Court of Appeal, one can observe in Orr that Cody employs different language than the Court in Orr concerning the threshold Vukelich test. Different language, within the same judgment, in describing the Vukelich test, mirrors the issue of the broad use of language in the legal landscape across Canada when dealing with the Vukelich threshold.
- [19] This was not lost in the Supreme Court of Canada when Haevischer landed on their docket. The Court took the opportunity to visit the jurisprudence and revisit the Vukelich test. The extent to which they did this is an issue in this voir dire and consequently I will spend some time with the case of Haevischer.
- [20] There is no question, to one degree or another, the Court recast Vukelich in a fundamental way. This is signalled at the beginning of the case:
- [2] There is a clear consensus in courts across Canada that trial judges have the power to summarily dismiss applications made in the criminal law context in certain circumstances. However, the national case law is divided about the proper threshold to be applied. It is time for this Court to provide guidance on this important issue, which is linked to concepts as fundamental to our criminal justice system as trial fairness and trial efficiency. The chosen standard must protect the accused's constitutional rights to a fair trial and full answer and defence while avoiding undue delay and the disproportionate or wasteful use of court resources. It should also discourage decision makers from determining the merits of the underlying application without all the evidence, as this risks unfairness for an efficiency which may be more apparent than real.
- [3] As a result, an application in a criminal proceeding, including for a stay of proceedings for abuse of process, should only be summarily dismissed if the application is "manifestly frivolous". This threshold best preserves fair trials, protects the accused's right to full answer and defence, and ensures efficient court proceedings. It is a rigorous standard that allows trial judges to weed out the sort of applications that the summary dismissal power is designed to exclude, but permits most applications to be decided on their merits in proportionate proceedings.

[Emphasis added.]

- [21] And again at para. 23, the Court strikes the issue:

[23] A Vukelich hearing occurs before the court hears the merits of the underlying application and is directed to a very different question: Should the underlying application be summarily dismissed or should it be allowed to proceed to a voir dire? The appropriate standard to be applied for this preliminary question about summary dismissal lies at the heart of this appeal.

[Emphasis added.]

[22] The Court also recognized the proposition is straightforward; however the standard was elusive:

[44] Because of the nature of the underlying application, McEachern C.J. did not need to articulate a general standard for when an application in a criminal trial should be summarily dismissed. The defence application advanced in Vukelich challenged a search warrant and relied upon *R. v. Garofoli*. In *Garofoli*, the Court held that successfully challenged portions of an information to obtain ("ITO") are to be excised, after which the trial judge must determine if the remainder of the ITO supports the issuance of the warrant. In *Vukelich*, the trial judge applied the *Garofoli* framework to conclude on the face of the record, accepting all of the defence's allegations as true and excising the impugned information, that there was still sufficient information to issue the warrant. Given the nature of the defence application and the principles from *Garofoli*, McEachern C.J. found that holding a voir dire would "not assist the proper trial of the real issues".

[45] Since 1996, Vukelich hearings have been extended well beyond search warrant cases and are frequently used in criminal trials in British Columbia. While it is more common for the Crown to request a Vukelich hearing to summarily dismiss a defence application, the trial judge's screening function applies equally to Crown applications, and defence counsel do sometimes request Vukelich hearings.

[Citations omitted. Emphasis added.]

[23] The conclusions of the Court begin at para. 62:

[62] I turn now to the question at the heart of this appeal: What is the threshold for the summary dismissal of applications made in the criminal law context? I briefly review the uncertainty in the existing jurisprudence. I then identify the correct threshold, which is whether the underlying application is manifestly frivolous, and explain why this threshold promotes both trial efficiency and trial fairness

[63] The threshold test "has been expressed in different ways at different times". It has been variably described as having no reasonable prospect of success (Cody, at para. 38); being frivolous or manifestly frivolous; having no basis upon which it could succeed (Cody, at para. 38); having no reasonable likelihood that the voir dire will assist - [and parenthetically I add Orr] -- being doomed to failure; being unmeritorious on its face; not being grounded in any facts that have a reasonable likelihood of ultimately supporting a remedy; having no basis in fact or law; having no foundation in the evidence; being completely devoid of

merit . . .

- [64] As is apparent from the citations above, this uncertainty is not limited to British Columbia. Provinces and territories across the country have relied on a combination of cases, including Vukelich, Kutynec and Cody, as authority for the trial judge's power to summarily dismiss applications

[Citations omitted. Emphasis added.]

- [24] And further, at para. 75:

- [75] The Crown and others proposed the "no reasonable prospect of success" threshold based on their reading of Cody. In Cody, this Court used the phrases "reasonable prospect of success", "no basis upon which the application could succeed", and "frivolous" in connection with summary dismissal motions. In this case, the Court of Appeal for British Columbia stated that this Court "has articulated this standard as requiring an application to have a 'reasonable prospect' of success or of assisting in determining the issues before the court". [and again I add parenthetically, that was the test in Orr.] Other courts have also relied on Cody as authority for the threshold for summary dismissal, citing to one or more of the three phrases used.

[Citations omitted.]

- [25] In my view the Court was clear the proposed test for summary dismissal was a test of general application:

- [76] However, Cody did not decide the threshold to be applied generally to the summary dismissal of applications made in the criminal law context.

- [77] Further, the "no reasonable prospect of success" standard is ill suited to summary dismissal in the criminal context as it may invite an assessment of the merits of the underlying application. A detailed assessment goes beyond the scope of a summary dismissal motion and invites the sort of protracted proceedings that currently plague Vukelich hearings. It risks drawing the summary dismissal judge in too deeply on a limited record. While it is a useful standard in other areas of law, it tends to work against efficiency when used for summary dismissal in the criminal context. The assessment of the merits of the underlying application ought to be reserved for the final part of the decision-making process:

- [78] Alternatively, others before this Court invoked Pires to argue that trial judges should decline to embark on an evidentiary hearing if the petitioning party "is unable to show a reasonable likelihood that the hearing can assist in determining the issues before the court"; this is sometimes referred to as the "no reasonable likelihood of assistance" standard. However, by commenting on the need for trial judges to control prolix proceedings, the Court in that case also did not purport to decide the threshold for summary dismissal motions. Rather, Pires dealt with a challenge to a search warrant and affirmed the requirement from Garofoli that the defence must show a reasonable likelihood that cross-examination of the affiant will

assist in determining the relevant issues.

[79] The "no reasonable likelihood of assistance" standard suffers from the same flaw of being merits-based. In addition, its focus is on procedure (how to decide the underlying application) rather than substance (namely, whether the application is somehow flawed and ought to be summarily dismissed). Thus, while this may be a helpful consideration when deciding how a voir dire should be conducted, it should not be used in summary dismissal motions to determine whether an underlying application should proceed to a voir dire.

[Emphasis added.]

[26] In my view, on a plain reading of the decision as a whole the Court was addressing the threshold standard applicable in criminal proceedings in determining whether to proceed with a particular application in that proceeding, including Garofoli applications. Indeed, the Court utilizes a hypothetical Garofoli application as an example of how the test might be applied.

[27] At para. 86 of Haevischer:

[86] An application may also be manifestly frivolous where the remedy sought could never issue on the facts of the particular application. The nature of the application will be relevant to this analysis. On certain applications, the trial judge may be able to assume the facts put forward by the applicant and, assuming those facts, determine whether the remedy sought could issue. Garofoli applications, where trial judges ask if the ITO could still support the issuance of the search warrant even if the challenged portions of the ITO are excised, make the point. Where the ITO still supports the issuance of the warrant, then the application can be summarily dismissed because, even if the defence could prove that the impugned portions of the ITO ought to be struck, the sought-after remedy would not follow.

[Emphasis added.]

[28] Nevertheless, the Crown submits that para. 80 of the judgment carves out the proposition that the standard does not apply to a Vukelich hearing in the context of a Garofoli application. Para. 80 reads as follows:

[80] The "manifestly frivolous" standard is intended to be a clear standard to be applied to summary dismissal motions brought in the criminal law context that are not otherwise subject to a legislated or judicial threshold. It does not, for example, have an impact on applications brought under Criminal Code provisions such as s. 685(1) applications concerning frivolous appeals or s. 679 applications for bail pending an appeal (. . .). Nor does this standard eclipse the bodies of law that have developed around particular types of applications, such as Garofoli and Pires applications to challenge the lawfulness of a search warrant.

[Emphasis added.]

- [29] In my view, with respect, to interpret the judgment in Haevischer as exempting the 'manifestly frivolous' test concerning a Vukelich application relating to a proposed Garofoli application is inconsistent with the pains the Court took to point out the unsatisfactory state of the Vukelich jurisprudence in all manner of applications. Consequently the Court found it necessary that there is a need for certainty and consistency in applying the Vukelich standard.
- [30] To interpret the judgment as the Crown suggests, with the greatest of respect, is not in accord with the broad approach referencing all Vukelich applications in the criminal context.
- [31] The interpretation urged by the Crown is also inconsistent with the Court immediately mooting the Vukelich standard, as stated by the Court, in the context of a Garofoli application.
- [32] In my view, the Court was making clear in para. 80 that the judgment of the Court was narrow; in the sense it was addressing the standard to be applied in Vukelich applications but not otherwise. It was not addressing other established procedural thresholds that might have developed in resolving applications before the court.
- [33] In relation to the merits of the position concerning summary dismissal; all counsel have made submissions upon an overview of the ITO and submissions concerning what counsel hope to develop concerning the potential strengths or weaknesses of their respective positions. The Crown has firmly advanced the view there is no cogent position taken by the accused that could undermine the propriety of the authorizations. The accused has set out in oral and written submissions certain areas they say where inference is critical to the legitimacy of the authorizations, and those inferences were not properly available to the issuing judge.
- [34] In the case at bar, the ITO in issue is 127 pages in length. At the invitation of the Crown, I have read it. I agree with counsel that while there is specific evidence and information contained in the ITO that targets the activity in and around the Homer Street address, the ITO must be read as a whole providing the contextual picture in assessing whether it is capable of supporting the authorizations in issue. The issue will be whether upon close examination of the intersecting parts, the whole is capable of supporting the authorization.

Conclusion

- [35] I find there is no requirement that the accused file an application seeking leave to pursue a Garofoli application.
- [36] I conclude that while it may be the Crown is correct that the authorizations cannot be undermined, that is for another day. In my view the Crown has not established the proposed application is manifestly frivolous. Whether the accused will succeed is an entirely different matter.

[37] I am also not persuaded at this stage there is little or no benefit to the trial process in hearing the application. The submissions of counsel developing the points raised, knitting together the ITO during the voir dire, in my view, renders it reasonably likely that the court will be assisted in sorting out what ultimately may or may not be admitted in evidence before the jury.

[38] The accused are entitled to embark upon the application relating to 1121 Homer Street. This concludes this aspect of voir dire #2.

"Crossin J."

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