

CANADA / JUDGMENT

R. v. Toor

2025 BCSC 1071

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Supreme Court of British Columbia

DECIDED

17 April 2025

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2025 BCSC 1071 R. v. Toor

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Toor,

2025 BCSC 1071

Date: 20250417

Docket: 95959-2; 95959-16

Registry: Abbotsford

Rex

v.

Khushveer Singh Toor

Abhijeet Singh

Gurkaran Singh

Restriction on Publication: Pursuant to s. 486.5(1); 486.5(9); and 648(1) C.C.C.

Inherent Jurisdiction

Before: The Honourable Justice Ormiston

Oral Reasons for Judgment

(Re Accused Toor)

Counsel for the Crown:

D.P.H. Tsui

W.J. Dorsey

Counsel for the Accused:

B. Mohan

S. Kalkat

Place and Date of Hearing:

Abbotsford, B.C.

March 11, 2025

Place and Date of Judgment:

Chilliwack, B.C.

April 17, 2025

- [1] THE COURT: The co-accused on the same indictment are Abhijeet Singh and Gurkaran Singh, who I will refer to as the "co-accused" in these reasons.
- [2] The prosecution of Mr. Toor was severed from his co-accused at our last appearance. These are my reasons with respect to Mr. Toor's application to proceed with a jury instead of a judge alone trial to which he previously consented. Crown counsel is opposed.
- [3] Mr. Toor's application is advanced on the basis that this Court has remedial power to specify the mode of trial in order to prevent an unjust result for the accused. Crown counsel submits that their refusal is an exercise of prosecutorial discretion, and that the Court should not interpose itself in such decision-making, absent a finding that the Crown conduct amounts to an abuse of process.
- [4] It is important, before moving forward with this analysis, to be clear that the defence does not allege an abuse of process. Despite having prepared some written argument raising abuse of process, defence counsel has asked the Court to strike all reference to such a claim from their submissions. The defence clarified the legal basis for their application at the very outset of this hearing when Crown counsel said they would seek an adjournment on grounds of insufficient notice if they were going to have to respond to an abuse of process application. In this context, defence counsel assured the Court that the adjournment sought by Crown would not be required.
- [5] The factual foundation and other legal principles being advanced remain the same. The defence submits that neither the prosecution, nor the public interest would be prejudiced by a return to a jury trial, and that ultimately the Crown's decision to withhold their consent to re-election now that Mr. Toor will be tried separately from his co-accused is unreasonable and risks a significant unfairness.

Background

- [6] The context in which this application has been brought is important to understand the positions of the parties, so I will begin by outlining some of the relevant background.
- [7] The charges against Mr. Toor and his co-accused were laid in 2022. First degree murder is one of the enumerated offences in s. 469 of the Criminal Code of Canada, R.S.C. 1985, c. C-46 [Criminal Code] for which the default mode of trial is judge and jury. All three accused were deemed to have so elected.
- [8] This matter proceeded without preliminary hearing to the setting of a judge and jury trial scheduled from May 20 through to August 1, 2025. I will refer to these as the current trial dates.
- [9] In 2024, counsel for the co-accused advised that they were involved in another unrelated criminal trial, which was ongoing, and where Court dates had been scheduled that would conflict with the current trial dates set for this trial. Attempts were apparently made by all counsel to streamline this trial, including admissions of fact and re-election to a judge alone trial. Mr. Toor's first expression on the record about his preference for a judge alone trial was December 13, 2024.
- [10] Nevertheless, counsel for the co-accused went on to apply to adjourn the scheduled trial dates in relation to their clients. This application was opposed by Crown counsel and Mr. Toor. The prospect of severing Mr. Toor from his co-accused was raised by counsel in the course of the adjournment application, so that Mr. Toor could continue with the currently trial dates.
- [11] Despite the presiding judge's comments that a joint trial would be preferable, the adjournment application was ultimately granted on January 27, 2025. At that same appearance, the current trial dates were expressly not struck. Mr. Toor agreed to a judge alone trial, and his counsel signed the notice of re-election on his behalf, indicating his wish to re-elect to a trial by judge alone. The Crown consented. This re-election was canvassed and confirmed on the record with Mr. Toor personally on February 13.
- [12] While it appears to have been the subject of earlier discussion, by February 21, Crown counsel advised defence that they were "prepared to proceed against Mr. Toor in May 2025 as scheduled." When Mr. Toor returned to Court on February 24, the presiding justice attempted to confirm the judge alone election again in light of some audio issues at the previous appearance. While the accused himself appeared to affirm, counsel advised that the consent to re-elect to judge alone was contingent on there being a joint trial with the co-accused.

- [13] At the February 24 Case Management Conference ("CMC"), counsel for Mr. Toor confirmed that he would not be available for a joint trial with the co-accused in January 2026. On this same date, counsel for Mr. Toor also confirmed that he was not waiving his s. 11(b) right with respect to any further delay.
- [14] Crown counsel formally made the application to sever Mr. Toor's prosecution from his co-accused at our last appearance and it was granted by this Court on the consent of Mr. Toor. Crown counsel has not filed a new indictment charging Mr. Toor alone, but rather relies on the same indictment. Mr. Toor first raised the prospect of applying to re-elect to a jury trial at the February 24 CMC, and this Court heard submissions from both parties last day.

The Law

- [15] Counsel for Mr. Toor framed his written argument and some submissions around s. 561 of the Criminal Code, which generally applies to an accused's right to re-elect their mode of trial. Section 561 allows an accused to re-elect as of right, provided they do so no later than 60 days before the first day of trial. While counsel candidly acknowledges that this section does not apply to s. 469 offences, the defence submits this section should guide the Court's analysis on the present application.
- [16] I have considered the analysis of s. 561 that informs some of the applicable jurisprudence. However, based on the specific provisions in the Criminal Code that deal with re-election for s. 469 offences, I find the application to re-elect for this offence, which is murder, is governed by s. 473 of the Criminal Code, which provides at subsection (1):

Notwithstanding anything in this Act, an accused charged with an offence listed in section 469 may, with the consent of the accused and the Attorney General, be tried without a jury by a judge of a superior court of criminal jurisdiction.

- [17] Given the deemed election of judge and jury under s. 471 of the Criminal Code, s. 473 is the section that gave Mr. Toor the ability to elect a judge alone trial as he did back in February with the consent of the Attorney General. The application the accused has brought before me is premised on him having so consented.

- [18] Accordingly, the application being made today for Mr. Toor to withdraw his consent to a judge alone trial must be done in accordance with subsection 473(2), which states:

Notwithstanding anything in this Act, where the consent of an accused and the Attorney General is given in accordance with subsection (1), that consent shall not be withdrawn unless both the accused and the Attorney General agree to the withdrawal.

- [19] As such, the accused may be tried by judge alone only if both the Crown and the accused consent, and once such consent is given, it may not be withdrawn unless both the accused and the Crown once again agree to the withdrawal of consent.

- [20] The legal issue, then, on this application is whether this Court can or should interfere with the Crown's decision not to consent the accused's application to withdraw his previous consent to a judge alone trial. A prosecutor's decision to consent to a judge alone trial under s. 473(1) was reviewed by the Alberta Court of Appeal in *R. v. Ng*, 2003 ABCA 1, leave to appeal to the Supreme Court dismissed, 2004 SCCA 33.
- [21] In *Ng*, the Court decided that Crown counsel's refusal to consent to re-election was an exercise of prosecutorial discretion, and reviewable only upon the accused demonstrating, on a balance of probabilities, that there had been an abuse of process: paras. 33-34. As such, the Crown was not required to give any explanation to the accused or the Court to justify their refusal.
- [22] Defence counsel in the present application does not offer any direct legal authority to support their proposition that this Court's remedial powers allow for interference with the Crown's decision not to consent to a jury trial under s. 473(2). Given the dearth of jurisprudence about decisions made under that particular subsection, I agree with the defence submission that the situation is somewhat unique. Defence counsel suggests that Crown decision-making under s. 473(2) is different from the case law dealing with 473(1), in part because subsection (2) engages an accused's constitutional right to a jury trial.

Analysis

- [23] The fact that an accused enjoys a constitutional right to a jury trial, but not to a judge alone trial, is well-supported by statute and jurisprudence: *R. v. Oland*, 2018 NBQB 253, at para. 6, citing *R. v. Turpin*, [1989] 1 S.C.R. 1296; and, *R. v. Ng* at para. 135.
- [24] In emphasizing the importance of this distinction, defence counsel points specifically to *Ng* at para. 149, where Fraser C.J.A., in his concurring judgment, writes the following:

Identifying the kind of reasons which might well influence a Crown decision not to consent to a trial by judge alone highlights the serious potential for harm if Courts were to second guess prosecutorial decisions in the absence of any proven abuse of process. Many of these decisions are linked to an assessment of what is in the public interest. In the context of the prosecution of criminal offences, that call ordinarily goes to the Crown. While the Courts retain an overriding discretion in the choice of mode of trial, it is to deny a re-election from a judge and jury to a judge alone in certain circumstances, not to insist on a trial by judge alone, absent abuse of process. As a general rule, therefore, the Courts ought not interpose themselves into the exercise of prosecutorial discretion.

- [25] To the extent that defence counsel relies on this passage to argue that this Court should not "insist on a judge alone trial absent abuse of process," I disagree with such an interpretation. Read in the context of the decision being rendered by Fraser C.J.A., the Court is emphasizing that, where the Crown is refusing to consent to a judge alone trial, the onus rests on the accused to establish an abuse of process, not the Crown to establish the absence of an abuse of process.
- [26] The decision in *Ng* hinges on the Court finding that Crown consent under s. 473(1) is an exercise of prosecutorial discretion. While the judgment of the Court also references an accused's constitutional right to a jury trial, the context in which the Court makes these remarks is important. The Court was not engaging with the issue of whether Crown consent under s. 473(1) is an exercise of prosecutorial discretion or not. It was deciding the ultimate merits of an abuse of process application. The analysis in *Ng* with respect to an alleged abuse of process is not applicable to the decision I have to make, which is whether this Court can interfere with the Crown's discretion to remedy what is alleged to be, at most, unfair or unreasonable conduct.
- [27] In my view, the threshold issue to be decided here is whether or not the Crown's refusal to consent under s. 472(2) is also an exercise of their prosecutorial discretion. If so, then this case aligns with decisions made under s. 473(1) where there is sound authority to find such discretion should not be disturbed unless the Crown decision-making amounts to an abuse of process.
- [28] I find that Crown consent under s. 473(2) is an exercise of prosecutorial discretion, and I come to this conclusion for substantially the same reasons as the Courts have found Crown consent under s. 473(1) is an exercise of prosecutorial discretion.
- [29] In *Ng*, the Court finds that a prosecutor's decision to refuse consent to the election or re-election can only be probed in limited instances of an abuse of the Court's process where the prosecutorial misconduct threatens the accused's right to a fair trial. The issue before the Court in *Ng* was the basis on which the trial judge could review a prosecutor's decision to refuse consent to election or re-election, and the characterization of such consent as prosecutorial discretion is presumed by the Court at the outset of its analysis: see para. 21.
- [30] The decision in *Ng* predates *R. v. Anderson*, 2014 SCC 41, where the Supreme Court of Canada expands on the nature of prosecutorial discretion, albeit in the context of different Crown decision-making. *Anderson* distinguishes between prosecutorial discretion and conduct of the Crown that amounts to trial tactics or strategy. The latter can be assessed by the Court on the less deferential standard of fairness and reasonableness; the former on the high standard of an abuse of process (at para. 36). At para. 44 of *Anderson*, Justice Moldaver describes prosecutorial discretion as "an expansive term that covers all decisions regarding the nature and extent of a prosecution and the Attorney General's participation in it." The Court reiterates the language used in *Krieger v. Law Society of Alberta*, 2002 SCC 65, that prosecutorial discretion includes "all decisions regarding the nature and extent of the

prosecution," and goes on to give examples, noting that many stem from the provisions of the Criminal Code itself.

- [31] In contrast, the Court in *Anderson* explains that trial tactics include counsel ignoring rulings or orders, engaging in inappropriate behaviour such as tardiness, incivility, abusive cross-examination, improper addresses to a jury, inappropriate attire, et cetera: see para. 58. As the Court in *R. v. Oland* notes at para. 15, it is clear from the examples given in *Anderson* that "tactics or conduct" deals primarily with behaviour by counsel inside the courtroom.
- [32] *Anderson* was followed in the context of Crown consent under this section, s. 473, in *R. v. Oland*. In *Oland*, the Court arrives at the same conclusion as *Ng*, that Crown consent under s. 473(1) is an exercise of prosecutorial discretion and can only be reviewed on an abuse of process or a violation of the accused's right to a fair trial. In *Oland*, the Court expressly finds that the accused must establish an abuse of process as opposed to a lower standard of showing that Crown's refusal to consent is unfair and unreasonable. It does so on the basis that, where the Crown is exercising its prosecutorial discretion as opposed to trial tactics, nothing short of conduct amounting to an abuse of process will justify the Court encroaching on its discretion. The Court in *Oland* finds that, while *Ng* does not specifically address the developing jurisprudence around what constitutes prosecutorial discretion, its findings accord with the expansive view of prosecutorial discretion set out in *Anderson*. I agree with this reasoning.
- [33] At para. 12 of *Oland*, the Court considers how *Anderson* enlarged the definition of prosecutorial discretion, which *Krieger* described as "powers that constitute the core of the Attorney General's office." In *Anderson*, Justice Moldaver explained that the use of the word "core" resulted in an unwarranted narrowing of the definition of prosecutorial discretion, notwithstanding the expansive language used in *Krieger* to define that term: see para. 47 of *Anderson*.
- [34] In the course of analogising the Crown's decision-making under s. 473 to the other examples of prosecutorial discretion given in *Anderson*, the Court in *Oland* relies on the fact that s. 473(1) of the Criminal Code expressly confers the discretion in question on the Crown: see para. 23.
- [35] This decision in *Oland* is also consistent with the Quebec Court of Appeal decision in *R. v. Varennes*, 2023 QCCA 136, where the Court overturned the trial judge's interference with Crown's decision not to consent under s. 473(1). It did so on the basis that the trial judge's conclusion that the Crown decision to consent to a trial by judge alone under s. 473 "was not at the heart of the prosecutor's discretion," and that this was unfounded in law. The Court of Appeal found this error led the judge to apply an incorrect standard of unfairness or unreasonableness in reviewing the prosecutor's decisions: see para. 24. I am mindful that this decision is under appeal, however it is consistent with Justice Moldaver's assessment in *Anderson*, that requiring the decision to be at the "core" of the Attorney General's office is an unduly narrow definition of prosecutorial discretion.

- [36] Applying this jurisprudence to s. 473(2), I find that, just as in s. 473(1), the Criminal Code specifically grants Crown discretion to withhold consent to an accused's request to return to a jury trial. There is nothing about the wording of these two subsections to suggest that the Crown's ability to withhold their consent is any more restrained under subsection (2) than subsection (1). In both instances, it is an unfettered discretion.
- [37] Parliament is entitled to limit the mode of trial for an accused, provided it does so constitutionally. The legal dispute before me is not a constitutional claim. In other words, the defence is not seeking a finding that the accused's Canadian Charter of Rights and Freedoms [Charter] rights or right to a fair trial are infringed by the fact that s. 473(2) gives the Crown discretion to withhold consent to return to a jury trial once they have already made the decision to elect a trial by judge alone, nor are they seeking any other constitutional remedy.
- [38] The Crown decision-making in this case is permitted under s. 473(2), and I accept that it is closely related to the conduct of the prosecution against Mr. Toor and his co-accused. I cannot agree with the defence suggestion that the Crown was engaging in the kind of tactics described in *Anderson* by severing Mr. Toor's prosecution when Justice Dley had made comments about the benefits of a joint trial for all accused. The application to sever was repeatedly requested by counsel for the accused, and the judge's remarks are not in the nature of a direction that the Crown failed to follow. In fact, the Court recognized that the decision to proceed separately against Mr. Toor was ultimately one for the Crown to make.
- [39] In conclusion, I find that Crown consent, or lack thereof, under s. 473(2) is an exercise of prosecutorial discretion.
- [40] Defence counsel puts significant emphasis on the fact that a return to the *de facto* mode of trial would not prejudice the public or the Crown in any way. In support, I have been provided with correspondence between Crown and the sheriffs from February 28, 2025, suggesting that sheriffs would still have time to set up a jury panel if required. This kind of evidence is analogous to what was before the Court in *Ng*, where even in the face of favourable reasons for a re-election, the Court could not find the Crown was acting with oblique motive where it gave no reasons for withholding its consent.
- [41] While there was no direct argument made regarding abuse of process, the defence submissions about Crown ultimately agreeing to sever the prosecution of Mr. Toor and their decision-making regarding the mode of trial implicitly suggests they have acted with improper or oblique motives. As the Court in *Ng*, at para. 13, cites from Justice L'Heureux-Dubé in *R. v. Cook*, [1997] 1 S.C.R. 1113, "it is unlikely that such a finding could arise without there being a legitimate claim for abuse of process."
- [42] Given my finding that the Crown's decision-making lies in the domain of prosecutorial discretion, I will not interfere with that discretion on the basis that it is unfair or unreasonable, so I need not resolve those questions.

- [43] I have considered the Ontario Court of Appeal decision in *R. v. Stark*, 2017 ONCA 148 relied on by the defence in submitting that the accused's right to elect a jury trial is essential to trial fairness. Counsel invites this Court to intervene in the Crown's decision-making to prevent the kind of miscarriage of justice identified in *Stark*, which occurs where the Court proceeds without allowing the accused to make an informed election.
- [44] The difference between this case and *Stark* is a factual one. *Stark* rests on the finding that trial counsel did not advise the accused about the available modes of trial before he made his election. It was only on appeal that the incompetence of counsel and this miscarriage of justice was revealed. There is no such evidence before me. Mr. Toor was represented by counsel when he consented to a judge alone trial. He personally confirmed his unequivocal consent on the record. Competence of counsel is presumed, and would understandably have prevailed in any Crown assessment of Mr. Toor's assertion that his re-election to a judge alone trial was based on having a joint trial with his co-accused.
- [45] Counsel also relies on *Stark* in submitting that Mr. Toor was not fully informed before making his election, because he did not know with certainty that his prosecution would be severed from his co-accused when he consented to a judge alone trial. The record supports defence counsel's assertion that Crown counsel did not definitively commit to severing Mr. Toor's prosecution until after he consented to a judge alone trial. However, it is arguable whether this rises to the same miscarriage of justice that clearly occurs when an accused is never properly advised of the available modes of trial, as was the case in *Stark*. I have not been provided any authority to suggest that a right to re-election necessarily flows from severance.
- [46] However, more importantly, what the defence is arguing here is that Mr. Toor only made an uninformed election because of Crown counsel's conduct in failing to commit to his request for severance until after he consented to a judge alone trial. There is no basis in the record to find that Crown had foreclosed the possibility of severance before Mr. Toor consented to a judge alone trial. Retention of the current trial dates, even after the co-accused were successfully adjourned, is a strong indication that acquiescing to severance was a real possibility. Mr. Toor confirmed his consent to a judge alone trial on the record a couple of weeks later, including the written consent signed by counsel.
- [47] To the extent that the defence suggests that Crown is acting with oblique motives in withholding their consent to a jury trial given Mr. Toor's affidavit evidence, it is not for this Court to weigh the bona fides of that decision in the absence of an abuse of process application. The present situation cannot be analogised to *Stark*, where Crown counsel at trial did not know a miscarriage of justice was occurring.
- [48] In my view, at the trial level, the Court cannot skip to the conclusion that the Crown is allowing a miscarriage of justice to occur without allowing for a fulsome examination of their decision-making, which would come in the course of an abuse of process application. In the absence of clear evidence like incompetent representation or Crown conduct that is

arbitrary, capricious, or the product of improper motives, I cannot find a miscarriage of justice that would warrant treading into the realm of prosecutorial discretion has been established here. Accordingly, the defence application for Mr. Toor to re-elect his mode of trial from judge alone to judge and jury is dismissed.

"Ormiston J."

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