

CANADA / JUDGMENT

United States v. Pal

2009 BCSC 1868

COURT

Supreme Court of British Columbia

DECIDED

24 April 2009

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2009 BCSC 1868 United States v. Pal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

United States v. Pal,

2009 BCSC 1868

Date: 20090424

Docket: 23551

Registry: Vancouver

In the Matter of the Extradition Act

S.C. 1999, c. 18, as amended

and

In the Matter of

The Attorney General of Canada on behalf of

The United States of America

and

Reginald Sanjay Pal

also known as Reggie Pal

Corrected Judgment: The short citation and header have been changed
on all pages on April 19, 2010.

Before: The Honourable Madam Justice Ross

Oral Ruling on Application to Reopen Case

Counsel for the Attorney General of Canada on behalf of the Requesting State:

D. Majzub

Counsel for the Person Sought:

M. Jetté

Place and Date of Hearing:

Vancouver, B.C.

April 24, 2009

Place and Date of Judgment:

Vancouver, B.C.

April 24, 2009

- [1] THE COURT: The Respondent in this extradition matter applies to reopen to file the affidavit of Kirsten Bydal, which exhibits a letter from Ellyn Lindsay, Assistant U.S. Attorney. The letter reports that four victims, whose evidence is summarized in the amended record of the case, have died. These are Thelma Anderson, Arthur Cropper, Iva Wright and Richard Kellogg.
- [2] Second, the Respondent seeks a brief adjournment to provide the possibility to investigate the date of death of these individuals. The Respondent submits that both the fact and date of the deaths of these individuals is relevant to the court's review pursuant to *United States of America v. Ferras*, 2006 SCC 33, [2006] 2 S.C.R. 77 [Ferras] and to a possible Tarantino application (*United Kingdom of Great Britain and Northern Ireland v. Tarantino*, 2003 BCSC 1134, 177 C.C.C. (3d) 284 [Tarantino]) that is a consideration of whether, by virtue of the timing of the deaths in relation to the certification of the record of the case, there is evidence of a lack of diligence giving rise to a breach of the Charter of Rights and Freedoms.
- [3] The position of the applicant is that the applicant is agreeable to reopening for the purpose of marking the affidavit, but is opposed to the granting of an adjournment on the basis that neither the fact of the deaths nor the date of the deaths of these witnesses has, in the applicant's submission, any bearing on the question of the reliability of the amended record of the case.
- [4] Counsel submits there is no duty on the part of the requesting state to continuously verify the information contained in the record of the case.

- [5] The evidence of Ms. Anderson and Mr. Cropper is of particular significance in that Mr. Cropper is the sole victim associated with FBNH, and Ms. Anderson's evidence provides evidence of a link with Mr. Pal through a rental by D&C Holdings of the mailbox to which she was directed to send funds. D&C Holdings is associated with Mr. Pal through other evidence.
- [6] Moreover, while the amended record of the case makes reference to documents and, in one case, another witness in relation to Ms. Wright and Mr. Kellogg, there is no such reference made in relation to the evidence of Ms. Anderson and Mr. Cropper.
- [7] In terms of the case law, in Ferras, the Supreme Court of Canada provided a framework for the consideration of these issues. Starting at paragraph 40, in its discussion of the deficiencies of the Shephard test (United States of America v. Shephard (1976), [1977] 2 S.C.R. 1067), the court notes:

... Similarly, I take it as axiomatic that a person could not be committed for trial for an offence in Canada if the evidence put against the person is not available for trial. As Donald J.A., dissenting in Ortega stated, at para. 51:

If evidence is not available for trial it should not be used as a basis for committal. The concern goes well beyond modalities and rules of evidence, it goes to the heart of the question for the judge: whether there is enough evidence to put the requested person on trial.

- [8] At paras. 52-3 the court continues:

Certification of evidence as set out in s. 33(3)(a) raises a presumption that the evidence in a record of the case is reliable. This follows from the principles of comity between Canada and the requesting state. Certification, as discussed above, is the indicium of reliability that Parliament has prescribed for evidence in these circumstances. Unless challenged, certification establishes reliability.

The person sought for extradition may challenge the sufficiency of the case including the reliability of certified evidence.

- [9] The court then continues at paras. 57-8:

The record of the case provisions, as well as modern treaties ... recognize the basic requirement of "available" evidence. They do so by requiring the requesting state to certify the availability of evidence. Even where a treaty does not expressly require the availability of evidence to be certified, it remains a fundamental element to be established to meet the test for committal. Where the requesting state does not certify or otherwise make out a prima facie case that the evidence exists and is available for trial, the case for committal is incomplete and should be dismissed.

This is not an onerous burden. Indeed, where actual first-hand evidence ... is put before an extradition judge, the evidence's existence is self-evident and its availability for trial will be presumed. Similarly, where evidence is certified as available by a requesting state, that

certification results in a presumption of availability for trial. However, cases might arise where a person sought could cogently challenge the presumption of availability of evidence for trial. For example, where a person sought can show that a requesting state relies on evidence of a witness who, prior to the extradition hearing, retracted his or her statement, the availability of that evidence for trial may be brought into doubt. Another example is where a state makes only a bare assertion that evidence exists without providing any description whatsoever of its content or form. In such a case, the availability of the evidence may be in doubt. Furthermore, an extradition judge does not make a prediction about the future state of the evidence. He or she makes a common sense determination about whether the evidence exists and is available for trial -- at the time of the extradition hearing -- based on the evidence itself, any circumstantial guarantees of availability (such as certification) and any evidence tendered to dispute the presumption of availability for trial.

[10] Does then the evidence of the death of witnesses constitute a basis to dispute the presumption of availability of the evidence for trial? In *The United States of America v. Fordham*, 2005 BCCA 197, 196 C.C.C. (3d) 39, the Court of Appeal dealt with a submission that the record of the case certified by the requesting state should not have been admitted because the evidence included in it was not available for trial as required by the Extradition Act, S.C. 1999, c. 18.

[11] The issue was not in that case that the witnesses had died, but that their evidence may have been unavailable because they may have been reluctant to testify or difficult to locate.

[12] Mr. Justice Hall, for the Court, stated at paragraph 31:

I would not assume that because these witnesses may be reluctant or difficult to locate, their evidence is not therefore "available" in a prosecution in the United States. For instance, it may be possible to have evidence given by such witness from Canada by video link. It may also be feasible for evidence to be adduced at any such prosecution as it could be in Canada in a situation where a witness has previously testified and is not available at trial to give the evidence...

[13] The court cited with approval the decision of Mr. Justice Romilly in *United States of America v. Freimuth*, 2004 BCSC 154, 183 C.C.C. (3d) 296 [Freimuth] where he states, starting at paragraph 29:

In my view, except in extraordinary circumstances, once a record of the case has been certified in accordance with the Act and the Treaty, the extradition judge should not "look behind" the certification. Section 32(1)(a) of the Act provides that evidence in a record of the case is admissible at the extradition hearing if it is certified in accordance with s. 33(3) of the Act. The Supreme Court of Canada had held that for the validity of the certification, Canada relies on the fairness and good faith of the requesting state...

In *United States of America v. Yang* (2001), 157 C.C.C. (3d) 225 (Ont. C.A.), the Ontario Court of Appeal similarly held that our courts should not go behind the certification by the requesting state. At para. 58, Rosenberg, J.A. stated:

Under s. 33(3), the judicial or prosecuting authority must certify that the evidence summarized in the record of the case is available and either would be sufficient under the law of the extradition partner to justify prosecution or was gathered according to the law of the extradition partner. In short, the evidence must be available and must satisfy the legal standards of the extradition partner. I do not see why Canada should demand any greater guarantee of reliability from the extradition partner. Further, I do not see how the extradition partner would be in a position to make the reliability determination without having a detailed knowledge of the legal system of the extradition partner and then, purportedly passing on its legitimacy. Both concepts are antithetical to the extradition process.

[14] Romilly J. then continued at paragraph 39:

Based on Yang ... there is no overriding requirement that in certifying that the evidence summarized or contained in the record of the case is "available for trial", the requesting state must prove that every source of such evidence will attend as a witness at a future trial. Rather, it is sufficient that the evidence is available for trial. The manner in which that evidence is to be adduced in the trial court is not a requirement of availability.

[15] However, counsel for the Respondent notes that this decision is prior to Ferras and may not fulfil the requirements of the new test.

[16] The matter was dealt with afresh by the Court of Appeal in *United States of America v. Costanzo*, 2009 BCCA 120, 243 C.C.C. (3d) 242, leave to appeal ref'd [2009] S.C.C.A. No. 196 [Costanzo]. In that case, there was an argument that the record of the case was unreliable. The submission was based on affidavit evidence that suggested that some of the witnesses referred to in the record of the case had died and would not be available to give evidence. The case was brought. The decision cited is in reference to applications for further disclosure.

[17] At the trial level, reasons for judgment indexed at 2008 BCSC 300, 234 C.C.C. (3d) 108, Mr. Justice Bracken cited with approval *Freimuth*, and then stated at paragraph 31:

In this case, the ROC appears to meet the requirements for certification and admission. The facts facing Stromberg-Stein J. in *Tarantino* were much stronger than the facts here, even assuming that the information contained in the affidavit filed by the respondent is accurate. The respondent relies on the material obtained from the death index searches in the United States to establish that some of the evidence in the ROC will not be available for trial contrary to the certification.

However, even assuming that the oral testimony of Mr. Walters and Mr. Mariano is not available at the trial, other evidence of banking documents obtained by the prosecution is said to provide evidence of the payments from the bank accounts of those two individuals and the subsequent deposit of those payments to bank accounts alleged to have been managed or controlled by the respondent. It seems to me that much of the evidence will in fact be available even without the oral evidence of Mr. Walters and Mr. Mariano.

In Tarantino, there were significant problems with the ROC that led to the conclusion that it was so unreliable as to adversely affect the fairness of the committal process. Section 33 of the Act requires that "the evidence summarized or contained in the record of the case" is available for trial. I find that the ROC in this matter meets the test of admissibility set out in s. 33 of the Act.

[18] On appeal, Madam Justice Rowles, speaking for the court at paragraph 33 stated:

As noted by Hall J.A. in *United States of America v. Fordham* ... there was positive evidence in Tarantino demonstrating the unreliability of the certification process in the Requesting State.

Quite simply, the circumstances leading to the conclusion reached in Tarantino are in no way analogous to the points the appellant puts forward in this case.

The evidence of 18 victims is set out in the ROC. The victims were all elderly. The ROC sets out that three of them are deceased and one is unable to testify because he has suffered a stroke. The ROC nonetheless certifies that the evidence of all these victims is available at trial in the Requesting State through other means. In that regard, I note that the ROC refers to documents seized, victim questionnaires, and the testimony of their relatives. The appellant argues that the ROC may be unreliable because there is some evidence that an additional two individuals listed in the ROC as "expected to be available to testify at trial" may be, in fact, deceased, and have been so since before the ROC was certified.

Among other things, what the appellant's argument fails to recognize is that the mere fact that a witness may be deceased does not mean that their evidence is not available. The admissibility of evidence is, of course, a matter for determination by the court hearing the case in the Requesting State.

[19] The Court of Appeal described the second disclosure application as a request for disclosure of materials in relation to the death of a witness, and noted at paras. 37-9:

In relation to the second disclosure application, the extradition judge held that the possibility that witnesses may have died did not merit the ordering of disclosure because it did not call into question the reliability and admissibility of the ROC. The reasons of the judge for reaching that conclusion appear at paras. 18-37...

The extradition judge determined that there was no evidence before him of conduct by the Requesting State falling so far below an expected reasonable standard such that it amounted to a complete failure of due diligence impacting upon the fairness of the process. As a result, he concluded there was no basis to call into question the reliability or availability of the evidence of these witnesses and, therefore, no basis upon which to order disclosure. I agree with that conclusion.

For the reasons stated, I would not accede to either of the grounds of appeal asserting error in the dismissal of the disclosure applications.

[20] In this case, in the amended record of the case, Ms. Lindsay certifies that the evidence summarized or contained in the attached document is available for trial, and is sufficient under the laws of the United States to justify prosecution. The amended record of the case contains reference to the evidence of Mary Kozbiel who was noted to be deceased. It contains this note:

The prosecution will attempt to introduce her evidence at trial pursuant to U.S. law.

And then makes reference to a statement provided by the witness to FBI Special Agent Jane Kennedy.

[21] The amended record of the case makes reference to statements provided by Mr. Cropper to Federal Trade Commissioner Investigator Laurene France and to a statement provided by Thelma Anderson to FBI Special Agent Kennedy.

[22] The letter sought to be introduced by the Respondent includes the statement by Ms. Lindsay:

Despite these individuals now being deceased, the evidence attributed to them as summarized in the second amended record of the case and supplemental record of the case, which I certified on November 21st, 2005, and January 22nd, 2009, respectively, remains available for trial in the form of business records, documents and other evidence which can be further presented at trial pursuant to United States law.

Further, the passing of these individuals does not affect the certification of the above records of the case as evidence summarized or contained therein remains available for trial and is sufficient under the laws of the United States of America to justify prosecution, despite these witnesses being deceased.

[23] As noted earlier, the amended record of the case makes reference to documents and other witnesses in relation to the two witnesses who are now deceased, but makes no such reference in relation to Ms. Anderson and Mr. Cropper.

[24] Thus, in relation to these two witnesses, the assertion in the amended record of the case is arguably not as strong as or potentially inconsistent with the assertion in Ms. Lindsay's evidence, assuming that the statement in relation to the evidence of Ms. Kozbiel that the prosecution will attempt to introduce her evidence, is comparable.

[25] By contrast, it appears that, in Costanzo, it was clear that the evidence was available through other methods, and here I have regard to paragraph 32 of the reasons of Mr. Justice Bracken. In those reasons, at paragraph 34, he stated:

At the hearing, the requesting state can ask that the court not place reliance on those portions of the record as was done in Cheema [United States of America v. Cheema (1999), 65 C.R.R. (2d) 234 (B.C.S.C.)], or the court can itself choose to place little or no reliance on such statements.

[26] He stated at paras. 36 and 37:

It is my view that any errors as to the availability of evidence for trial alleged to exist in the ROC should be assessed in the context of the ROC in its entirety. Provided the portions of the evidence alleged in the ROC that are shown to be unavailable at the trial does not make the overall content of the ROC so unreliable as to affect the fairness and integrity of the committal process the ROC should be admitted.

Here, the ROC contains a statement by Ms. ... Lindsay, Assistant United States Attorney for the Central District of California, certifying that the evidence summarized or contained therein is available for trial and I find that even if the portions challenged by the respondent are not in fact available it is my view that the ROC is sufficient to meet the test of admissibility under the Act.

- [27] In the present case, the information with respect to the witnesses having died only came to the attention of counsel recently. I note the date on the letter attached to the affidavit is April 21st, 2009. Therefore, in the present case, argument at the hearing, which has already taken place, in terms of the Ferras analysis was not directed to the issues described in the paragraphs that I have just referred to in the decision of Justice Bracken, and nor obviously was there any opportunity to make the alternate argument, the Tarantino argument.
- [28] Witnesses Anderson and Cropper are, as stated earlier, on a different footing than the other witnesses, both potentially with respect to the extent to which their evidence is available through other sources, and in relation to their potential significance in terms of the analysis of the case.
- [29] In the circumstances, I have concluded that the better course is to grant the Respondent's request for a brief adjournment and, accordingly, I have concluded that it is appropriate to grant the application to reopen, and mark the affidavit as an exhibit in these proceedings. It is also appropriate to grant a brief adjournment to permit counsel to conduct a further investigation and to receive, in due course, further submissions if counsel determines that that is appropriate.

"Ross J."

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