

# SUPREME COURT OF YUKON

Citation: *R v Amin*,  
2023 YKSC 46

Date: 20230816  
S.C. No. 20-01515  
Registry: Whitehorse

BETWEEN:

HIS MAJESTY THE KING

Respondent

AND

RUDRA PULASTYAKUMAR AMIN

Applicant

Before Justice K. Wenckebach

Counsel for the Respondent

Faiyaz Alibhai

Counsel for the Applicant

Jennifer Budgell

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[This ban does not apply to Michelle Palardy]**

## REASONS FOR DECISION

### Overview

[1] The accused, Rudra Amin, was charged with seven counts of sexual assault against three complainants. His matter went to trial before a judge and jury in October 2022. At the conclusion of Crown's closing statement, defence counsel sought a mistrial, which I granted.

[2] In granting the mistrial, I found that the Crown committed numerous errors in his closing: he made references based on legally impermissible reasoning; invited the jury to speculate about the complainants' sexual history, which could, in turn, lead to

improper reasoning based on myths and stereotypes; invited the jury to engage in propensity reasoning; and engaged in inflammatory rhetoric.

[3] Although not noted at the time of the mistrial application, at the end of his closing statement, the Crown made comments about Mr. Amin's attitudes about women, the attitudes about women in places outside of Canada, and what is acceptable and legal in Canada. Mr. Amin is South Asian. At trial, evidence was led about Mr. Amin's country of origin, his immigration to Canada, and his immigration status.

[4] Mr. Amin is now seeking costs against the Crown. The Crown opposes the application.

[5] Crown and defence agree on the applicable legal principles and that the Crown at trial committed multiple errors in his closing. They disagree, however, about whether Crown's actions were sufficiently problematic that a costs award is merited. The only issue to be decided, then, is whether Crown's errors reach the threshold for granting a costs award.

[6] For the reasons below, I find that the Crown's errors and his use of racially inflammatory language, cumulatively, warrant an award of costs to Mr. Amin.

### **Analysis**

A. Were the Crown's errors in his closing address to the jury a marked and unacceptable departure from the reasonable standard of the prosecution?

[7] Mr. Amin submits that the Crown engaged in legally impermissible, inflammatory, and racist rhetoric, amounting to misconduct.

[8] The Crown in this application, who was not the prosecutor at trial, submits that the Crown's errors were made in good faith and do not reach the threshold necessary to award costs.

*Law on Costs in Criminal Proceedings*

[9] Costs can be awarded either on the basis of a *Charter*<sup>1</sup> violation or the court's inherent jurisdiction (*R v Pawlowski* (1993), 12 OR (3d) 709 (ONCA) at para. 11). In both cases, the court is to apply the same test for determining whether to award costs (*R v Taylor*, 2008 NSCA 5 at paras. 47-48).

[10] Costs are not routinely granted in criminal proceedings but are granted when the Crown's actions are a marked and unacceptable departure from the reasonable standards expected of the prosecution (*R v 97649 Ontario Inc*, 2001 SCC 81 at para. 87 [*Dunedin Construction*]). The threshold for granting costs is higher than inadvertence or negligence but it is not necessary to show misconduct or that the Crown's conduct was egregious (*Taylor* at para. 54; *R v Melrose*, 2016 BCCA 292 at para. 36).

[11] The purpose for granting a costs award is to maintain the integrity of the court's process. They may also be granted as a disciplinary measure in *Charter* violations to discourage flagrantly improper Crown misconduct (*Dunedin Construction* at para. 81).

[12] In the case at bar, defence argued that my jurisdiction for awarding costs arises not only from my inherent jurisdiction, but also because Mr. Amin's rights to a fair trial were violated under s. 7 of the *Charter*. However, defence counsel did not provide sufficient submissions to support the argument that Mr. Amin's *Charter* rights were

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<sup>1</sup> *Canadian Charter of Rights and Freedoms, Part 1 of the Constitution Act, 1982* (the "*Charter*")

violated. I will therefore not rely on the *Charter* for my jurisdiction, but rather, will use my inherent jurisdiction in determining this application.

[13] I will first address the issue of the legal errors Crown committed and then will address the argument that the trial Crown used racially inflammatory statements.

*Legal Errors*

[14] Defence counsel submits that trial Crown's closing was legally incorrect in multiple areas and showed contempt for Mr. Amin. There is no suggestion that the Crown did not know the law. I should therefore conclude that the incorrect statements he made were intentional. Defence counsel argues that these intentional legal errors alone warrant an award of costs.

[15] Crown submits that the trial Crown's errors were honest mistakes. In assessing the Crown's actions, I should take into account the context. Counsel were working under time constraints. This could lead to errors where more time and thought would have allowed the Crown to avoid those errors. The errors were not a marked and unacceptable departure from reasonable standards.

[16] I agree with the Crown that the trial Crown's errors were honest mistakes. I have no basis to conclude that the Crown intentionally made the errors he did. However, the errors were multiple and repeated. Counsel had also been alerted to some of the particular issues that the case raised. The potential for impermissible cross-count, similar fact, and bad character reasoning had been discussed during the trial. Crown counsel should have been alive to these issues. Instead, he invoked similar fact and bad character evidence in his closing, over and over again. While I do not conclude that

Crown's mistakes were intentional, I do conclude that the trial Crown did not have regard to the applicable law or the impact his closing would have on the jury.

[17] These mistakes come at least very close to a marked and unacceptable departure from the reasonable standards of the prosecution. I need not determine whether they reach that threshold, however, as I have ultimately concluded that these errors, in combination with trial Crown's use of racially inflammatory statements, warrant a costs award. I therefore turn to my analysis of the trial Crown's impugned statements.

#### *Racially Inflammatory Statements*

[18] I conclude the trial Crown's submissions had the effect of appealing to racist and xenophobic sentiments.

[19] Mr. Amin is South Asian and an immigrant to Canada. These facts were no secret to the jury. There was a challenge for cause based on Mr. Amin's race. Moreover, a part of the defence's theory was that the complainants were seeking to have Mr. Amin deported. Thus, Mr. Amin testified about his country of origin, when he immigrated to Canada and about his immigration status. The complainants testified about their knowledge of his immigration status and whether they wanted him to be deported. The jury would therefore have been alive to Mr. Amin's South Asian identity and that he was not born in Canada.

[20] In his closing address the trial Crown did not talk about Mr. Amin's race or that he was an immigrant. However, he made the following statements:

... And from their evidence there is an image of Mr. Amin that emerges: a man with no respect for a woman; a man with no respect for his words to a woman; a man with no fidelity to a woman. More importantly, a man with a sense of entitlement to a woman's body. A man, when his hormones are raging, thinks he can act on a woman's body with

impunity. I can't speak about an attitude anywhere else in the world, but in Canada it's inappropriate and unacceptable. In Canada when you act on that sense of entitlement without a woman's consent, it is not only unacceptable, it is criminal. It is sexual assault. In Canada "No" means – does not mean "Yes". "No" does not mean "Maybe". "No" does not mean "Keep trying". In Canada "No" means "No". "No" means "Stop". When you touch a woman and she says "No" and she's crying, pardon my language, it means you're being a bastard. It means you've crossed the line. It means "Stop". It means "Step back". It means "Go away". That is not negotiable. This is the message you must send to Mr. Amin. This is why I invite you to return a verdict of guilty on all counts against Mr. Amin.

[21] Defence counsel submits that these statements are racist, and that the trial Crown was intentional in making these statements. Crown submits that, in the context in which they were made, the statements were appropriate.

[22] I do not find that trial Crown intended on making racist statements or intended to appeal to racist sentiments. Crown's closing seems to be an attempt to reach the jury through rhetorical flourishes. It is likely that the Crown simply did not stop to think about what he was implying through this use of rhetoric.

[23] However, it is the effect that matters, not the intent. In his closing, the Crown first described Mr. Amin as having no respect for women. He then made a reference to other places in the world, before describing the superior values and laws in Canada, repeatedly referencing that these are the values and laws in Canada. Given the evidence of Mr. Amin's country of origin, his immigration to Canada and his current immigration status, the implication is that Mr. Amin is a foreigner, with foreign values about women, who should be held to Canadian standards. These statements would not have been made about someone who was white or who would have been perceived to be Canadian born.

[24] Racial prejudice, xenophobia, and discrimination are “intractable features of our society” (*R v Spence*, 2005 SCC 71 at para. 1). Judges, lawyers, and others in the legal community are not immune to these biases. The court instructs juries to be aware of both conscious and unconscious bias, and to strive to cast their biases aside. We in the legal community must do the same. This means that we must also be vigilant that the words we use do not incite prejudicial reactions. It is vital that we take this care, as failure to do so not only puts the rights of the accused to a fair trial at risk but also risks harming the administration of justice.

[25] In the case at bar, the trial Crown did not consider the issues of bias, unconscious bias, and the effect his words could have on the jury. This, in combination with the errors he made in his closing, is a marked and unacceptable departure from the reasonable standards expected of the prosecution.

## **CONCLUSION**

[26] I therefore conclude that Mr. Amin is entitled to costs from the Crown.

[27] Mr. Amin’s defence counsel has asked to provide submissions on the amount of costs to be payable. The parties should first try to come to agreement on the amount of costs. If they are unable to agree, it can be brought back for submissions.

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WENCKEBACH J.