

**NOVA SCOTIA COURT OF APPEAL**

**Citation:** *R. v. Rahman*, 2013 NSCA 139

**Date:** 20131203

**Docket:** CAC 406301

**Registry:** Halifax

**Between:**

Ashiqur Rahman

Appellant

v.

Her Majesty the Queen

Respondent

**Judges:** Oland, Beveridge and Farrar, J.J.A.

**Motion Heard:** October 8, 2013, in Halifax, Nova Scotia

**Held:** **Motion for disclosure dismissed per reasons for judgment of Farrar, J.A.; Oland and Beveridge, J.J.A. concurring.**

**Counsel:** Appellant in person  
Mark Scott, for the respondent

**Decision:**

**Background**

[1] The appellant, Ashiqur Rahman, was convicted of manslaughter and aggravated assault relating to the injuries and ultimate death of his daughter, Aurora Breakthrough (now reported as *R. v. Rahman*, 2012 NSSC 235, *per* Cacchione, J.).

[2] He was sentenced to six years and six months in prison. He originally appealed both his conviction and sentence. On January 15, 2013, Mr. Rahman amended his Notice of Appeal to appeal only his conviction. He is self-represented on this appeal. He was represented by counsel at trial.

[3] In anticipation of making an application to introduce fresh evidence, Mr. Rahman filed a motion seeking disclosure of information pertaining to Ms. Jane Gomes, his former partner, and Aurora's mother as follows:

1. All photos and videos of Ms. Jane Gomes recorded by the Bank of Montreal around 10:24 a.m. on July 15, 2009;
2. The IWK invoice for Ms. Gomes stay at the hospital surrounding Aurora's birth and any related letters, if any;
3. Records from Acadia University surrounding the circumstances of Ms. Gomes leaving the university's residence in the Fall of 2007; and
4. Records from Acadia University relating to the reasons why Ms. Gomes was not employed at the university.

[4] The motion was heard before a panel of this Court on October 8, 2013. For the reasons that follow I would dismiss Mr. Rahman's motion.

**Motion for Disclosure**

[5] At the hearing of the motion, Mr. Rahman withdrew his request for disclosure of 3 and 4 above, leaving only the video surveillance at the Bank of Montreal and the IWK invoice and related correspondence as the outstanding items for which he seeks disclosure.

[6] I will address both of these requests after briefly reviewing the law with respect to disclosure at the appellate level.

[7] A party to an appeal, like Mr. Rahman, may obtain production of material in the possession and control of the Crown. In *R. v. Trotta* (2004), 23 C.R. (6<sup>th</sup>) 261 (Ont. C.A.), the court explained the Crown's disclosure obligation on appeal. It may be summarized as follows:

1. There is a connection between the request for production and the fresh evidence he proposes to adduce and there is a reasonable possibility that the materials sought could assist on the motion to adduce fresh evidence; and
2. There is a reasonable possibility that the evidence to which the production request is linked may be received as fresh evidence on appeal. (*Trotta*, ¶25)

[8] Mr. Rahman faces another hurdle in this case in that the materials sought by him are in the possession of third parties.

[9] The procedure relating to third party records, at the first instance, is set out in *R. v. O'Connor*, [1995] 4 S.C.R. 411 and was recently reiterated in *R. v. McNeil*, 2009 SCC 3. I will only outline the elements of the procedure relevant to Mr. Rahman's motion:

[27] Stated briefly, the procedure to be followed on an *O'Connor* application is the following:

- (1) The accused first obtains a *subpoena duces tecum* under ss. 698(1) and 700(1) of the Criminal Code and serves it on the third party record holder. The subpoena compels the person to whom it is directed to attend court with the targeted records or materials.
- (2) The accused also brings an application, supported by appropriate affidavit evidence, showing that the records sought are likely to be relevant in his or her trial. Notice of the application is given to the prosecuting Crown, the person who is the subject of the records and any other person who may have a privacy interest in the records targeted for production.

(3) The *O'Connor* application is brought before the judge seized with the trial, although it may be heard before the trial commences. If production is unopposed, of course, the application for production becomes moot and there is no need for a hearing.

[10] Third party production at the appellate level is governed by the same policies and evidentiary burdens governing an *O'Connor* application at the trial level with the appropriate modifications for an appeal context (*R. v. West*, 2012 NSCA 112).

[11] With these principles in mind I will now turn to the specific disclosure requests made by Mr. Rahman.

*Bank of Montreal Video*

[12] Mr. Rahman says he seeks the video to show that Ms. Gomes went to the bank on July 15, 2009 leaving him alone with Aurora . He says it would prove that she was not seriously concerned about Aurora's safety if she would go out and leave the baby alone with him.

[13] At the hearing of this motion, the Crown provided Mr. Rahman with a CD of the video surveillance which it had obtained from the Bank of Montreal from July 15, 2009.

[14] Ms. Gomes could not be identified in the video. Mr. Rahman says this is not enough; that he requires production of any video in the possession of the Bank of Montreal which may show Ms. Gomes at the bank on that day.

[15] There are a number of problems with Mr. Rahman's request at this stage of the proceedings:

1. He has not subpoenaed the representatives of the Bank of Montreal to attend court with the materials;
2. There is no evidence that such a video of Ms. Gomes exists;
3. Mr. Rahman has been provided with everything which the Crown has in its possession from the Bank of Montreal relating to its investigation;

4. There is no dispute that on July 15, 2009, Ms. Gomes attended the bank on her own. Nor does Mr. Rahman deny being alone with Aurora on that date;
5. The evidence surrounding this visit was thoroughly canvassed at trial.

[16] Putting aside the lack of notice to the Bank of Montreal, Mr. Rahman has not established the existence of such a video. Even if a video exists, he has not established any connection between the request for production and the fresh evidence he proposes to adduce.

[17] Finally, he has not established that there is a reasonable possibility that the evidence may be received as fresh evidence on appeal.

[18] The fact that Ms. Gomes went to the bank alone on that day and that Mr. Rahman was home alone with the child is not in dispute. Even if a video existed which showed Ms. Gomes, it would simply confirm the evidence which was already adduced at trial.

[19] The trial judge had the evidence of Ms. Gomes going to the bank alone and could draw what inferences he deemed appropriate from that evidence including that she had no concern for the child's welfare when in the presence of Mr. Rahman. Mr. Rahman is simply trying to re-argue an issue that was already canvassed at trial.

[20] For these reasons, I would not order disclosure of any video from the Bank of Montreal.

#### *IWK Invoice and Related Correspondence*

[21] Mr. Rahman seeks the IWK invoice and related correspondence for Ms. Gomes stay at the hospital for Aurora's birth.

[22] Mr. Rahman appears to have two rationales for seeking this disclosure. He says that the arrival of the invoice was the "probable cause" for her withdrawal of the money from the Bank of Montreal on July 15<sup>th</sup>, 2009. His theory being that she withdrew the money so that MSI would not know she had it. He says if MSI knew she had the money it would not pay the hospital invoice.

[23] The second reason, and the one which he says is most significant, is that if either the invoice does not exist, or the date the invoice was mailed was a

significant period of time before July 7<sup>th</sup> or after July 7<sup>th</sup>, 2009, it would disprove the events which Ms. Gomes described on that date.

[24] In order to address Mr. Rahman's arguments, some further background information is necessary. Aurora was born on the evening of June 6<sup>th</sup>, 2009. The first discussion about the IWK invoice, according to both Mr. Rahman and Ms. Gomes, occurred with a social worker on June 8th, 2009, when Mr. Rahman asked how much it was going to cost for the birth and hospital stay. He was told it would be something close to \$6,000. Ms. Gomes' evidence on this point was, after hearing the estimated amount of the invoice, Mr. Rahman was quiet in the cab ride on the drive home. She did not say he was upset at that time.

[25] Mr. Rahman in giving his testimony says he knew when they were at the hospital, even before Ms. Gomes and Aurora were discharged, that the bill would eventually be paid by MSI. He was never concerned about it.

[26] The next time that the IWK invoice comes up is with respect to the events of July 7<sup>th</sup>. Ms. Gomes testified that she had a visit with a public health nurse on that day. After the health nurse left, Ms. Gomes went downstairs to get the mail and the IWK invoice was there. Ms. Gomes testified that Mr. Rahman seemed upset about the invoice because the MSI coverage had not yet been dealt with. However, she assured him that it was not an issue.

[27] Ms. Gomes' evidence is as follows:

A. And that afternoon we had a visit with public health nurse, Ann Marie. After she left, I went downstairs to pick up the mail, and the hospital bills were in the mail. I told Ashiqur that the bill was arrived. And he asked me what was I doing about it, because I was actually getting help from the North End Clinic social services worker, Paul – his name's Paul O'Hara. He was helping me to get MSI coverage, and he explained that MSI would cover it since I was in Nova Scotia all the time, ever since I got here, the previous two years, I mean.

So during that conversation Ashiqur just seemed upset because it - - like, I still actually, we didn't still have the MSI coverage. We were still to apply for it. And I just told him, "You don't have to worry about it. If I can't handle it, then - - if it doesn't happen, that - - if it's like MSI is not paying for it, then I'll ask my parents and they'll help me. You won't have to worry about it."

And I was a little bit angry, and he was - - like, he was frustrated too, so he just said, "What do you think? You think I'm saying it because of money?" While we were arguing Aurora woke up. She was crying. She was sleeping before. I picked her up to feed her, but she didn't really feed. Then I put her

down.

Ashiqur picked her up. She was still -- she wasn't continuously crying. She was, like, crying, then stopping for a little bit, then starting to cry again. And Ashiqur cradled her for a little bit of -- she wouldn't stop, so he put her down too. And I was going to pick her up. I was just going to -- let me see -- she just -- hold her for a bit and probably she will be okay. But I was just going to pick her up and Ashiqur said, "You don't come around her." And he pushed me, I fell back, not on my back. I fell backward on my elbow. And Ashiqur, like, slapped -- it wasn't really a slap. He went like this twice on her. And I couldn't really grab him before he did that. And I screamed, "No, please." And he was a little bit away from her, and, you know, Aurora was still crying even more.

[28] Mr. Rahman, in his testimony, testified that he thought the IWK invoice arrived sometime in June and that it was not a concern for him because Ms. Gomes had already contacted MSI and there was no issue about it being covered.

[29] He continued:

Q. Jane says that the day you got the bill, it was in July and that you got angry and, I believe, pushed her. Did you do that?

A. No, because it's been already dealt with. She has already contacted -- she had already contacted MSI. MSI told her what to do. We didn't have any conversation about that at all. She knew what to do.

Q. Were you physical with Jane at all?

A. No.

[30] The events of July 7, 2009, including the timing of the receipt of the invoice was raised and fully canvassed by counsel both in direct and cross-examination of Ms. Gomes and Mr. Rahman.

[31] The trial judge, in his summary of the evidence, described the July 7<sup>th</sup> incident as follows:

[27] On July 7<sup>th</sup> the family received an invoice from the Isaac Walton Killam Children's Hospital (IWK) for Aurora's birth and stay at the hospital. Mr. Rahman was upset that the family still did not have provincial health care coverage and was facing a large hospital bill. Aurora was crying. Ms. Gomes picked her up and fed her, but Aurora did not feed very well. Ms. Gomes put Aurora down and then Mr. Rahman picked her up, cradled her and then put her down. Aurora continued crying. Mr. Rahman then slapped her across the face once with the palm of his hand and once with the back of his hand. Aurora cried even louder, but after being fed she went to sleep. Ms. Gomes checked Aurora and noticed no bruises or

marks. Mr. Rahman denied that he had hurt Aurora. Mr. Rahman said he was really sorry and would not do it again.

[32] With this background I will now turn to Mr. Rahman's two arguments with respect to the significance of the IWK invoice and related correspondence.

[33] The first one, as outlined above, is that it was a motive for Ms. Gomes to withdraw money from the Bank of Montreal on July 15th, 2009. Again putting aside the failure to provide the required notification of his disclosure request to the IWK and Ms. Gomes; there is no evidence that MSI would either seek to recover monies from Ms. Gomes if it found that she had funds in the bank nor is there any evidence to suggest that MSI would not have provided coverage if it were aware that she had funds in the bank. Mr. Rahman has not shown, by appropriate affidavit evidence, that the records sought are likely to be relevant to his assertion that it was a motive for Ms. Gomes to withdraw funds on July 15<sup>th</sup>, 2009. Mr. Rahman's rationale for requesting this information does not even reach the level of speculation. It is simply devoid of any merit and cannot be a basis for disclosure.

[34] The second reason or rationale given by Mr. Rahman for seeking this information is to disprove the events which occurred on July 7th, 2009 as testified by Ms. Gomes.

[35] Once again, putting aside the required notice to Ms. Gomes and the IWK, and assuming the invoice and supporting correspondence are in existence and could have some relevance to Ms. Gomes' credibility about the events of July 7, 2009, I am not satisfied there is a reasonable possibility that the evidence would be received as fresh evidence on this appeal.

[36] Section 683(1) of the *Criminal Code of Canada*, R.S.C. 1985, c. C-46 provides a court may receive fresh evidence where it is "in the interests of justice". The criteria for the introduction of fresh evidence is well-known and I will not repeat them here. See *R. v. Palmer*, [1980] 1 S.C.R. 759. I will only refer to two of the criteria, the first being that evidence will not be admitted if by due diligence it could have been adduced at trial. This general principle will not be applied as strictly in a criminal case as in a civil case.

[37] The second is that the evidence, if believed, when considered with the rest of the evidence at trial could reasonably be expected to affect the verdict.



[38] Even with a relaxed test for due diligence, I am not satisfied the evidence would be admitted as fresh evidence. Mr. Rahman and Ms. Gomes both gave evidence, in direct and cross-examination, about when the IWK invoice arrived and the events of July 7, 2009. It was a live issue at trial and fully canvassed in the evidence. There is no allegation on this appeal of ineffective assistance of counsel at trial. If the IWK invoice and related correspondence were of such great significance to Mr. Rahman's defence they could have been the subject of an *O'Connor* application prior to or during the trial.

[39] Further, I am not satisfied the invoice, even if it differed from the date Ms. Gomes said she received it, would materially affect the verdict. As noted earlier, the issues surrounding the timing of the arrival of the invoice were fully canvassed before the trial judge. Again, the request is nothing more than another attempt to re-argue an issue that was fully argued at trial.

[40] Finally, there is no suggestion in the trial judge's decision that the invoice arriving on July 7<sup>th</sup> was of particular significance to his finding of facts about what occurred on that day or on the other events described in his decision.

[41] For these reasons I would dismiss Mr. Rahman's motion for disclosure.

Farrar, J.A.

Concurred in:

Oland, J.A.

Beveridge, J.A.