PROVINCIAL COURT OF NOVA SCOTIA
Citation: *R. v. Graham*, 2020 NSPC 59

Date: 20200930
Docket: 8365516, 8365517
Registry: Pictou

Between:

Her Majesty the Queen

v

Angela Michelle Graham

DECISION REGARDING DISCLOSURE

Judge:	The Honourable Judge Del W Atwood
Heard:	2020: 3 June, 27 July in Pictou, Nova Scotia
Charge:	Sections 140 and 334 of the *Criminal Code of Canada*
Counsel:	T William Gorman for the Nova Scotia Public Prosecution Service B Craig Clarke for Angela Michelle Graham

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LIBRARY HEADING

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Charge:	Sections 140 and 334 of the *Criminal Code of Canada*
Subject:	Constitutional law: disclosure or production of evidence
Summary:	The accused was charged with public mischief and theft. Defence counsel sought disclosure of third-party-suspect evidence pertaining to an unrelated case; the prosecution declined the defence request.
Issues:	(1) Is discovery of the third-party-suspect evidence sought by the defence governed by the law pertaining to disclosure, or the law pertaining to common-law production? (2) Is the evidence possibly relevant to the charges before the court?
Result:	Disclosure application granted.

By the Court:

Summary

[1] This decision has to do with an application for criminal-case discovery of material supposed to be in the control of the prosecution.

[2] Angela Graham has been charged with making a false report to police of having been robbed; it is alleged that she did this to cover up a theft from her employer.

[3] Her counsel seeks an order compelling the prosecution to turn over investigative material pertaining to what would appear at first glance to be an unrelated case.

[4] The prosecution opposes the application.

[5] The case advanced by defence counsel has a number of weaknesses.

[6] Notwithstanding the application deficiencies, I find the defence to have satisfied the burden of proving that the investigative material concerning this unrelated case:

- falls within the category of first-party disclosure;

- is relevant to Ms Graham's case; and
- is not protected by a restraining privilege.

[7] Accordingly, the court orders the prosecution to disclose it to Ms Graham's counsel. These are my reasons.

Procedural history and legally relevant facts

[8] Ms Graham is charged with two offences that are alleged to have occurred on 21 January 2019:

- public mischief by making a false report to police of armed robbery, § 140(1) of the *Criminal Code* (case 8365516); and,
- theft of money from her employer in an amount not exceeding five thousand dollars, ¶ 334(b) of the *Code* (case 8365517).

[9] I repeat what I wrote in the preceding summary: the theory of the prosecution appears to be that Ms Graham concocted the robbery report to camouflage the theft. These allegations remain unproven, and will be subject in due course to a trial, during which Ms Graham's presumption of innocence will be assiduously observed.

[10] The prosecution elected to proceed summarily.

[11] Ms Graham pleaded not guilty; a trial date is pending.

[12] The prosecution has disclosed to defence counsel a certain volume of information in its possession which it has assessed as being relevant to Ms Graham's case.

[13] Defence counsel made a written request of the prosecution that it turn over investigative material related to a robbery that had occurred on 18 October 2018 [the October robbery], about three months prior to Ms Graham's robbery report to police; the October robbery is purported to have happened not too far from where Ms Graham told police she had been held up.

[14] The October robbery has no obvious connection to Ms Graham's charges.

[15] Indeed, the prosecution declined the disclosure request of defence counsel as it was of the view that the October robbery would not be relevant to Ms Graham's case.

[16] Counsel for Ms Graham has applied to the court to compel the prosecution to turn over information regarding any police investigation that might have been conducted regarding the October robbery. Defence counsel has advanced this application as being governed by first-party disclosure law.

[17] The application is opposed by the prosecution. The prosecution asserts that the application ought to be governed by third-party production rules, not first-party disclosure; further, regardless of which legal principles ought to apply, the prosecution advocates that the application should be dismissed as defence has not made out either a probable-relevance or possible-relevance case.

Core legal questions

[18] Should the application be adjudicated as an application for first-party disclosure, or an application for third-party production?

[19] Should police investigative material about the October robbery, if it exists, be disclosed by the prosecution or produced by police?

Specific legal rules and provisions

[20] The law recognizes two means for permitting persons charged with offences to obtain criminal-case discovery:

- *First-party disclosure of material which is possibly relevant to a charge before the court, and which is in the custody or reach of the prosecution—R v Stinchcombe*, [1991] 3 SCR 326 *[Stinchcombe] and R v Gubbins*, 2018 SCC 44 at ¶ 29 *[Gubbins]*—The duty borne by the

prosecution to disclose first-party material to a person charged with an offence arises upon request and does not require an application to a court: *R v McNeil*, 2009 SCC 3 at ¶ 7 [*McNeil*]; however, if a request for disclosure should get turned down, an accused may apply to the court for an appropriate *Charter* remedy. It is not necessary for the court to vet or review the material in dispute when dealing with a disclosure application. However, the court must consider claims of privilege made by the prosecution—*Stinchcombe* at ¶ 16, 20, 22.

- *Production of material of probable relevance, which is in the possession of a third party—R v O'Connor*, [1995] 4 SCR 411 *[O'Connor], and Gubbins* at ¶ 29—In a production case, the custodian of the material sought to be discovered must be notified of the application, typically by means of a subpoena or an equivalent notice—*O'Connor* at ¶ 135-6; see also *R v Jackson*, 2015 ONCA 832 at ¶35 (leave to appear to SCC ref'd, [2016] SCCA No 38). Third-party applications will often be supported by affidavits from committed witnesses, who are able to be cross-examined about facts relevant to production. In common-law production cases, the court must consider whether the material is privileged and likely relevant. If privileged, or if not likely relevant, the material is not subject to production.

> Even if likely relevant and not privileged, the court must, after reviewing the material, balance the interests of the accused against the privacy-protected interests of third parties. Only if this balancing favours the accused may the material be ordered to be produced—*O'Connor* at ¶ 30, 153.

[21] As in this case, applications for criminal-case discovery may be controverted over which regime is applicable. There is granularity to the choice. One point is clear: while police may in many cases have the status of being third-party records custodians (*R v Quesnell*, 2014 SCC 46 at ¶ 11), the prosecution cannot shelter behind third-party-production rules in cases when an investigative state agency has failed to turn over to prosecutors material characterized properly as fruits of an investigation pertinent to an active charge; in such a case, the investigative state agency is on the same footing as the prosecution: *McNeil* at ¶ 14. However, this is not that sort of case, as I am satisfied that the position taken by the prosecution is principled and in accordance with the governing law; there is a legitimate controversy here whether this application should be heard as a first- or third-party application, and whether the evidence which defence seeks to discover is relevant.

[22] As a matter of policy, the prosecution might wish to err on the side of caution and favour disclosure when it can turn over material easily, and without

violating a privilege or privacy interest; however, it may properly decline to disclose what is clearly irrelevant: *Stinchcombe* at ¶ 20.

Analysis

[23] Two preliminary observations are apposite in this case.

[24] First: this is the only disputed disclosure/production application in this judicial centre that has had to go to hearing before me. I infer from this history that there is an effective working relationship among local counsel regarding criminal-case discovery. That is the way it should be.

[25] Second: I agree with the prosecution that this is not the open-and-shut case that defence counsel appears to believe it to be.

[26] Significantly, it was not clear from the application materials filed with the court by the defence that the material being sought even existed, let alone whether it was in the possession or control of the prosecution.

[27] Furthermore, defence counsel seemed to have assumed that the application was properly one for first-party disclosure, rather than third-party production. This was not a safe assumption. Had the court determined ultimately that third-party production governed, the application necessarily would have been denied, as defence had failed to notify the policing service that was the supposed custodian of

the October-robbery material of the pendency of the application, either by way of notice or by subpoena. Notice to records custodians in third-party production cases is a necessary precondition to justiciable applications, as records custodians have standing that is independent of the prosecution.

[28] When it is a close call whether a criminal-case-discovery application ought to proceed as a disclosure hearing or a production hearing, a court should favour the former. This is because of the risk that a production hearing may compel an accused to provide the prosecution with a preview of defence evidence and strategy, and this before a case to meet has even been put before the court.

[29] However, that risk is not engaged in this case, as the defence pleadings reveal quite clearly the nature of the defence theory and strategy.

[30] Notwithstanding the problematic features of the defence application which I have identified, the court has been assisted by the fulsome and fair response submitted by the prosecution, from which I find it safe to infer that:

- the material sought by defence regarding the October robbery exists;
- the prosecution has sufficient control over the material as to bring this application within the first-party disclosure regime (on this point, I was assisted by the analysis in *R v Stipo*, 2019 ONCA 3 at ¶ 78-89); and,

- there are no privilege issues at stake.

[31] These findings are not determinative of the application. This is because, as argued validly by the prosecution, it is not immediately apparent that the material sought by defence counsel about the October robbery would have any relevance to the charges before the court.

[32] Recall that the gist of the charges against Ms Graham are that she fabricated a report of having been robbed in order to cover up a theft from her employer.

[33] The material sought by defence counsel pertains to a report of an unrelated robbery which is supposed to have occurred three months prior to Ms Graham's call to police, and at a location different to where Ms Graham said she was robbed, albeit in the same community.

[34] How could information of the October robbery be relevant to Ms Graham's case?

[35] The theory of the defence at this stage seems to be that evidence of the October robbery might leave a trier in a state reasonable doubt whether Ms Graham's report of robbery was fabricated; the inference which defence might seek to draw at trial is that Ms Graham really was robbed, and that she was robbed by the same person who committed the October robbery. In saying this, I

recognize that defence is not bound to put this or any other theory to the court at trial, nor will Ms Graham be required to prove anything.

[36] I agree with the prosecution that this preliminary defence theory does not immediately make out a case of obvious relevance sufficient to compel disclosure of any information gathered by police about the October robbery.

[37] This is because the theory of defence counsel is, essentially, that there is a third-party suspect. Third-party-suspect evidence is controversial as it implicates persons who are not parties to the case that is actually before the court. It is the sort of evidence that, as a category, is typically adjudged by courts as not obviously relevant.

[38] A fine point is that it matters whether the putative third party is known: *R v Grandinetti*, 2005 SCC 5 at ¶ 46-49. In cases of a known third-party suspect, the onus upon defence to establish, at trial, the relevance of third-party involvement is greater, as there must be some evidence to connect the known third party to the charged crime that is being tried.

[39] In cases of an unknown third-party suspect, a less-stringent proof-of-relevancy test is applied: evidence implicating an unknown third-party suspect will be relevant if there is a sufficient similarity between the charge before the court

and an uncharged one involving an unidentified assailant that would allow a court to infer that the same person committed both: *R v Grant*, 2015 SCC 9 at ¶ 27.

[40] The two briefs filed with the court by defence counsel inform that court that defence does not know the identity of the person involved in the October robbery. Having access to police investigative material about the October robbery would be relevant to full answer and defence, as it might be determinative of whether a third-party-suspect theory would get advanced by defence at trial as a known-third-party or an unknown-third-party case.

[41] In my view, this would be sufficient to support the proposition that the material sought by defence counsel is possibly relevant to Ms Graham's case.

[42] There is one more consideration that militates more strongly in favour of a disclosure order.

[43] Whether evidence is relevant and disclosable must take into account the dynamic nature of a case. What starts out as irrelevant might, during the unpredictable course of a trial, become relevant and require re-evaluation.

[44] This is what has happened here. *Cf R v Khela*, [1995] 4 SCR 201 at ¶ 10.

[45] The application brought by the defence has put the issue of a third-party suspect well and truly in play. It seems inevitable that it will be put before the court at trial, if not by defence, then by the prosecution.

[46] Why the prosecution?

[47] Recall that the public-mischief charge against Ms Graham alleges that she called police with a false report of robbery. Should she testify at trial, one might anticipate readily the prosecution confronting her about what she knew of the October robbery, and whether she used it as a template to construct her alleged fabrication.

[48] And so the anticipated dynamic of this case leads the court to conclude that evidence gathered by police regarding the October robbery will be relevant to Ms Graham's trial.

Ruling of the court as to remedy

[49] This application was brought well prior to the start of the trial. Defence has not put before the court any evidence of enduring prejudice to Ms Graham.

[50] In my view, the appropriate remedy is an order that the prosecution disclose to defence counsel the following material—as sought in the application filed by defence—relating to the October robbery:

- witness statements;
- police notes;
- any surveillance video; and,
- file-access records of investigating officers arising as a result of the report of robbery made by Ms Graham.

[51] This remedy is intended to protect Ms Graham's § 7 *Charter* rights to disclosure and to full answer and defence.

[52] The required order is to be drafted by defence counsel.

JPC