R. v. *Sayers* and *Elanik*, 2003 NWTSC 58

Date: 2003 10 06
Docket: S-1-CR 2002 000049

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

- and -

RONALD FRANK SAYERS and SHELLY MARIE ELANIK

ON SEPTEMBER 23, 2003 A BAN WAS MADE ON PUBLICATION OF ALL EVIDENCE, INFORMATION AND ARGUMENTS PRESENTED ON THIS APPLICATION, THE RULING RESULTING FROM THIS APPLICATION AND THESE REASONS FOR JUDGMENT

Heard at Yellowknife, NT, September 23, 2003

Reasons for Judgment filed: October 6, 2003

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE V.A. SCHULER

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Counsel for Her Majesty the Queen:	Bernadette Schmaltz and Caroline Carrasco

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REASONS FOR JUDGMENT

[1] The two accused in this case are jointly charged with second degree murder. Earlier on in these proceedings,Mr. Sayers'former counseland the Crown enteredinto what are commonly called plea bargaining negotiations. The negotiations went so far as the preparation of an agreed statement of facts and the setting of a date on which it was understood that Mr. Sayers would plead guilty to some offence. He did not, however, plead guilty and he and Ms. Elanik will be jointly tried commencing next month.

[2] Ms. Elanik's counsel requested from the Crown disclosure of the agreed statement of facts and any other information relayed to the Crown by Mr. Sayers' former counsel during the plea negotiations. Crown counsel contacted Mr. Sayers' new lawyer, who objects to the release of the agreed statement of facts and any other information. Crown counsel takes the position that the Crown will not make the requested disclosure without a court order. Ms. Elanik seeks such an order.

[3] The Crown concedes that the information provided by Mr. Sayers' former counsel as part of the plea negotiation process is relevant to Ms. Elanik's case. Ms. Elanik has already disclosed her defence. Her position is that anything she did was done under duress from Mr. Sayers.

[4] Ms. Elanik relies on her right to disclosure from the Crown as well as her s. 7 *Charter* right to fundamental justice, which includes the right to make full answer and defence to the charge against her.

[5] The fact and scope of the Crown's duty to disclose was set out by the Supreme Court of Canada in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326: the Crown has a duty to disclose all relevant information, whether exculpatory or not, and whether the Crown intends to use it in evidence or not. What *Stinchcombe* refers to as the "fruits of the investigation" are not the property of the Crown for its use in securing a conviction, but are the property of the public to ensure that justice is done.

[6] As an initial observation, I am not convinced that information relayed during plea negotiations which do not actually result in a resolution of the accused's case can be said to form part of the fruits of the investigation. Such information does not come to the Crown through the investigatory process, but through negotiations undertaken to resolve the charges which have resulted from the investigation.

[7] *Stinchcombe* talks about relevance, and not admissibility. Counsel for Ms. Elanik concedes that the information may not be admissible as evidence at the trial.

[8] In *Stinchcombe*, the Supreme Court said that in carrying out the disclosure obligation, counsel for the Crown has duty to respect the rules of privilege; where privilege is an issue, the Crown may seek a review by the trial judge of its decision not to disclose. The Court also said that the absolute withholding of information which is relevant to the defence can only be justified on the basis of the existence of a legal privilege which excludes the information from disclosure. The trial judge may decide that recognition of a privilege does not constitute a reasonable limit on the constitutional right to make full answer and defence.

[9] Since the Crown concedes that the information in question is relevant to Ms. Elanik's defence, the question is whether there is a privilege which may justify withholding disclosure. The Crown and Mr. Sayers invoke what has been referred to as a privilege for settlement negotiations or plea discussions. I will refer to it as the plea negotiation privilege.

[10] The privilege was recognized by Vertes J. of this Court in *R. v. T.J.C.*, [1997] N.W.T.J. No. 141 at para. 32:

> Finally, there is a well-known principle in civil law that all admissions or communications in the course of negotiations towards settlement are without prejudice, whether those words are used or not, and are protected by a privilege based on public policy and are not admissible in evidence. For authority respecting this point, I refer counsel to pages 719 through 731 of the text by Sopinka, Lederman and

> Bryant entitled The Law of Evidence in Canada. I know of no reason why the same privilege does not apply as well to criminal cases. Indeed, I think there is a stronger case to be made that the privilege applies in criminal cases because of the liberty interests and constitutional rights at stake. I note in passing only that such a privilege had been extended to plea bargaining communications in United States criminallaw. Perhaps the reason why there is no obvious Canadian case on this point is that the point is obvious.

[11] Clearly the plea negotiation privilege reflectsthe strong public interestin having criminal proceedings resolved by way of a guilty plea rather than a trial. In order for such negotiations to have a chance of success, both Crown and defence must feel free to hold candid discussions and reveal the strengths and weaknesses of their respective cases.

[12] The plea negotiation privilege was invoked in *R. v. Bernardo,* [1994] O.J. No. 1718 (Ont. Gen. Div.), where LeSage J. agreed that there is and should be a recognized privilege surrounding plea discussions vis à vis the accused and the Crown in order to encourage Crown and defence to have full, frank and private negotiations in criminal cases.

[13] LeSage J. accepted the Crown position that a privilegeought to exist in the sense that the plea negotiation information should not be used in a subsequent prosecution against the person, in that case, Homolka, who had engaged in the negotiations and completed resolution of her charges. However, he held that the privilege should not extend when that person is not an accused and not at any risk of prejudice. He held specifically that the privilege should not extend to an agreement that requires the person to be a witness against another, as was the case with Homolka, who was to be a witness for the Crown. Significantly, he also stated that his ruling was not to be taken as meaning that all communications between Crown and accusedwould necessarilybe the subject of a disclosure order (at paragraph 21):

> In ruling that in this case the communications must be disclosed, I would not want it to be taken that all communications between Crown and an accused or an informer would necessarily be the subject of a disclosure order. Here, the accused, Homolka, was apparently intended at an early stage to be a witness in a prosecution against a third party. If she is to become a witness against a third party, it is imperative that that third party, in this case Bernardo, have full access to the negotiations which resulted in her becoming a Crown witness.

[14] In this case, there is no evidence of any intention that Mr. Sayers would be a Crown witness, the plea negotiations did not culminate in a resolution, he is still an accused facing a murder charge and he is very much at risk of prejudice. So the

rationale that was found to exist in *Bernardo* for not extending the privilege does not exist in this case.

[15] On behalf of Ms. Elanik it is said that she does not intend to use the information in question against Mr. Sayers but only in preparation for her own case; for example, so that she may know his position and what questions she may face on cross-examination by counsel for Mr. Sayers or Crown counsel. Since she does not intend to use the information against Mr. Sayers, it is argued that the privilege ought not to extend to the information. In my view, the line between using the information for her own case and using the information against Mr. Sayers in their joint trial may be so fine as to be non-existent. As far as cross-examination by counsel for Mr. Sayers, I think the answer is simply that Ms. Elanik is not entitled to disclosure from her co-accused of his case. As for the Crown, Crown counsel conceded in this case that she would not be able to use the information because of the privilege attached to it.

[16] I find that any agreed statement of facts and other information provided to the Crown in the course of the plea bargaining on Mr. Sayers' behalf is protected by the plea negotiation privilege. I find further that the withholding of the information is justified by that privilege. Ms. Elanik's position with respect to her knowledge of her co-accused's case is the same now as it was before the plea negotiations. The fact that the plea negotiations were not successful in the end may mean many things, among them that Mr. Sayers did not adopt or agree to whatever "facts" were discussed or agreed to between counsel. In all these circumstances, I think the connection between the privileged information and Ms. Elanik's right to make full answer and defence is tenuous. In any event, I find that the privilege is a reasonable limitationon that right in this case.

[17] Ms. Elanik also relied on s. 37(5) of the *Canada Evidence Act*, which provides:

> 37. (1) Subject to sections 38 to 38.16, a Minister of the Crown in right of Canada or other official may object to the disclosure of information before a court, person or body with jurisdiction to compel the production of informationby certifying orallyor in writing to the court, person or body that the information should not be disclosedon the grounds of a specified public interest.
>
> (5) If the court having jurisdiction to hear the application concludes that the disclosure of the information to which the objection was made under subsection (1) would encroach upon a specified public interest, but that the public interest in disclosure outweighs in importance the specified public interest, the court may, by order, after considering both the public interest in disclosure and the form of and conditions to disclosure that are most likely to limit any encroachment upon the specified public interest resulting from disclosure, authorizethe disclosure, subject to

> any conditions that the court considers appropriate, of all of the information, a part or summary of the information, or a written admission of facts relating to the information.

[18] Counsel for Ms. Elanik relies on this section as setting out the test for overriding the plea negotiation privilege: if the public interest (Ms. Elanik being a member of the public) in disclosure outweighs in importance the specified public interest, being the plea negotiation privilege, the court can order disclosure.

[19] I have considerable doubt as to whether this section appliesin the circumstances before me. It seems to be aimed at a situation where the Crown objects to evidence being adduced in open court or some other proceeding, on the grounds of a specified public interest. Here, all that is being sought is disclosure, for Ms. Elanik's own use and not in the circumstances set out in s. 37: *Davidson v. Canada (Solicitor-General)* (1989), 47 C.C.C. (3d) 104 (F.C.A.) at pp. 111-112 regarding the predecessor section 36.1. However, even if s. 37(5) does apply, I would hold that the right to full answer and defence of the accused, Ms. Elanik, does not outweigh the public interest or Mr. Sayers' interest, in the confidentiality of plea negotiations undertaken with a view to resolving the case without trial.

[20] It is clear that in a joint trial the rights of the accusedwill sometimesconflict and have to be balanced. An accused's right to a fair trial does not entitle him or her to exactly the same trial when tried jointly as would take place had he or she been tried alone: *R. v. Suzack* (2000), 141 C.C.C. (3d) 449 (Ont. C.A.). Similarly, this application involves the balancing of rights and interests. In balancing the public interest, and Mr. Sayer's interest, in the confidentiality of the plea negotiations against the use that Ms. Elanik may make of the information requested in order to make full answer and defence, which is speculative, I find that the latter does not outweigh the former. To find that when an accused enters into plea negotiations with the Crown and those negotiations are ultimately unsuccessful, the informationrelayed in the course of those negotiations must be made available to his or her co-accused, would, I find, in all likelihood have a chilling effect on plea negotiations in trials involving more than one accused. Where the application is made for disclosure of information relating to an accused who is no longer on trial and is to be a Crown witness, as was the case in *Bernardo*, the considerations are different.

[21] Although reference was made during argument to solicitor client privilege, Ms. Elanik seeks only information which was shared by former counselfor Mr. Sayers with the Crown. In *Bernardo*, LeSage J. found that solicitor client privilege would not normally apply where the information has been divulged to a party adverse in interest such as the Crown. In his affidavit filed on this application, Mr. Sayers says that he

did not waive solicitor client privilege. Since I have decided on the basis of the plea negotiation privilege that the information sought by Ms. Elanik should not be disclosed, I need not decide whether in the circumstances of this case solicitor client privilege was waived or, if not waived, whether it applies to the information given to the Crown. To determine whether Mr. Sayers did or did not in fact waive solicitor client privilege would require an examination of facts for purposesof which his former counsel would have to be given notice. That notice was not given by any of the interested parties.

[22] Crown counsel argued that the test for overriding plea negotiation privilege ought to be the same as the test for overriding solicitor client privilege because the rationale for the two kinds of privilege is similar. Although this is a very interesting argument, I find that I need not address it. For the reasons set out above, I find that the Crown is justified in withholding the information generated by and in the plea negotiations and accordingly the application by Ms. Elanik is dismissed.

V.A. Schuler,
J.S.C.

Dated at Yellowknife, NT this
6th day of October 2003

Counsel for Shelly Marie Elanik:	John U. Bayly, Q.C.
Counsel for Ronald Frank Sayers:	Thomas Boyd
Counsel for Her Majesty the Queen:	Bernadette Schmaltz and Caroline Carrasco

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