

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- vs. -

SEMERE MEHARI

Transcript of a Ruling by The Honourable Justice J.Z.
Vertes, at Yellowknife in the Northwest Territories, on
March 21st A.D., 2006.

APPEARANCES:

Ms. S. Smallwood: Counsel for the Crown

Ms. M. Nightingale: Counsel for the Accused

Charge under s. 354(1)(a) Criminal Code of Canada
Charge under s. 5(2) Controlled Drugs and Substances Act

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of the Criminal Code

BAN ON PUBLICATION OF COMPLAINANT/WITNESS PURSUANT TO
SECTION 486 OF THE CRIMINAL CODE

1 THE COURT: These are my reasons on the
2 defence application for further and better
3 disclosure. Because the application is resisted
4 in part on the basis of a lack of relevance to
5 the issues of this case, it is necessary to set
6 out what I understand to be the factual
7 parameters of this application.

8 The accused is charged with one count of
9 possession of cocaine for the purpose of
10 trafficking and one count of possession of
11 proceeds of crime. The charges arose as the
12 result of a vehicle stop. Constable Vezina,
13 along with another officer, stopped a vehicle
14 driven by the accused. In the vehicle was
15 another occupant, M.P. The stop came after
16 Constable Vezina checked the vehicle's license
17 plate with telecoms operators.

18 Upon stopping the vehicle, Constable Vezina
19 saw that M.P. was a passenger. M.P. was known to
20 him. A search of M.P. resulted in the discovery
21 of drug paraphernalia. M.P. then told the
22 officer that there were drugs in the vehicle. A
23 search of the vehicle resulted in the seizure of
24 some crack cocaine. A search of the accused
25 revealed further amounts of crack cocaine and
26 cash.

27 The defence has filed an application to

1 exclude the evidence seized as the result of the
2 searches of the vehicle and the accused on the
3 basis that the accused's rights were violated.

4 It is in the context of the preparation for
5 the voir dire that this disclosure application
6 has been filed. The defence seeks information
7 relating in particular to M.P.'s involvement with
8 the police, particularly Constable Vezina, and
9 M.P.'s involvement in other cases. Such
10 information is said to be relevant so as to
11 enable the defence to probe the reasonableness of
12 Constable Vezina's actions in stopping the
13 vehicle and then in searching the vehicle and the
14 accused.

15 Crown counsel informed me that the Crown
16 does not intend to call M.P. as a witness either
17 on the voir dire or at trial. Defence counsel
18 informed me that, if the seized items are
19 admitted as evidence at trial, the primary issue
20 in dispute will be the purpose of the possession.

21 I set out these factual circumstances
22 because, as counsel know, the disclosure
23 obligations of the Crown rest on the foundation
24 of relevance. The Crown is required to disclose
25 all relevant material in its possession or
26 control. Any information that may be of some use
27 to the defence must be disclosed, unless

1 non-disclosure is justified by some legal
2 privilege. Relevance, of course, is determined
3 by the issues in the case.

4 In this case the issues are, first, whether
5 Constable Vezina had the necessary articulable
6 cause to stop the vehicle and, secondly, whether
7 he had the requisite grounds to search the
8 vehicle and to search and arrest the accused.
9 What the officer thought subjectively, and what
10 the objective facts of the situation were, are
11 all matters that will be explored in the
12 examination and cross-examination of the officer.

13 I am grateful to both counsel for narrowing
14 the scope of the disclosure issues during the
15 hearing of this application.

16 I will review the disclosure requests as
17 outlined in the defence Notice of Motion.

18 (a) Telecoms log/reports and voice
19 recordings of police transmissions relating to
20 license plate checks or other contacts from
21 Constable Vezina to RCMP headquarters.

22 I was told by Crown counsel that she will be
23 producing the telecoms logs and recordings to the
24 defence. Therefore, it appears to me, that this
25 is no longer an issue.

26 (b) A list of all dates of contact between
27 police and M.P. before the offence date,

1 especially contacts between Constable Vezina and
2 M.P., and copies of all notes, statements,
3 recordings, and summaries of those contacts.

4 Defence counsel, during argument, reduced
5 this request to records respecting contacts
6 specifically between Constable Vezina and M.P.
7 Crown counsel agreed to disclose notes or
8 reports, if any, regarding such contacts. I
9 think this concession is appropriate since, in my
10 view, such material is at least broadly relevant
11 to the question of Constable Vezina's subjective
12 grounds to do what he did.

13 (c) Copies of all drug intelligence and
14 field operations files relating to M.P. and the
15 accused.

16 As a general rule, and as a matter of public
17 policy, having regard to the purpose of law
18 enforcement, it is in the public interest that
19 sensitive police intelligence information, or
20 information about ongoing investigations, or
21 information about investigative techniques, be
22 protected and therefore subject to a public
23 interest privilege from disclosure. It seems to
24 me that, broadly speaking, drug intelligence and
25 field operations files fall under one or all of
26 those categories. I have heard no evidence to
27 suggest that there is some fair trial interest or

1 other important factor that should cause me to
2 deviate from this general approach. However, if
3 there are any such files specifically relating to
4 the accused and to this offence, then I assume
5 they have already been disclosed. I see no such
6 files listed on the Crown's inventory of
7 information in its possession and ordinarily I
8 would not expect to see such files since these
9 charges apparently arose from a vehicle stop made
10 on the spur of the moment (the validity of the
11 grounds for doing so not being the issue on this
12 application). There is nothing to suggest that
13 the stop was the result of some ongoing
14 investigation.

15 (d) The disclosure of all notes,
16 debriefings, plea agreements, immunity
17 agreements, Indictments, sentencing hearings,
18 letters from Crown attorneys to police respecting
19 charges laid against M.P. and later stayed in
20 this investigation, including documentation
21 regarding the charges for breach of probation.

22 Crown counsel has agreed to disclose any
23 such information, if it exists, but only as it
24 relates to these proceedings. I think that is
25 sufficient to comply with the Crown's disclosure
26 obligations considering the fact that M.P. will
27 not be a Crown witness.

1 I am now going to address, out of sequence,
2 item (g) from the Notice of Motion. All records
3 of M.P. including PIRS, and CPIC. There are also
4 references to two other acronyms which have no
5 bearing on this case, I am told. I was informed
6 that PIRS is what are referred to as the "subject
7 list report" and "occurrence screens" in the
8 Crown's inventory of documents. Crown counsel
9 has undertaken to disclose such parts of PIRS as
10 refer to contact respecting this offence.
11 However, on this point, I agree with defence
12 counsel that all of the PIRS record should be
13 disclosed. This is because of what I was told
14 about Constable Vezina revising his testimony
15 from the preliminary inquiry after he reviewed
16 the PIRS report. Since the officer's testimony
17 will be critical on the voir dire, the basis for
18 that testimony, even just in part, may be
19 examined. Therefore I order disclosure of these
20 reports in their entirety.

21 I will now address items (e), (f), (h), and
22 (i) from the Notice of Motion. These, taken
23 together, request general information about
24 M.P.'s involvement with any and all law
25 enforcement agencies, his involvement in court
26 proceedings, and the use of M.P. as a police
27 informant. The Crown objects to produce any of

1 this material, if indeed such material exists, on
2 the grounds that it is irrelevant and violates,
3 potentially, the police informer privilege. This
4 is said, of course, without any admission that
5 M.P. is or ever was a police informant. On this
6 point I agree with Crown counsel.

7 There is no suggestion in this case that
8 M.P. was working as a police agent or informer in
9 reference to the stopping of the accused's
10 vehicle. M.P. will not be a witness. Indeed it
11 is hard to think of what M.P. would or could add
12 to this case. The issues revolve around the
13 police officer's subjective belief, and the
14 objective reasonableness of that belief, as far
15 as his grounds to stop the vehicle are concerned
16 and then to search it and the accused. Anything
17 that M.P. may have done on other or previous
18 occasions is irrelevant to those issues.

19 It is accurate to say that ordinarily police
20 reports and records relating to extrinsic
21 misconduct by persons who are or may be summonsed
22 as witnesses by the Crown in unrelated criminal
23 prosecutions are disclosed to the defence. But
24 the key is that the person who is the subject of
25 those reports may be a witness against the
26 accused. That is not the case here. Therefore I
27 refuse to order disclosure of this material. In

1 any event, Crown counsel has already undertaken
2 to disclose notes and records, if any, of all
3 contacts between Constable Vezina and M.P.

4 This leaves for consideration three e-mail
5 messages that Crown counsel identified in her
6 inventory. These are messages between a Crown
7 counsel and Constable Vezina after the laying of
8 these charges. The Crown resists disclosure on
9 the ground of solicitor-client privilege.

10 There is no question that solicitor-client
11 privilege can apply to communications between
12 Crown counsel and the police. But the privilege
13 does not automatically apply to any and all
14 communications as between Crown counsel and the
15 police. The working relationship between the two
16 inevitably leads to all types of communications,
17 some fairly mundane and others very serious. The
18 police is not a "client" of the Crown's office
19 for all purposes and at all times. I know of no
20 case that says that just because a communication
21 is between a Crown counsel and a police officer
22 that there is automatically some relationship of
23 solicitor-client created so as to trigger the
24 privilege. For the privilege to apply, it must
25 be made in circumstances where legal advice of
26 some kind is sought from, and given by, a
27 professional legal advisor acting in such a

1 capacity.

2 It seems clear that the relationship between
3 Crown counsel and the police is very much like
4 that of a government lawyer who gives advice to a
5 client department. Where the advice is on some
6 legal issue, then the privilege applies. But the
7 privilege does not apply to all communications.
8 Each claim of privilege must be assessed on a
9 case-by-case basis to determine if the
10 circumstances are such that they give rise to the
11 privilege. As noted in the Supreme Court of
12 Canada case of R. v. Shirose (1999) 133 C.C.C.
13 (3d) 257, at para 50, whether or not
14 solicitor-client privilege attaches depends on
15 the nature of the relationship, the
16 subject-matter of the advice, and the
17 circumstances in which it is sought and rendered.

18 Having reviewed the e-mail messages in
19 question, I must say that I fail to see how they
20 come within the category of solicitor-client
21 privilege. They do not discuss any legal issues;
22 they do not seek nor give advice or opinions; they
23 merely relate information as to steps to be taken
24 in the prosecution of these charges. They are
25 merely information items. Not being in the
26 nature of solicitor-client communications, the
27 privilege does not apply.

1 Since these messages are related to these
2 proceedings, they are to be disclosed. The only
3 exception to this direction are some handwritten
4 notes at the bottom of what I gather is the last
5 message. Those notes appear to me to be in the
6 nature of a memo to file or, to put it in more
7 technical terms, a lawyer's work product. Thus
8 those handwritten notations are not disclosable
9 and should be edited out of the document when it
10 is disclosed. I therefore direct the Clerk of
11 the Court to return to Crown counsel the e-mail
12 messages that were provided to me under seal so
13 that this order may be complied with in due
14 course.

15 THE CLERK: Yes, Your Honour.

16 THE COURT: Those are my directions,
17 counsel, and my rulings with respect to the
18 disclosure application.

19 -----
20 Certified correct to the best
21 of my skill and ability,

22
23
24 _____
25 Lois Hewitt, CSR(A), RPR, CRR
26 Court Reporter