R. v. K.M., 2015 NWTSC 33

Date: 2015 07 07
Docket: S-1-YO-2014-000005

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

HER MAJESTY THE QUEEN

- and -

K.M.
(A Young Person)

Publication Ban: Information contained herein is prohibited from publication pursuant to **ss. 110 and 111** of the *Youth Criminal Justice Act* and pursuant to **s. 28** of the *Youth Criminal Justice Act* and **s. 648** of the *Criminal Code*, RSC 1985, Chap C-46

MEMORANDUM OF JUDGMENT
(Disclosure Application)

I) INTRODUCTION

[1] K.M. faces a first degree murder charge following the death of Charlotte Lafferty in Fort Good Hope. His jury trial is scheduled to commence in Yellowknife on January 25, 2016. He has filed an Application seeking to compel the Crown to record, by audio or video recording, all its interviews with witnesses and potential witnesses, and to disclose these recordings.

[2] K. M. is not alleging any impropriety on the part of the prosecutors who have carriage of this matter. He acknowledges that under the current state of the law, the Crown is under no obligation to record these interviews. He argues however, that adding this requirement to the Crown's disclosure obligations constitutes a small and logical step in the development of the law in this area. He urges this Court to take that step.

II) EVIDENCE ADDUCED IN SUPPORT OF THE APPLICATION

[3] Both parties have filed affidavits on this Application. There does not appear to be any conflict or controversy about the matters addressed in this evidence. The evidence refers to the sequence of events that led to this Application. It also addresses matters of a more general nature about the Crown's practices regarding witness preparation interviews.

1. Evidence adduced by K.M.

[4] K.M. has filed the affidavit of Alanhea Vogt, a colleague of K.M.'s counsel.

[5] Ms. Vogt deposes that before the preliminary hearing, K.M.'s counsel received emails from the prosecutor which included details of conversations that she had with some witnesses during meetings held in preparation for the preliminary hearing. K.M.'s counsel requested that from that point forward, the Crown fully record meetings with all witnesses and disclose those recordings.

[6] The prosecutor sent K.M.'s counsel copies of the notes made by the Crown officials who were involved in the witness meetings that her earlier email related to. She indicated that the Crown would not be recording future witness interviews because the Crown was under no legal obligation to do so. Copies of the notes disclosed to K.M.'s counsel are attached as exhibits to Ms. Vogt's affidavit.

[7] Ms. Vogt deposes that in the Northwest Territories, witness statements taken by police are almost without exception audio or video recorded. She also deposes that small recording devices that can capture several hours of recording are readily available, at a relatively low cost, in Yellowknife.

2. Evidence adduced by the Crown

[8] The Crown has filed the affidavit of Vivian Hansen.

[9] Ms. Hansen is employed as a Crown Witness Coordinator with the Crown's office. She deposes that the role of Crown Witness Coordinators is to provide information and services to complainants and witnesses who are to appear before the courts, establish a rapport with the witnesses, act as a liaison between witnesses and the prosecutors, and participate in witness preparation meetings.

[10] Ms. Hansen deposes that in a witness preparation meeting, witnesses are given explanations about the court process, are told what to expect from the proceedings, and are given the opportunity to review statements given to police and transcripts of earlier testimony they have given about the matter. Ms. Hansen deposes that witnesses often share their fears and anxieties about the court process during these meetings.

[11] She also deposes that meetings with witnesses usually take place a few days before they are to testify, and in many cases, particularly for matters proceeding in communities outside of Yellowknife, on the day they are to testify.

[12] Ms. Hansen further deposes that witnesses are sometimes reluctant to meet with Crown Witness Coordinators and prosecutors. She deposes this is particularly so with teenage complainants and complainants in domestic violence matters.

III) ANALYSIS

1. General principles regarding disclosure

[13] The fundamental principles that govern the Crown's disclosure obligations were articulated by the Supreme Court of Canada in *R. v. Stinchcombe* [1991] 3 S.C.R. 326. The Crown's obligation to disclose is rooted in trial fairness. In particular, it is rooted in the need to ensure that an accused has an opportunity to make full answer and defence, which is a principle of fundamental justice protected by section 7 of the *Canadian Charter of Rights and Freedoms*.

The Supreme Court of Canada underscored the fundamental importance of that right in *Stinchcombe*:

> The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted.
>
> *R. v. Stinchcombe*, *supra*, Paragraph 17.

[14] The scope of the Crown's duty to disclose is well established: the Crown must disclose to the Defence any relevant material or information in its possession, whether the Crown intends to rely on it or not. The obligation extends to relevant information that is favourable to the Defence. The obligation to disclose has to be complied with in a timely fashion, and the obligation is a continuing one. Finally, the Crown's duty to disclose implies a duty on the Crown and police to preserve relevant evidence. *R. v. La* [1997] 2 S.C.R. 680, Paragraphs 17 and 20.

[15] It is also well established that, irrespective of the format or method used to provide it, disclosure has to be meaningful. For example, providing copies of police officers' notes that are illegible does not satisfy the Crown's obligation. *R. v. Bidyk*, 2003 SKPC 124. At the other end of the technological spectrum, providing a large quantity of data in an electronic format, but in such a way that the data in unsearchable and impossible to access in a meaningful way, does not satisfy the Crown's obligation either. *R. v. Dunn et al.*, 2009 CanLII 75397 (Ont.S.C.).

2. The position of the parties

[16] It is common ground between the parties that there are circumstances where details of Crown interviews with its witnesses must be disclosed. This is indeed what happened in this case: during the court preparation meetings, some of the witnesses provided new information that was relevant, and the Crown did disclose this information in a timely manner.

[17] K.M.'s position, however, is that the disclosure of anything short of an actual recording of the interview is necessarily incomplete disclosure, and therefore, is inadequate disclosure. This, K.M. says, is because no one can be expected to write down, *verbatim*, every question asked and every answer given during a meeting. He points to various examples from the notes disclosed to him to demonstrate that different note takers record things differently, with varying level

details, which can leave some confusion or uncertainty about what was actually said.

[18] In addition, K.M. argues that many subtleties and non-verbal cues, such as hesitation or pauses before answering a question, cannot be captured by notes of a conversation. Without an actual recording, this type of information, potentially useful from the perspective of the Defence, is lost.

[19] K.M. argues, as well, that his ability to use information arising from witness interviews may be impeded if there is no recording of those interviews. Specifically, he asserts that his ability to cross-examine the witness on any inconsistency arising from the witness' interview could be impacted by the absence of a recording. This, he argues, jeopardizes his ability to make full answer and defence, and undermines his right to a fair trial.

[20] K.M. further argues that the absence of an independent recording of witness interviews may lead to delays in the trial. In the event that a witness denies or does not recall what he or she said during the meeting with the prosecutor, the prosecutor would have to be called as a witness to establish what was said. This would necessarily result in a mistrial and additional delays. K.M. argues that this could lead to a breach of his *Charter* protected right to be tried within a reasonable time.

[21] For all those reasons K.M. argues the Crown's duty to disclose should include a duty to ensure that a full record of its meetings with witnesses is preserved, through the audio or video recording of those meetings.

[22] The Crown argues that what K.M. seeks is something that he is not, in law, entitled to have, and is also not necessary for him to have in order to make full answer and defence. The Crown argues that the potential issues that K.M. identifies with respect to his ability to make full answer and defence at trial can be addressed in various ways.

[23] First, the Crown argues that the legal, professional, ethical and policy principles that bind prosecutors provide sufficient safeguards to ensure that any new and relevant information arising from witness preparation interviews will be disclosed fully and meaningfully.

[24] The Crown notes that the *Canada Evidence Act* permits the cross-examination of a witness on a prior inconsistent statement made orally, such that the absence of a recording does not prevent cross-examination of the witness on any inconsistency that may arise.

[25] As for potential issues arising from a witness denying or not recalling what was said during a meeting with the prosecutor, the Crown says those can be addressed by the Crown making admissions as to what the witness said during the interview. The Crown also notes that if, as was the case here, a Crown Witness Coordinator is present during the meeting, this affords a way to establish what was said at the meeting without the prosecutor becoming a witness on the case. The Crown argues that given all of this, the risk of the prosecutor having to become a witness on the case is extremely remote and that the remedy that K.M. seeks is disproportionate in relation to that risk.

[26] Finally, the Crown argues that the potential benefits of recording witness interviews, from an accused's perspective, must be balanced against a number of other interests and considerations, including practical considerations, the potential chilling effect such measures could have on the ability of prosecutor to meet witnesses ahead of a court case, and the interests of witnesses.

3. The merits of the Application

[27] As has already been noted, K.M. acknowledges that what he seeks in this Application is an expansion of the law pertaining to the scope of the Crown's disclosure obligations. Neither counsel is aware of this relief ever having been sought before. I too am unaware of any case where this issue has been dealt with, one way or another.

[28] I agree with K.M.'s submissions that common law principles evolve over time and that trial courts have a role to play in that evolution, particularly in the context of the evolution and refinement of *Charter* rights. I have expressed that view recently in the context of the right to reasonable bail, protected by Paragraph 11(e) of the *Charter*:

> (…) giving effect to Mr. Nadli's position represents an extension of the scope of the right as delineated in *Pearson*. But that is, more often than not, how the scope

> and reach of *Charter* protections evolve. The scope of the right to counsel, of the right not to be subjected to unreasonable search and seizure, to name only two, have evolved considerably over the years as new situations emerged, or new arguments were presented to, and dealt with by, trial courts. That is how the law evolves.
>
> *R. v Nadli*, 2014, NWTSC 47, (appeal filed August 12, 2014, AP-2014-000010), at Paragraph 53.

[29] In my view, the fact that K.M. is seeking relief that would, if granted, represent an expansion of the Crown's disclosure obligations, is not, in and of itself, a reason to deny his Application.

[30] However, I disagree with his assertion that what he seeks represents a "small" step in the development of the law. In large measure, K.M.'s application is not based on facts that are specific to his case. He relies, for the most part, on general principles of law. He acknowledges that nothing in the Crown's conduct of this case thus far gives rise to any particular concerns or the need for the specific remedy he seeks.

[31] It would appear that if his position prevails, and this Court concludes that all Crown witness meetings must be audio or video recorded in order for K.M. to make full answer and defence, the same would be true in all criminal cases. This would bring about a significant change to the manner in which the Crown is expected to deal with witness preparation interviews, and would place significant additional burdens on the Crown. I do not think this can be characterized as a "small step".

[32] Be that as it may, it does not necessarily follow that K.M.'s Application should be dismissed for that reason alone. When *Stinchcombe* was decided, it brought about fundamental changes to what had until then been the scope of disclosure. These changes placed additional requirements and burdens on police and prosecution agencies across the country. Yet, the Supreme Court of Canada concluded that those changes were necessary in order to ensure that accused persons' rights to a fair trial were preserved.

[33] The central question is not whether allowing this Application would place additional burdens on the Crown, require changes in the day to day practices of prosecutors, or create inconveniences for prosecutors and those who assist them in

their witness preparation work. The central question is whether recording witness interviews is required to ensure that K.M.'s constitutional rights to make full answer and defence and to have a fair trial are preserved. Having carefully considered the issue, I have concluded that it is not.

[34] There is no question that a video recording, or even an audio recording, of any interaction between two persons represents the most accurate and complete record of that interaction. But the law entitles an accused person to full and complete disclosure, not perfect disclosure. There are numerous authorities in support of that proposition. *R. v. Lalo*, 2003 NSSC 147, Paragraph 35; *R. v. Jarvie et al.*, 2003 CanLII 64366 (ONSC), Paragraph 26; *R. v. Trang*, 2002 ABQB 744, Paragraph 511.

[35] The inapplicability of the standard of perfection, when it comes to disclosure, mirrors the inapplicability of that standard when assessing trial fairness:

> (...) the *Canadian Charter of Rights and Freedoms* guarantees not the fairest of all possible trials but rather a trial that is fundamentally fair: *R. v. Harrer*, (1995) 3 S.C.R. 562. What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involves in the process, like complainants and the agencies which assist them in dealing with the trauma they may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice, but fundamental justice.
>
> *R. v. O'Connor* [1995] 4 R.C.S. 411, Page 517.

[36] In my view, imposing a requirement on the Crown to record and disclose its witness interviews would create significant practical problems that would inevitably be detrimental to daily workings of the criminal justice process.

[37] I accept that there have been considerable technological advancements in recent years and that small and affordable recording devices are now readily available. The physical ability of the Crown to record its meeting, especially as far as audio-recording is concerned, is not the issue.

[38] The reality of criminal litigation is that, as noted in Ms. Hansen’s affidavit, witness interviews often take place a short time before the trial. This is especially so for the many cases that proceed outside of the City of Yellowknife. In this

jurisdiction, circuit work represents a large portion of the work that the courts hearing criminal cases do.

[39] If prosecutors were required to record and disclose their witness interviews, certain things would need to take place, in all cases, between the time of the witness interviews and the time of trial. The prosecutor would have to review the recordings and edit out irrelevant portions of the interview. For example, what witnesses might say about their anxiety and fear of the process would usually not be relevant and would have to be edited out. The same is true for other conversation intended to put the witness at ease or build a rapport with them, or things of a personal nature, unrelated to the case, that a witness might share during the meeting.

[40] The prosecutor would then have to transfer the data of the edited recording onto something (CD, DVD, USB key), so that it could be disclosed. Defence counsel would then need time to listen to the recordings. And this would have to occur for each and every witness that has been interviewed by the prosecutor or Crown Witness Coordinator.

[41] It is difficult to imagine, practically speaking, how all of this could take place without delaying the trials. It could prove very challenging even when only a few trials are set on any given date, but even more so in the context of a busy Court day where several matters may be set for trial, particularly on circuit. It seems to me that this type of process would, practically speaking, be entirely unworkable.

[42] As mentioned at Paragraph 20, K.M. has made submissions about the prospect of delays, potentially in contravention of Paragraph 11(b) of the *Charter*, that could arise as a result of witness meetings not being recorded. In my respectful view, inordinate delays are actually far more likely to arise if such a requirement is imposed.

[43] Apart from these practical concerns and challenges, there are broader trial fairness considerations to take into account. Witnesses who appear in Court usually do so under Court order. They do not have a choice about the matter. Even complainants, whose complaint may have been the trigger for the charge being laid, do not control the process once a charge is laid. If they are served with a subpoena and do not attend, they face the prospect of being arrested and taken into custody. They do not have the option of unilaterally deciding to stop participating

in the process. The same is true for all witnesses. Given this, it is important that persons to be called as witnesses at a trial have someone explain the process to them, and be given an opportunity to review statements they have given about the events they are expected to testify about.

[44] Ms. Hansen deposes in her affidavit that witnesses are sometimes reluctant to meet with prosecutors. This is not particularly surprising, nor is it unrealistic to suggest that the prospect of having court preparation meetings recorded might make them even more reluctant to cooperate with the Crown and attend meetings with prosecutors and Crown Witness Coordinators.

[45] Even apart from the possible reluctance of witnesses themselves, the prospect of having to record and disclose interviews could, in some cases, lead Crown officials to limit the number of witness interviews that they conduct, to avoid some of the practical and logistical difficulties that I have already alluded to, and to avoid trials being delayed. That too could result in more witnesses being called to testify without having been able to meet with the prosecutors and Crown Witness Coordinators.

[46] It is not desirable to have a greater number of witnesses placed in the position of being called to testify in a criminal trial without having had an opportunity to meet with the Crown, have the process explained to them, and have an opportunity to review any statement they might have given to police. In my view such a prospect is not only unfair to the witness, but is also not in the interests of justice.

[47] It is also important not to lose sight of the fact that the central objective of these types of meetings is court preparation, and not the investigation of the allegations forming the subject-matter of the charge. In the Canadian system of criminal justice, prosecutors are not responsible for the investigation of matters. Prosecutors sometimes provide legal advice at the investigation stage, but their role is not to collect evidence and conduct investigative interviews with witnesses. While occasionally, as was the case here, a court preparation interview with a witness may lead to new and relevant information being provided, eliciting information from the witness about the events is not the fundamental purpose of the interview. This too, in my view, militates against imposing on the Crown the type of requirement sought by K.M.

[48] I recognize, as I have already mentioned, that an audio or video recording would provide the most complete and accurate record of a court preparation interview. It would provide an independent and reliable account of what was said. I also agree with K.M. that the solutions proposed by the Crown to deal with some of the pitfalls that could occur, in particular where there is uncertainty about what was said during the meeting, are not perfect solutions. But these considerations have to be balanced against the other considerations I have identified.

[49] As noted above at Paragraph 35, an accused is entitled to a fair trial, not a perfect one, and to full and complete disclosure, not perfect disclosure. As McLachlin J., as she then was, said in *R. v. O'Connor*:

> Perfect justice in the eyes of the accused might suggest that an accused person should be shown every scintilla of information which might possibly be useful to his defence. From the accused's perspective, the catalogue would include not only information touching on the events at issue, but anything that might conceivably be used in cross-examination to discredit or shake a Crown witness. When other perspectives are considered, however, the picture changes. The need for a system of justice which is workable, affordable and expeditious; the danger of diverting the jury from the true issues; and the privacy interests of those who find themselves caught up in the justice system - all these point to a more realistic standard of disclosure consistent with fundamental fairness. That, and nothing more, is what the law requires.
>
> *R. v. O'Connor*, *supra*, Page 517.

IV) CONCLUSION

[50] In my view, what K.M. seeks in this Application is perfect disclosure. I acknowledge that the relief he seeks would provide him a more complete and more accurate record of what will transpire in the witness interviews that will be conducted in preparation for this trial, and could be of some use to him, but I am not satisfied that this complete record is necessary in order for him to make full answer and defence. I am also satisfied that the overall fairness of the trial process, taking into account his interests, but also other interests that must be considered,

not only does not require his Application to be granted, but could be adversely impacted if it was.

[51] The Application is dismissed.

L.A. Charbonneau
J.S.C.

Dated at Yellowknife, NT, this
7th day of July 2015

Counsel for the Crown: Annie Piché and Jeannie Scott
Counsel for the Accused: Charles Davison

S-1-YO-2014-000005

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN

:

HER MAJESTY THE QUEEN

- and -

K.M.
(A Young Person)

Publication Ban: Information contained herein is prohibited from publication pursuant to **ss. 110 and 111** of the *Youth Criminal Justice Act* and pursuant to **s. 28** of the *Youth Criminal Justice Act* and **s. 648** of the *Criminal Code*, RSC 1985, Chap C-46

MEMORANDUM OF JUDGMENT OF THE HONOURABLE JUSTICE L.A. CHARBONNEAU