Date: 2016 06 09
Docket: S 1 CR 2013 000013

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

HER MAJESTY THE QUEEN

Respondent

-and-

MIROSLAV HEBIK

Applicant

MEMORANDUM OF JUDGMENT

[1] The Applicant, Miroslav Hebik, brought an application for a mistrial and costs. It was heard on December 18, 2015. The application for the mistrial was granted, with written reasons to follow, and the decision on the application for costs was reserved.

BACKGROUND

[2] On December 22, 2010, the Royal Canadian Mounted Police laid an information charging Mr. Hebik with two counts of assault against his step-daughters, Sabrina and Nicole Krivan.

[3] The Crown provided disclosure in January of 2011.

[4] The Crown stayed the charges against Mr. Hebik on April 12, 2011. It then recommenced the proceedings on March 14, 2012. It provided further disclosure in July of 2012. A preliminary inquiry was held on January 23, 2013.

[5] The matter proceeded to trial by judge alone before me, commencing June 24, 2014. The assaults were alleged to have occurred many years before, during the

complainants' childhoods. There was no physical evidence. There were no medical reports of injuries. The Crown's only witnesses were Sabrina and Nicole. Mr. Hebik denied the allegations. Thus, the credibility of the two complainants was of central importance in the Crown's case and critical to my findings.

[6] I determined Mr. Hebik was guilty and directed convictions be entered against him on June 27, 2014. Sentencing was adjourned to allow for the preparation of a pre-sentence report and to accommodate counsels' schedules.

[7] A sentencing hearing was scheduled for January 27, 2015. On the day before, the Crown provided defence counsel with Victim Impact Statements written by Sabrina and Nicole Krivan. Mr. Hebik's lawyer noted the following in Sabrina's statement:

> As well, the stress of the case, in general has had a major impact on me. I have spent close to four years pushing for this case to be heard in a courtroom; ***and in doing so spent many hours speaking with various parties on the phone, through email***, and having to travel and take time off work for the proceedings. I should also mention that in February 2011 the case was stayed in Whitehorse, Yukon without Nicole or I's acknowledgement, and I spent close to a year fighting for the charges against Miroslav to be re-instated. . .
>
> *Sabrina Krivan's Victim Impact Statement,*
> Exhibit "A" to the Affidavit of Sireen Al-Moghrabi
> Sworn June 29, 2015

[8] The reference to email in particular raised the possibility that full disclosure was not made before the trial. The sentencing hearing was adjourned. Subsequently, Mr. Hebik's lawyer wrote to the Crown's office in Yellowknife on February 3, 2015 and made a formal request for further disclosure.

[9] In response to that request, the Crown provided Mr. Hebik's lawyer with a significant number of pieces of correspondence between Sabrina and the Crown. Among these was a letter dated April 19, 2011 written by Sabrina Krivan on her own behalf and on behalf of Nicole Krivan (the "Letter").[1] The Letter was addressed to Barry Nordin, then the Chief Crown Prosecutor for the Northwest Territories. The motivation for writing the Letter was clearly the Crown's decision to stay the charges against Mr. Hebik. In the Letter, Sabrina Krivan expressed dissatisfaction with that decision and she encouraged the Crown to reconsider. She made several statements about the details of the alleged assaults, including their

[1] The letter indicates on the first page it was sent from Sabrina Krivan and "on behalf of Nicole Krivan". The signature block says "Sabrina Krivan and Nicole Krivan".

nature, the circumstances under which they took place and certain other behaviours attributed to Mr. Hebik, which the complainants found objectionable. She also suggested Mr. Hebik was racist and she commented negatively on his suitability for his employment position and his character generally.

[10] Mr. Hebik's lawyer brought an application for disclosure which was heard on August 7, 2015. As part of that process, and with counsels' agreement, I reviewed the Crown's documents *in camera*. There were no other documents which the Crown ought to have disclosed.

[11] The Crown waived privilege over internal correspondence relating to its decision to withhold the Letter from the disclosure package. That correspondence consists of an electronic mail message, dated July 10, 2012, from a legal assistant to Barry McLaren, the prosecutor who had conduct of the file at that time, and Mr. McLaren's response of the same date. This was provided to Mr. Hebik's counsel on June 8, 2015.

[12] The pertinent portions of the legal assistant's message, which included the Letter as an attachment, are reproduced below:

> Subject: Should this be included in the Hebik disclosure?
>
> Hello,
>
> While preparing the new and complete disclosure package for the Hebik files, I came across this correspondence between the victim and PPSC employees. I spoke to Chris about whether these documents are something that should be disclosed, specifically the letter from Sabrina Krivan about the original stay of proceedings and complaint against [another prosecutor] that was addressed to Barry Nordin.
>
> Chris is presently of the opinion that they need not to be and ought not to be disclosed but as you have carriage of these files, he feels that you should have the final say.
>
> […]
>
> Please advise.

[13] Mr. McLaren responded a few minutes later. He wrote:

> None of that material nor any office or PPSC memos is disclosure. The statements and police narrative are what they should be given.

[14] The preliminary inquiry proceeded on January 23, 2013. At that time Mr. Hebik was represented by another lawyer. It is apparent from the *Transcript of the*

Preliminary Inquiry[2] that the fact of communications between Sabrina Krivan and the Crown about the stay was at that point known to Mr. Hebik's counsel, although the Letter had not yet been disclosed.

[15] In its written submissions in this application, Crown counsel stated the Letter's existence became known during the preliminary inquiry; that Mr. Hebik's then counsel cross-examined Sabrina on its contents; and defence counsel indicated she might seek disclosure of it. (Respondent's Factum, pp. 11-12). While it is not suggested the Crown's submissions are intentionally misleading on this point, this description of what happened at the preliminary inquiry is not entirely accurate when compared to what appears on the record.

[16] The discourse between Sabrina Krivan and Mr. Hebik's counsel on the matter of recommencement of the proceedings is found at pages 104 through 107 of the *Transcript of the Preliminary Inquiry*. While the subject of a letter to the Crown about the stay was raised, defence counsel did not have the Letter. It is thus incorrect to say defence counsel cross-examined Sabrina on its contents.

[17] Sabrina was asked if she made a telephone call to the Crown's office about the stay. Sabrina responded that she spoke to Mr. Nordin, who, she said, suggested she write a letter to ask that the charges to be reinstated. She said she wrote a letter. Notably, when asked if she wrote to the Yellowknife Crown's office, which is where the April 19, 2011 letter was addressed, Sabrina said she wrote to the Yukon Crown office and not the Yellowknife office. *Transcript of Preliminary Inquiry*, p 106, ll 16-19.

[18] Defence counsel asked Sabrina if she knew whether anything happened as a result of that letter. At that point, Crown counsel voiced objection to the line of questioning on the basis of relevance:

> MR. MCLAREN: Okay. Now, I will raise, what I may call, an objection. Relevance, Your Honour. Ms. Krivan's discussions with the Crown following a stay, what's the bearing on the evidence on this preliminary hearing?
>
> *Transcript of Preliminary Inquiry*, p 104, ll 19-23

[19] Defence counsel explained the accused's position was that Sabrina had "ulterior motives" in pursuing the charges and that she wanted to explore what was written and what was said. She then stated:

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[2] A copy of the transcript was included as part of the Crown's Application Record, filed July 20, 2015, in relation to the defence Disclosure Application.

> And I may make a disclosure request to my friend, but in order to do that I simply wanted to ensure I had enough information; at this point, I likely do.
>
> *Transcript of Preliminary Inquiry*, p 105, ll 3-6

[20] The judge who presided at the preliminary inquiry did not accept the Crown's position on relevance, although she recognized the potential for an objection on the basis of privilege, depending on what questions might be asked. Ultimately, very little was shared about the contents of the letter Sabrina said she wrote. Defence counsel's specific questions – and the responses – were as follows:

> Q [...] so you wrote a letter to the Yellowknife Crown's office, correct?
>
> A To the Yukon Crown office because that is where the - - it was stayed there.
>
> Q And you were doing that for the purpose of having the matter brought back?
>
> A Reopened, yes.
>
> Q Reopened. And you made a pitch, as far as why that should happen, I take it?
>
> A It was based on the reasons why they told me it was stayed, so I just explained based on those reasons why I think it should be reopened.
>
> *Transcript of Preliminary Inquiry,* p. 106, ll 16-27

[21] No further disclosure request was made by either of Mr. Hebik's lawyers before the trial.

THE MISTRIAL APPLICATION

[22] The Crown's disclosure obligation is well-known: it has a legal and ethical obligation to disclose all information in its possession and control pertaining to the case save for that which is protected by privilege or clearly irrelevant. The burden of proving information is either privileged or irrelevant is on the Crown. *R v Stinchcombe,* [1991] 3 SCR 326.

Mr. Hebik's Position

[23] Defence counsel argued the Crown breached its duty and violated Mr. Hebik's s. 7 *Charter* rights in failing to disclose the Letter. This irreparably compromised trial fairness by impeding Mr. Hebik's ability to make a full answer and defence. Defence counsel asked that the case be re-opened and a mistrial

declared, based on the *criteria* in *Palmer v R*, [1980] 1 SCR 759. Although those *criteria* were developed in the context of whether to admit fresh evidence on appeal they may be used to inform a decision on whether a case should be re-opened and, if appropriate, whether a mistrial should be declared. *R v Arabia*, [2008] ONCA 565, 235 CCC (3d) 354. The *criteria* are:

a. the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial, provided that this general principle will not be applied as strictly in a criminal case as in civil cases;

b. the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;

c. the evidence must be credible in the sense that it is reasonably capable of belief; and

d. it must be such that if believed, it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

The Crown's Position

[24] The Crown argued it was not required to produce the Letter as part of its disclosure obligation for two reasons. First, the Letter was not part of the investigation but instead pertained to the Crown's decision to stay proceedings. It says Mr. Hebik was at all times aware the charges had been stayed and then recommenced but, he did not challenge that decision. I take this as a suggestion by the Crown that the Letter would only become relevant had Mr. Hebik challenged the recommencement.

[25] The second reason the Crown says it was not required to produce the Letter is because it did not contain information materially different from that which had already been produced to defence counsel in other forms. This rendered it irrelevant.

[26] The Crown took the position that the *Palmer* test was not satisfied in any event. Although Crown conceded the contents of the Letter met the credibility criterion, it argued the Letter was irrelevant; that defence counsel knew about the Letter from the preliminary inquiry, but failed to diligently pursue disclosure; and that the Letter could not have reasonably been expected to affect the result.

Analysis

a. Relevance

[27] That the Letter was written in response to the Crown's decision to stay the proceedings, rather than as part of the initial investigation, does not make it irrelevant. While the stay was what motived Sabrina to write to the Crown, the fact is the Letter is quite plainly a statement by a complainant about the very matters in issue at the trial.

[28] The Crown's argument that the Letter was irrelevant because it contained nothing materially different from that which had already been disclosed in other forms is also unconvincing. The relevance threshold is low and the Crown has a duty to disclose whenever there is a reasonable possibility that the information will assist an accused in making a full answer and defence. *R v Dixon,* [1998] 1 SCR 244 at 257. Again, the Letter contained numerous statements by Sabrina about the events forming the charges. That many of the statements were, in the Crown's view, materially the same as information contained in previous statements does not make them irrelevant.

[29] Relevance must also be considered in terms of its usefulness from the perspective of the defence: *R v Egger,* [1993] 2 SCR 451 at 467. In his written submissions on this application, defence counsel asserted if he had the Letter in his possession before the trial, he would have used it in cross-examining Sabrina to try to establish a propensity to exaggerate, possibly undermining her credibility. From this perspective, it was clearly relevant.

b. Diligence

[30] It is incumbent on defence counsel to exercise due diligence in pursuing disclosure. As stated by Cory, J., in *Dixon, supra*, at 266:

> The fair and efficient functioning of the criminal justice system requires that defence counsel exercise due diligence in actively seeking and pursuing Crown disclosure. The very nature of the disclosure process makes it prone to human error and vulnerable to attack. As officers of the court, defence counsel have an obligation to pursue disclosure diligently. When counsel becomes or ought to become aware, from other relevant material produced by the Crown, of a failure to disclose further material, counsel must not remain passive. Rather, they must diligently pursue disclosure.

[31] In my view, it would be unfair to conclude either of Mr. Hebik's lawyers fell short in their obligation to pursue disclosure, even though the existence of correspondence to the Crown from Sabrina was known as of the time of the preliminary inquiry and even though Mr. Hebik's former counsel indicated she might seek further disclosure. I say this for a number of reasons.

[32] The suggestion that defence counsel should have been more diligent in pursuing disclosure is at odds with the Crown's argument on this Application that the material in the Letter was irrelevant and thus not subject to disclosure. Defence counsel have no obligation to pursue disclosure of *irrelevant* material. They are, however, entitled to rely on the Crown to fulfill its duty to disclose relevant material.

[33] There were many pieces of correspondence between Sabrina and the Crown which were disclosed following the disclosure request in February of 2015. Under cross-examination at the preliminary inquiry Sabrina referred to correspondence she directed to the Crown's office in Yukon, and not Yellowknife, which is where the Letter in question here was directed. In my view, it cannot be said with certainty that the correspondence Sabrina referred to at the preliminary inquiry is the Letter in question here.

[34] Crown counsel objected to questions posed at the preliminary inquiry about Sabrina's communications with the Crown on the matter of the stay and recommencement of the charges on the basis of relevance. From that, it would have been entirely reasonable for defence counsel to conclude the Crown had reviewed correspondence it had with Sabrina and determined, in accordance with its duty, that it was irrelevant.

[35] Finally, it is critically important that the Crown's failure to disclose the letter did not arise from inadvertence or oversight. There was, rather, a conscious decision taken by the Crown prosecutor who had conduct of the case to exclude it. This followed a specific inquiry from a legal assistant. That decision was made despite the Letter's contents plainly consisting almost entirely of statements from Sabrina about the charges, which were not privileged and obviously relevant. It should have been disclosed even in the absence of a request.

c. Impact on Trial Outcome

[36] I turn to the Crown's argument that the Letter, when considered with the other evidence adduced at trial, could not reasonably have been expected to affect the outcome.

[37] As noted, Mr. Hebik's counsel argued he would have used the Letter in cross-examination to demonstrate Sabrina had a propensity to exaggerate, thus leading to questions about her credibility. The Crown pointed out defence counsel did not indicate, except in very broad terms, specific examples of exaggeration. He also noted Sabrina was cross-examined on issues relating to feelings of anger towards her parents, exaggeration and collusion with her sister during the trial.

[38] The problem with the Crown's argument in a case like this is that it calls for too much speculation about what questions would have been put to Sabrina based on what she wrote in the Letter, what her answers would have been and how they would have stacked up in the context of the whole of the evidence. It does not take into account the dynamic and often unpredictable nature of cross-examination. It requires an assumption that notwithstanding the addition of the Letter to mix, the evidence would have unfolded in the same or substantially the same manner and that I would have made the same findings on Sabrina's credibility. In the criminal context, where proof beyond a reasonable doubt is the standard and where so much is at stake, these are not safe assumptions to make.

[39] It is not a certainty that the result would have been different had Mr. Hebik's lawyer had the opportunity to cross-examine Sabrina on the Letter, but that is not what is required. What must be demonstrated is that it could reasonably be expected to have affected the result. Given the lack of corroborative evidence, witness credibility played a critical role in the ultimate determination. It is reasonable in the circumstances to conclude cross-examination on the Letter could have altered the outcome.

d. Mistrial Declaration as a Remedy

[40] It is well-settled that judges must exercise the authority to declare a mistrial sparingly and only in the clearest of cases. Before concluding a mistrial was appropriate in this case, I considered the possibility of re-opening the case and having Sabrina recalled to be cross-examined on the statements she made in the Letter. Proceeding that way would not only be impractical, it would also be unfair.

[41] The criminal trial process contemplates cross-examination be undertaken in a relatively contemporaneous manner. That allows the questioner to test the reliability of evidence, and for the trier of fact to assess it, in context and while it is fresh. By the time disclosure was completed and this application was heard, some eighteen months had passed since the trial. Sabrina's responses to questions about the Letter simply could not be adequately or fairly assessed so long after hearing her testimony in chief and her initial cross-examination. It is true that transcripts of the evidence at trial could be reviewed and memories refreshed, but it would be

an artificial, expensive exercise which would contort the process and ultimately, compromise trial fairness. A mistrial was the only realistic option.

COSTS

[42] Costs against the Crown in criminal proceedings are a rarity and I agree with Crown counsel's submission that the appropriate analysis to apply is that set out in *R v Delorme,* [2005] NWTSC 78, NWTJ No. 80 (CanLii). Costs may be awarded against the Crown in criminal proceedings where there is a marked and unacceptable departure from the conduct reasonably expected of Crown counsel. An applicant need not demonstrate bad faith or a deliberate attempt by the Crown to avoid its disclosure obligations. *Delorme, supra,* para 12.

[43] Applying the analysis in *Delorme,* I conclude Mr. Hebik should be awarded reasonable costs of this application and for the trial itself. The failure to disclose the Letter was a marked and unacceptable departure from the standard of conduct expected of Crown counsel. It did not arise through inattention or inadvertence. The Crown made a deliberate decision to withhold from disclosure a document which contained information directly and obviously relevant to the charges. There is no satisfactory explanation for this. The legal result is that Mr. Hebik's right to timely and full disclosure was breached, compromising his ability to make a full answer and defence. The practical result is that Mr. Hebik was put to the expense of a criminal trial which resulted, ultimately, in no resolution.

[44] I was not provided with information respecting the amount of costs sought on Mr. Hebik's behalf. If the Crown and defence counsel are unable to determine between themselves what "reasonable" costs are in the circumstances, I invite them to contact the Clerk of the Supreme Court to arrange to appear before me and make further submissions.

K. Shaner
J.S.C.

Dated at Yellowknife, NT
this 9th day of June, 2016.

Counsel for the Applicant: Mr. Ian D. McKay
Evans, Fagan, Rice, McKay

Counsel for the Respondent:	Mr. Faiyaz Amir Alibhai Public Prosecution Service of Canada

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