SUPREME COURT OF YUKON

Citation: *R v McLaughlin*, 2022 YKSC 26

Date: 20220511
S.C. No. 20-01512A
Registry: Whitehorse
Heard: Watson Lake

BETWEEN:

HER MAJESTY THE QUEEN

AND

STEVEN ALEXANDER MCLAUGHLIN

Before Justice K. Wenckebach

Counsel for the Crown — Lauren Whyte and Melissa McKay

Appearing on his own behalf — Steven McLaughlin

This decision was delivered in the form of Oral Reasons on May 11, 2022. The Reasons have since been edited for transcription without changing the substance.

REASONS FOR DECISION

[1] WENCKEBACH J. (Oral): Mr. McLaughlin is charged with five offences: one count of aggravated assault; one count of assault; one count of uttering threats; and two counts of forcible confinement.

[2] One of the complainants, Jessica Aranda, testified at the preliminary inquiry held on this matter, but has not appeared to testify at trial. The Crown has therefore brought an application to admit the evidence given by Ms. Aranda at the preliminary inquiry at

trial, pursuant to s. 715(1) of the *Criminal Code*, R.S.C. 1985, c. C-46 (the "*Criminal Code*") and under the principled exception to the hearsay rule.

[3] I will first address s. 715(1) of the *Criminal Code*.

[4] Section 715(1) states:

> Where, at the trial of an accused, a person whose evidence was given at a previous trial on the same charge, or whose evidence was taken in the investigation of the charge against the accused or on the preliminary inquiry into the charge, refuses to be sworn or to give evidence, or if facts are proved on oath from which it can be inferred reasonably that the person
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> (a) is dead,
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> (b) has since become and is insane,
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> (c) is so ill that he is unable to travel or testify, or
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> (d) is absent from Canada,
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> and where it is proved that the evidence was taken in the presence of the accused, it may be admitted as evidence in the proceedings without further proof, unless the accused proves that the accused did not have full opportunity to cross-examine the witness.

[5] In order for preliminary inquiry evidence to be admissible at trial, the Crown must show on a balance of probabilities:

(i) that the evidence was given at the preliminary hearing;

(ii) that the witness is now refusing to give evidence; and

(iii) that the preliminary inquiry evidence was given in the presence of the accused.

[6] Once this is established, the evidence is admissible unless the accused demonstrates that they were not afforded a full opportunity to cross-examine the witness.

[7] However, even where the requirements for admissibility under s. 715(1) are met, the Court still has the discretion to not admit the evidence if it would operate unfairly to the accused.

[8] In this case, there is no question that Ms. Aranda gave evidence at the preliminary inquiry and that it was given in the presence of the accused. The issues to be decided are, therefore, whether Ms. Aranda is now refusing to give evidence, whether Mr. McLaughlin had a full opportunity to cross-examine Ms. Aranda, and whether admission of the evidence would be unfair to Mr. McLaughlin.

[9] The first question is whether Ms. Aranda is refusing to give evidence.

[10] The Crown submits that Ms. Aranda does not want to attend court, and that the Crown and the RCMP have attempted to contact Ms. Aranda and serve her with a subpoena but have been unable to do so. Ms. Aranda is therefore refusing to give evidence.

[11] The courts have established that a witness who evades service to avoid testifying at trial does thereby refuse to testify within the meaning of s. 715(1) (*R v Williams*, 2015 ONSC 6884, at para. 27). Evidence of attempted contact and service assists in establishing that the witness is actually evading service.

[12] In support of this argument, the Crown filed the affidavit of Lois Sembsmoen, the Crown Witness Coordinator for the Yukon Regional Office of the Public Prosecution Service of Canada, and called Cst. Richard to testify.

[13] Ms. Sembsmoen attests to the attempts she has made to contact Ms. Aranda going back to September 11, 2019. The picture she presents is that of a witness who is difficult to track down, with no consistent phone number, and a changing address. The

difficulties in maintaining contact with Ms. Aranda increased after she testified at the preliminary inquiry.

[14] Eventually, the RCMP were able to locate a phone number for Ms. Aranda. Ms. Sembsmoen phoned her on April 11, 2022. The phone was that of a friend, but Ms. Sembsmoen was able to speak with Ms. Aranda.

[15] Ms. Sembsmoen and Crown counsel phoned her again on April 12 and April 14, 2022. They spoke about whether Ms. Aranda was willing to testify. She said she was trying to avoid it. The Crown and Ms. Sembsmoen confirmed the trial dates and location with Ms. Aranda. They also agreed to meet on April 19, 2022, but Ms. Aranda did not attend.

[16] Ms. Sembsmoen phoned the number she had for Ms. Aranda and Ms. Aranda's friend told Ms. Sembsmoen that she had not seen her in a couple of days. Ms. Sembsmoen continued to attempt to find her by contacting shelters, Justice workers, Ms. Aranda's ex-partner, and hospitals, but was not able to find her.

[17] Cst. Richard, who works in Watson Lake, provided similar testimony. He attended a residence where Ms. Aranda had lived previously, spoke with Ms. Aranda's ex-partner and contacted shelters. He checked police occurrence records to see if her name popped up, asked for assistance from the Whitehorse detachment, and posted on CPIC that she was a person of interest.

[18] Cst. Richard was able to speak with Ms. Aranda on her friend's telephone number, possibly on April 9, 2022, and asked if he could have her address to serve her with a subpoena. She asked if she could pick it up at the Whitehorse detachment and

said that she wanted to deal with things the next day. She ended the call shortly thereafter.

[19] Cst. Richard was not able to speak with her again, despite phoning her at the same number.

[20] There is a period of two weeks in which Cst. Richard was on vacation and there is only hearsay evidence of attempts to find Ms. Aranda. I do not take that evidence into account. I find, however, that the Crown and Cst. Richard made significant efforts to find Ms. Aranda. Ms. Aranda was made aware of the date and time of trial, and that the Crown was seeking for her to testify. I therefore conclude that Ms. Aranda evaded service and is refusing to testify.

[21] The next question is whether Mr. McLaughlin had a full opportunity to cross-examine Ms. Aranda.

[22] In *R v Potvin*, [1989] 1 SCR 525, the Supreme Court of Canada explained how this part of the test should be applied. It stated that it is the opportunity to cross-examine at the preliminary inquiry and not the fact of cross-examination which is crucial to a fair trial. Counsel who fails to cross-examine a witness for tactical reasons has not been deprived of the opportunity to cross-examine the witness.

[23] Here, much of Mr. McLaughlin's argument was that his lawyer at the time of the preliminary inquiry did not cross-examine Ms. Aranda as thoroughly or on all the issues that he should have cross-examined her on.

[24] For instance, he did not ask her about the fact that she stole Mr. McLaughlin's daughter's car; he did not ask her about the inconsistency between her statement and

her testimony about the presence of guns at his home or other inconsistencies; or about aspects of her testimony that were simply not credible.

[25] While Mr. McLaughlin feels that his counsel did not do a thorough job and left many stones unturned, this is not a case in which ineffective counsel was provided. Mr. McLaughlin's lawyer did cross-examine Ms. Aranda, quite vigorously on some issues, and spent time on different areas of her testimony. I conclude that any issues that he did not address or did not go into depth on was done for tactical reasons. I therefore find that Mr. McLaughlin did have the opportunity to cross-examine Ms. Aranda.

[26] The final issue is whether it would be unfair to admit the evidence at trial.

[27] I conclude that it would be unfair to Mr. McLaughlin to admit the evidence.

[28] In *R v Saleh*, 2013 ONCA 742, the Ontario Court of Appeal explained the Court's discretion to exclude evidence. It stated at paras. 74 and 75:

> [74] The exclusionary discretion in s. 715(1) is directed at two principal types of mischief: unfairness in the manner in which the preliminary inquiry evidence was obtained, and unfairness in the trial itself caused by the admission of the preliminary inquiry evidence. A trial judge should only exercise this discretion after weighing two competing and frequently conflicting concerns:
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> - fair treatment of the accused; and
> - society's interest in the admission of probative evidence to get at the truth of the allegations in issue.
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> [75] The focus of the trial judge's concern must be on the protection of the accused from unfairness, rather than the admission of probative evidence without too much regard for the fairness of the adjudicative process. (citations omitted)

[29] In *R v Atkinson et al*, 2018 MBCA 136, ("*Atkinson*") the Manitoba Court of Appeal determined that the principled approach to hearsay, specifically the requirements of necessity and reliability, helps to inform the fairness analysis.

[30] Necessity here has been met, given that Ms. Aranda is refusing to testify.

[31] With regard to reliability, there are two aspects to reliability: procedural reliability and substantive reliability.

[32] In *R v Hawkins*, [1996] 3 SCR 1043, the Supreme Court of Canada stated that evidence taken at a preliminary inquiry is sufficiently reliable to be admitted pursuant to the principled approach to hearsay (at para. 76).

[33] I have no difficulty finding that Ms. Aranda's testimony meets the requirement of procedural reliability.

[34] I do, however, have concerns about the substantive reliability of certain aspects of Ms. Aranda's testimony. Substantive reliability is concerned with how trustworthy the evidence is.

[35] In *Atkinson*, the Manitoba Court of Appeal stated:

> [74] In my view, unfairness would be established where the proffered evidence is unreliable or incredible to the extent that it is not trustworthy. …

[36] In many cases, a witness's testimony is found to be not trustworthy because the witness is an unsavoury character or because the witness has a motive to lie. That is not the case here. Instead, the issue is that, on the crucial evidence about the aggravated assault, Ms. Aranda testified at the preliminary inquiry about her assumptions and suppositions, and not simply about what she observed.

[37] When first describing the alleged aggravated assault, Ms. Aranda described what she saw and heard. She described hearing:

> … this crack, like two rocks hit each other. And I'm like, Whoa, kind of thing, like what had just happened. And I hear my friend, my girlfriend, my best friend hit the floor. …

[38] Later on, however, she was asked by the Crown to explain further. Ms. Aranda then testified:

> He [Mr. McLaughlin] hit the back of her head with the shotgun. I'm assuming that's what — like that's what it sounded like to me, because I didn't really get to see it, but it sounded pretty, you know, it's a lot like something hitting something. So. It was just the sound of it.

[39] Later, the Crown asked whether there was a light on when the alleged aggravated assault occurred, and Ms. Aranda stated:

> A Not really, no. Not until after she came to after he did that to her.
> Q Okay.
> A And not 'til after he cracked her head open. …

[40] The only evidence that is admissible here is that Ms. Aranda saw that Mr. McLaughlin had a gun and heard a crack. Her belief that Mr. McLaughlin hit Ms. Cachene with the gun is not admissible.

[41] Thus, the difficulty is that the Crown is seeking to admit as evidence at trial Ms. Aranda's speculations and assumptions about what occurred. The evidence is unreliable because it should not be admitted at all.

[42] There is the possibility of providing an instruction to the jury on this part of Ms. Aranda's evidence and alerting it that it should only take into consideration what she observed and not what she believed occurred.

[43] However, this evidence is about one of the most serious charges against Mr. McLaughlin. It is also an essential element to Ms. Aranda's conclusions about why Mr. McLaughlin would not allow her and Ms. Cachene to leave. It is central to the

charges and central to Ms. Aranda's testimony. I do not believe that an instruction to the jury about the use they can make of Ms. Aranda's statement would be sufficient to counteract the unfairness to Mr. McLaughlin.

[44] I have an additional concern. Mr. McLaughlin's counsel had not received all the available disclosure before the commencement of the preliminary inquiry, and this has an impact on fairness as well. The lack of disclosure is through no fault of the Crown or defence. Mr. McLaughlin had several counsel by the time counsel who was acting for him on the preliminary inquiry was retained and his lawyer had been recently retained. When the lawyer asked for the disclosure, the Crown provided it. However, because the lawyer lives in British Columbia, it was sent by courier and took a week to arrive. By then, Mr. McLaughlin's counsel had left to come to Whitehorse for the preliminary inquiry.

[45] At the beginning of the preliminary inquiry, Mr. McLaughlin's counsel stated:

> I took over conduct of this matter only a few weeks ago, and unfortunately, the disclosure package that was sent by the Crown did not reach me in time, and so all I was able to be furnished was a small — the police narrative and the statement of the witness that you're going to hear today. So for obvious reasons, I'm not in a position that I can effectively deal with the other witnesses that were otherwise going to be called without involving a further adjournment or simply stumbling along in a discovery, and I did not want to tie the Court up in that fashion.
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> Had I been able to schedule this preliminary inquiry, it would've been much longer than one day.
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> So in the circumstances, in order to save this and keep the *Jordan* date on line, I've got instructions from my client to indicate to the Court that we're prepared to consent to committal at the conclusion of this preliminary inquiry …

[46] The issue of whether unfairness arises when a defendant receives information after the preliminary inquiry that they could have used in cross-examination has been considered by the courts.

[47] In *R v Barembruch*, [1997] BCJ No 2029 (QL), ("*Barembruch*") the British Columbia Court of Appeal heard an appeal in which the Crown had not provided information it had to the defence before the preliminary inquiry. The Court of Appeal found that the Crown had not done anything wrong but determined that the information:

> [18] … was such as could have led to telling cross-examination of [the witness] on the issue of credibility which was the primary issue before the court. That was denied the appellant.

[48] The Court of Appeal found, in that instance, that without the information, the accused did not have a fair trial.

[49] The Crown submits that unfairness does not arise here because Mr. McLaughlin gave instructions to his lawyer to proceed with the preliminary inquiry even though he did not have full disclosure. Counsel could have applied for an adjournment but did not. As that was his choice, unfairness does not arise.

[50] This argument does not take into account the conundrum Mr. McLaughlin and his lawyer were facing. Mr. McLaughlin was charged in August 2019. His preliminary inquiry was set on April 1, 2020 but was then adjourned and set again to November 25, 2020. Given the delays involved, Mr. McLaughlin's lawyer pressed on with the preliminary inquiry.

[51] The fact that he did is fortuitous, as it has taken one and a half more years to get from the preliminary inquiry to trial. Mr. McLaughlin should not be penalized because his counsel took the issue of delay seriously.

[52] This does not end the matter, however. In this case, Mr. McLaughlin's counsel had Ms. Aranda's statement and therefore had a basis upon which to cross-examine her. I must therefore find that having other disclosure would have had an impact on the cross-examination of Ms. Aranda in order to conclude that it would be unfair to admit Ms. Aranda's testimony into evidence at trial.

[53] In *Barembruch*, the importance of the information was evident. Here, it is not as clear that the lack of disclosure would have had an impact on counsel's ability to cross-examine the witness. However, there are two aspects of disclosure that Mr. McLaughlin identified that could have had an impact on cross-examination.

[54] Three CDs of pictures were part of Crown disclosure and included pictures of the guns seized by RCMP and of a woodpile on Mr. McLaughlin's property. This information was not provided to Mr. McLaughlin's lawyer at the preliminary inquiry and it is these pictures that I conclude would have affected the cross-examination.

[55] In her testimony, Ms. Aranda said that she saw Mr. McLaughlin with a gun and described it as a black double-barreled shotgun. In argument on the application, Mr. McLaughlin stated that he did not own a black double-barreled shotgun. The police seized five guns from Mr. McLaughlin, none of which were, as I understand it, a black double-barreled shotgun. Pictures of the guns were in the disclosure but were not provided to Mr. McLaughlin's lawyer. This evidence was important as it is this that Ms. Aranda says Mr. McLaughlin pointed at her and which Mr. McLaughlin used to hit Ms. Cachene.

[56] Although Mr. McLaughlin was able to tell his lawyer about the guns he did and did not own, pictures of the guns would have provided the lawyer with a clear

understanding of what exactly Mr. McLaughlin owned, how it compared to Ms. Aranda's testimony, and would have assisted in the ability to cross-examine her.

[57] It would, for instance, perhaps have allowed him to box her in fully in regards to her evidence or potentially would have had her admit that she was not as clear as she thought about what she saw.

[58] Similarly, the RCMP took pictures of the scene, including a woodpile. In his cross-examination of her, Mr. McLaughlin's lawyer implied that Ms. Cachene could have fallen and hit her head on the woodpile.

[59] In argument, Mr. McLaughlin pointed out that the picture of the woodpile had blood on it. The picture would have been useful for Mr. McLaughlin to reconstruct the incident. It also could have assisted in cross-examining Ms. Aranda using the photo.

[60] I am mindful that the circumstances in which the Court will decline to admit evidence taken at the preliminary inquiry under s. 715(1) will be rare. However, taken together, the inclusion of evidence that is not otherwise admissible and that is crucial to the Crown's case on aggravated assault, and the lack of disclosure on important issues that were pertinent to Mr. McLaughlin's cross-examination of Ms. Aranda lead me to conclude that it would be unfair to admit Ms. Aranda's evidence in the preliminary inquiry.

[61] The Crown has also sought to admit the evidence from the preliminary inquiry under the principled exception to the hearsay rule, as she is entitled to, given that s. 715 does not provide a complete code for the admission of preliminary inquiry testimony.

[62] The analysis of admission under the principled exception to the hearsay rule is much the same as that under s. 715. To the extent that the analyses differ, I do not

believe that, having found it to be unfair to Mr. McLaughlin to admit the evidence under s. 715, it is then open for me to determine that it should be admissible under another test.

[63] I therefore dismiss the Crown's application.

[64] I would like to thank Crown counsel for their very thorough and fair submissions on this difficult issue.

[65] MS. WHYTE: Thank you, Your Honour.

[66] At this point then, I've been thinking through what the proper procedural step is, and I think because this was a pre-trial application, I think the step is — as I mentioned in my submissions — that I would call no evidence and invite the Court to dismiss the charges against Mr. McLaughlin.

[67] THE COURT: All right.

[68] Mr. McLaughlin, I am dismissing the charges against you.

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WENCKEBACH J.