SUPREME COURT OF YUKON

Citation: *R v Silverfox*, 2022 YKSC 5

Date: 20220202
S.C. No. 20-01513
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

RESPONDENT

AND

CHARABELLE SILVERFOX

APPLICANT

No information, evidence, submission or part of the Judge's decision with respect to this application that is before the Court, that are in relation to the factual allegations against Charabelle Silverfox and Lynzee Silverfox, shall be published in any document or broadcast or transmitted in any way before such time as the evidentiary part of the trial of the two accused starts. <u>This publication ban has lapsed.</u>

Publication of evidence taken at the preliminary inquiry is prohibited by court order pursuant to s. 539(1) of the *Criminal Code*. <u>This publication ban is no longer in effect.</u>

Before Chief Justice S.M. Duncan

Counsel for the Respondent — Leo Lane and William McDiarmid

Counsel for the Applicant, Charabelle Silverfox — Jennifer Cunningham

REASONS FOR DECISION
(Application for Disclosure)

Introduction

[1] This is an application under s. 7 of the *Canadian Charter of Rights and Freedoms Part 1 of the Constitution Act, 1982* (the "*Charter*") by the one of the accused, Charabelle Silverfox (the "Applicant"), for further disclosure of police occurrence reports relating to a proposed Crown witness, [redacted].

[2] The Applicant is jointly charged with Lynzee Silverfox with first-degree murder, forcible confinement, and indignity to human remains in relation to the death of Derek Edwards in Pelly Crossing on December 13, 2017.

[3] The Crown has 85 occurrence reports about [redacted]'s involvement with police from 2004 to 2021. The Crown has disclosed 14 occurrence report summaries to the defence. The Crown maintains the remaining summaries and reports are clearly irrelevant for various stated reasons.

[4] The Applicant seeks judicial review of the Crown's decision not to disclose the additional occurrence report summaries in the Crown's possession on the basis that the Crown has not shown them to be clearly irrelevant.

Background

[5] [Redacted] provided a statement to the police on February 22, 2018, about a conversation she had with the Applicant when they were both in custody at Whitehorse Correctional Centre ("WCC"). She also testified at the preliminary inquiry on December 8, 2020, about this conversation.

[6] She provided the statement while she was still in custody at WCC. The applicant calls her a “jailhouse informant” and says as a result special considerations apply to her testimony.

[7] [Redacted] is related to the Applicant and the deceased. Both are cousins to her. She said in her statement to police the deceased was a like a brother to her as they were close in age. She described in that same statement her relationship to the Applicant as “pretty much her big sister.”

[8] The Crown says the reasons they have provided of why the 71 occurrence report summaries are being withheld, combined with the brief descriptions of the occurrence reports, show their clear irrelevance which has satisfied their legal obligation to disclose. The clearly irrelevant occurrence reports were described as those in which:

a. [redacted] was a victim, complainant, or witness in a matter where no one directly connected to this matter is involved;

b. [redacted] was accused of or charged with an offence not related to dishonesty, perjury, or obstruction of justice and not involving anyone directly connected to this matter;

c. [redacted] or a third party at [redacted]’s request were the subject of a wellness check; and

d. [redacted] disclosed information to the police that constitutes grounds for charges, but did not wish to pursue charges in court.

[9] The Crown explained that the occurrence report summaries were disclosed if the occurrence:

a. suggested [redacted] misled police;

b. mentioned the accused or anyone with the same surname; or

c. mentioned the victim or Vance Cardinal, a key Crown witness.

[10] The Applicant seeks the information in the occurrence summaries because they may be relevant to the credibility and reliability of the witness in three ways:

a. they may disclose discreditable conduct by [redacted] that could affect the weight given to her evidence;

b. they may reveal that [redacted] has previously made false reports or provided misleading information to the authorities; or

c. they may shed light on the relationship between the witness and the accused, influencing whether or not the jury finds the witness has a motive to fabricate their evidence.

[11] In addition, the defence seeks anything that may be relevant to the potential for benefits or promises made to [redacted] between the time of her statement up to the trial of this matter. The fact that she provided the statement while in custody may have given her a motive to lie. The defence says all of this information is necessary to make full answer and defence.

[12] At the suggestion of defence counsel and my request, the Crown produced to me the summaries of all the occurrence reports, disclosed and undisclosed, for my review of the Crown's relevance assessment in this context (*R v Chaplin*, [1995] 1 SCR 727 ("*Chaplin*") at para. 25).

Issue

[13] Has the Crown met its burden of showing the withheld occurrence report summaries are clearly irrelevant to this matter? Has the appropriate balance been

struck between providing the Applicant with the necessary information to make full answer and defence, and not placing too onerous a burden on police and the Crown, bearing in mind the privacy rights of third parties?

Law

[14] The starting point for Crown disclosure legal obligations is *R v Stinchcombe*, [1991] 3 SCR 326 ("*Stinchcombe*"). The Supreme Court of Canada imposed a duty on the Crown to disclose all relevant, non-privileged information in its possession or control, whether that information is inculpatory or exculpatory. The duty is ongoing throughout the trial process.

[15] The purpose of disclosure is to protect the constitutional right of the accused to know the case they have to meet and to make full answer and defence. This right "will be impaired where there is a reasonable possibility that undisclosed information could have been [reasonably] used by the accused to meet the case for the Crown, to advance a defence or to otherwise make a decision which could have affected the conduct of the defence" such as, for example, whether to call evidence (*R v Pascal*, 2020 ONCA 287 at para. 102). Relevance is determined in relation to its use by defence.

[16] The Crown must err on the side of inclusion, but it need not produce what is clearly irrelevant (*Stinchcombe* at 339). The onus is on the Crown to justify non-disclosure. In other words, the Crown must show there is no reasonable possibility that the information could be of any use to the accused at trial. The court must also keep in mind that the defence knows its case better than the Crown (*R v Dixon*, [1998] 1 SCR

244 ("*Dixon*") at para. 28) and something that may seem irrelevant to the Crown could have significance to the defence.

[17] Witnesses who testify in a criminal trial may be subject to cross-examination on matters that affect their credibility (*R v Pickton,* 2007 BCSC 718 ("*Pickton*") at para. 16). This includes probing the character of the witness, which can be done through information about their record of criminal convictions as well as any misconduct or discreditable behaviour that has not been subject of a conviction or even a charge (*Pickton* at para. 22; see also *R v Miller* (1998), 116 OAC 331 ("*Miller*"); *R v Cullen* (1989), 36 OAC 195; *R v Davison, DeRosie and MacArthur* (1975), 6 OR (2d) 103 (CA); *R v Bottineau*, [2005] 32 CR (6th) 70 (Ont Sup Ct); *R v Tessier*, [1997] BCJ No 2890 (SC)). The Supreme Court of Canada has held that "occurrence reports which raise legitimate questions about the credibility of the complainant or a witness, or some other issue at trial, will be treated as relevant" (*R v Quesnelle*, 2014 SCC 46 ("*Quesnelle*") at para. 17).

[18] The Crown's disclosure obligations are not dependent upon the admissibility of the information in question at trial. Cross-examination at trial is subject to the trial judge's discretion and is limited within the bounds of relevance and propriety (*Miller* at para. 24). However, as noted in *R v Barbosa* (1994), 92 CCC (3d) 131 at 140 (Ont. G.D.):

> Frequently, information which is apparently, or as a general rule, inadmissible, may either assist the defence with pre-trial inquiries in terms of locating witnesses or preparing witnesses or may become admissible evidence depending upon the advancement of a particular defence or defences…

[19] Thus as noted by the court in *Pickton* at para. 15:

> … while the parameters of cross-examination are of assistance in determining relevance, they cannot be expected to define it for the purposes of disclosure. … The threshold for relevance is much lower.

[20] A person in custody who testifies about an admission made by another person in custody must have their reliability assessed carefully. In the *Report of the Kaufman Commission on Proceedings involving Guy Paul Morin*, the Honourable Fred Kaufman, former judge of the Quebec Court of Appeal wrote "in-custody confessions are often easy to allege and difficult, if not impossible, to disprove." (*The Inquiry Regarding Thomas Sophonow, Appendix F: Manitoba Guidelines Respecting the Use of Jailhouse Informants* (Winnipeg: Manitoba Justice, 2001) at 194). The *Interim In-Custody Informer Policy* in Appendix F states it is immaterial whether the witness seeks a benefit from the Crown or not (p 195). The Supreme Court of Canada in *R v Brooks,* 2000 SCC 11 at 286, described the factors that necessitate caution in receiving evidence from in-custody informers, often referred to as jailhouse informants:

> ... the jailhouse informant is already in the power of the state, is looking to better his or her situation in a jailhouse environment where bargaining power is otherwise hard to come by, and will often have a history of criminality. …

[21] Often police occurrence reports contain personal information disclosed to police by complainants or obtained by police in various ways about other third parties involved in the occurrence. That personal information can include: age, family status, information about health, employment or housing, personal conflicts or relationship details, and previous involvement with the criminal justice system. There is a reasonable expectation of privacy by third parties in police occurrence reports (*Quesnelle* at

para. 44). The Crown, and the court, if the matter reaches that stage, must balance the privacy interests of complainants and witnesses against ensuring necessary disclosure to make full answer and defence. Normally this is done by way of redaction of such personal information before disclosure.

[22] A further factor to be balanced in the consideration of disclosure is the efficient administration of justice. Exhaustive disclosure proceedings may create unacceptable increases in the length and complexity of criminal trials (*Dixon* at para. 34).

[23] The Crown's determination of whether certain information is clearly irrelevant is subject to review by a judge (*Stinchcombe* at 340).

Analysis

[24] The Crown's response to the defence disclosure request in this case does not address the relevance of occurrence reports showing discreditable conduct. The Crown appears to have modified their determination of relevance by whether the occurrence involves anyone directly connected to the homicide before the Court, or whether it related to dishonesty, perjury, or obstruction of justice. As I noted in an earlier disclosure application in this case (2021 YKSC 58, unreported) discreditable conduct in the form of an allegation of misconduct in a police occurrence report may not be clearly irrelevant as it may be used to affect the credibility or reliability of the witness. Not all allegations of misconduct are potentially relevant, however. The basis of each allegation of misconduct, the context, and the degree of reliability of the allegation must be assessed before a determination of relevance is made.

[25] Criminal convictions can affect the credibility and reliability of a witness. As noted in *Miller* at para. 21, there is a "well-established principle that an ordinary witness may

be cross-examined with respect to discreditable conduct and associations, unrelated to the subject-matter of his testimony, as a ground for disbelieving his evidence (*Phipson on Evidence*, 11th ed. (1970), at p. 654)". Section 12 of the *Canada Evidence Act,* R.S.C., 1985, c. C-5, permits the questioning of a witness as to whether they have been convicted of any offence. Conviction of a criminal offence constitutes discreditable conduct and can be used for credibility determinations. The scope of the right to cross-examine on facts underlying the conviction is within the discretion of the trial judge, but this is a different question than disclosure. The facts in an occurrence report related to an offence for which the witness was convicted are not clearly irrelevant and should be disclosed.

[26] While [redacted] is a witness for the Crown, she is not a key witness and her testimony is primarily about one short conversation where a potentially inculpatory statement was made by the Applicant. There is no suggestion or evidence in the material of her seeking benefits or favours, or of any deals or arrangements made between her and the Crown. However, as noted in the *Interim In-Custody Informer Policy*, this is immaterial. The court in *Pickton* explained this further by saying that even if there have been no deals made by prosecutors or police with the witness, it does not mean that the witness may not hope to get a benefit or at least may have her own view of the matter, which would be relevant to possible bias in favour of the Crown (paras. 24-25). It is expected that the reliability and credibility of this witness will be carefully assessed by both Crown and defence.

[27] On review of the withheld occurrence report summaries, applying the law as set out above, I have concluded the eight additional occurrence report summaries set out

below should be disclosed as the Crown has not met its onus to show they are clearly irrelevant. These occurrence summaries are of incidents resulting in a conviction, thus constituting discreditable conduct, or of possibly misleading reports to police.

#21 – 2020/07/19 – [redacted] convicted of assault of individual at Selkirk Centre Store;

#36 – 2019/09/18 – [redacted] potential witness along with several others reporting theft of property – alleged stolen property not found at residence reported;

#54 – 2017/08/20 – [redacted] convicted of impaired driving;

#61 – 2017/05/31 – [redacted] failed to attend WCC for intermittent sentence; failed to comply with warrant; convicted of being unlawfully at large under s. 145;

#69 – 2016/10/12 – [redacted] convicted of impaired driving;

#73 – 2016/04/17 – [redacted] reported disturbance; arrested for failure to comply with condition of no alcohol because intoxicated;

#81 – 2010/02/05 – [redacted] convicted of assault; and

#82 – 2009/07/10 – [redacted] victim of assault – said she only reported because mom wanted her to; does not want charges and will not go to court.

[28] The occurrence report summaries listed above should be disclosed to the defence, with the usual precautions and practices to be undertaken by the Crown to ensure third party privacy interests are protected.

[29] The remainder of the withheld reports are clearly irrelevant. The brief summaries provided by the Crown set out for the most part why each of them is clearly irrelevant. Attached as Appendix A is a list of each withheld report and a brief explanation of why it is clearly irrelevant in my view. Those reasons include absence of misconduct by [redacted] in the occurrence report; lack of substantiation of the allegation of misconduct by [redacted]; the nature of the occurrence; validated report made by [redacted]; and administrative files.

_____
DUNCAN C.J.

Appendix A

[redacted]