SUPREME COURT OF YUKON

Citation: *R v Murphy*, 2015 YKSC 50

Date: 20151106
S.C. No. 08-01518A
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And

ALICIA ANN MURPHY

Applicant

A publication ban pursuant to ss. 645(5) and 648(1) of the *Criminal Code* has lapsed.

Before Mr. Justice L.F. Gower

Appearances:

Noel Sinclair and Paul Battin	Counsel for the Respondent
Jennifer Cunningham and Michael Dineen	Counsel for the Applicant

RULING
(Application for Adjournment)

INTRODUCTION

[1] The accused is charged with the second-degree murder of Evangeline Billy on or about June 22, 2008. She was convicted of this offence following her first trial in 2009. However, that conviction was overturned by the Court of Appeal in 2014, and a new trial

was directed. The accused has new counsel representing her on the retrial, namely Jennie Cunningham and Michael Dineen.

[2] The retrial was originally supposed to take place June 8, 2015 to July 3, 2015, but was adjourned on consent. This was principally because of recent disclosure received by the defence indicating that one of the key Crown witnesses, Tanya Murphy, a sister of the accused, may have had an *animus* towards the accused. Tanya Murphy is one of two witnesses who allege that the accused confessed the murder to them.

[3] The new trial dates were to have been November 2 to 27, 2015. On Friday, October 16, 2015, the accused applied for an adjournment mainly for two reasons. First, defence counsel requires more time to attempt to interview a potential alibi witness, for whom disclosure was only provided relatively recently, i.e. in early September and again on September 30, 2015. As of the date of the adjournment application, the Crown was refusing to provide a telephone number for this witness to the defence. The second principal reason for the adjournment arises from the retention by defence counsel of an expert forensic pathologist to provide an opinion on the wounds to the head of the deceased. I am informed that the expert originally promised to provide this opinion in August 2015, but that the final oral opinion was only provided on October 7, 2015. As a result of this opinion, defence counsel now wants to re-examine a body of evidence regarding a potential third party whom the defence suspects may have committed the murder.

[4] Because time was of the essence when the application was made, after deliberating over the weekend, on Monday, October 19, 2015, I granted the adjournment with reasons to follow. These are those reasons.

GROUNDS

1. Alibi Witness

[5] The first ground for the adjournment relates to the potential alibi witness, Tanya Doussept. On October 19, 2015, I made a separate ruling that the Crown is required to provide contact information for Ms. Doussept. That ruling is cited as 2015 YKSC 49, and the following paragraphs duplicate some of what I said there.

[6] The accused can account for her whereabouts for most of the evening of June 21, 2008 and the early morning hours of June 22nd. However, there is a period of time of approximately two to two-and-half hours which was unaccounted for during the first trial. For a portion of that time, about one hour to an hour-and-a-half, the accused testified at the first trial that she was at the apartment of a drug dealer nicknamed "Chukka", who has since committed suicide. She further testified that she had a brief encounter with a woman by the name of Tanya, who was standing by the door as the accused entered the apartment. It is now common ground that the woman the accused was referring to is Tanya Doussept. However, she was not called as a witness at the first trial.

[7] According to defence counsel, the accused's instructions in preparation for the retrial are that the brief encounter with Ms. Doussept occurred the night before the death of Evangeline Billy. On the actual night of the alleged murder, the accused is now expected to testify that she was once again in Chukka's apartment in the presence of Tanya Doussept, however sitting with her at a table having a beer for a more extended period of time.

[8] Defence counsel has retained a private investigator in preparation for the retrial. In April 2015, the private investigator discovered that Tanya Doussept resides in

Parksville, British Columbia, which is on Vancouver Island. The investigator travelled to that community and was able to meet with Ms. Doussept's mother, Leilani Houkes. However, he was not successful in arranging an interview with Ms. Doussept.

[9] On July 21, 2015, RCMP Constable Thur went to Parksville and obtained a statement from Ms. Doussept. In that statement she indicated that she learned through her mother that the private investigator had said that Ms. Doussept and the accused had been sitting together at Chukka's apartment having a beer, although Ms. Doussept herself said that she had no memory of that, despite being shown a photograph of the accused. That statement was not disclosed to the defence until early September 2015.

[10] Following Constable Thur's return to Whitehorse, Ms. Doussept called him on September 10, 2015 and spoke of a "flashback". She said that she was "pretty sure" that she does "somewhat" remember seeing "that girl" sitting at a table at Chukka's place. That information was not disclosed to the defence until September 30, 2015.

[11] Constable Thur was only able to obtain a phone number for Ms. Doussept from her partner, John Williams. Mr. Williams owns a cell phone, but did not want the police to give out his phone number and did not want anything to do with the investigation. That is the reason why the Crown initially refused to disclose the contact information for Ms. Doussept.

[12] Defence counsel submitted that even if Ms. Doussept was only present in Chukka's apartment for a brief period of time, she is still an important witness as she can potentially corroborate a portion of the accused's alibi. Counsel further submitted that, as of the date of the adjournment application, she still did not have contact information for Ms. Doussept and accordingly would need more time to attempt to

interview her, and possibly to follow-up on any additional information Ms. Doussept is able to provide.

[13] Crown counsel opposed the adjournment on this ground for two reasons. First, he submitted that the disclosure thus far indicates that Ms. Doussept is unlikely to be a cooperative witness for the defence, and therefore the likelihood of the defence team obtaining an interview is remote. Second, Crown counsel submitted that Ms. Doussept's evidence is "peripheral" at best, and that in any event, the Crown has subpoenaed her for the retrial so that she would be available to the defence. The Crown also complained that he had only just received notice the day before the adjournment application that the accused would be changing her testimony about her interactions with Ms. Doussept.

[14] In my view, this is a legitimate ground for an adjournment. The charge of second-degree murder is one of the most serious in the *Criminal Code*, and the accused is entitled to make full answer and defence. I am also concerned about the late disclosure of this evidence to the defence. Were I to deny the adjournment and force the accused to proceed with a month-long jury trial, in the event of another conviction, I expect that this would be the first ground of appeal, and that the appeal would have a reasonable chance of success.

2. Forensic Pathologist

[15] Some background here may help to put the timing of this issue into context. Jennie Cunningham was retained through the Yukon legal aid program to represent the accused for her appeal. The successful appeal decision was released on June 11, 2014. Ms. Cunningham was further retained through legal aid to conduct a bail hearing for the accused in June 2014, which was also successful. However, legal aid then

refused to retain Ms. Cunningham for the purposes of the retrial. Thus, Ms. Cunningham brought a *Rowbotham* application in November 2014, before me, and was successful in obtaining a conditional stay of the proceedings pending the necessary funding being obtained to pay for Ms. Cunningham's representation of the accused. The Crown then chose to appeal that decision to the Court of Appeal of Yukon. On May 6, 2015, the Court of Appeal upheld my *Rowbotham* order.

[16] As a result of these various delays, Ms. Cunningham informs me that she had no contract to retain experts until March 13, 2015. She made her initial contact with her expert forensic pathologist, Dr. Butt, on April 14, 2015 and he indicated that he would be providing his opinion in August. However, Dr. Butt did not provide a final, albeit oral, opinion to defence counsel until October 7, 2015.

[17] Dr. Butt's opinion is that the diagonal wounds on Evangeline Billy's scalp were likely caused by repeated motions with a sharp object, such as a knife, machete, or broken bottle. This is contrary to the Crown's evidence at the first trial, where the Crown's expert forensic pathologist, Dr. Lee, testified that the wounds were likely caused by blunt force trauma resulting from a rock being smashed on Ms. Billy's head. I understand there were rocks found in the vicinity of the crime scene, which was on the west bank of the Yukon River in Whitehorse, not far from the '98 Hotel.

[18] Defence counsel submits that Dr. Butt's evidence is significant because it points to a third party suspect, Leah Isaac. As I understand the disclosure, Ms. Isaac, now deceased, was a large bodied First Nations woman from Pelly Crossing, Yukon, who was a regular patron of the '98 Hotel, in Whitehorse, where much of the activity of the various witnesses was centred prior to Ms. Billy's death. Ms. Isaac was also known to

have a temper, as well as being in the habit of getting into fights and carrying around scissors. Some of the disclosure suggests that shortly after Ms. Billy's body was found, Ms. Isaac was heard to have said that she hurt somebody down by the river. She was not called as a witness at the first trial.

[19] I am informed that Ms. Isaac provided DNA samples and was thoroughly investigated by the RCMP immediately after the murder. Accordingly, there is a significant body of evidence including statements from Ms. Isaac and other witnesses who overheard her say different things at different times, as well as evidence of her whereabouts on the night of the murder.

[20] Before receiving Dr. Butt's opinion, the defence had looked at this evidence, but made a tactical decision not to pursue it, presumably because it did not appear to be sufficiently strong to justify the time and effort. However, defence counsel now wants an opportunity to reassess that evidence and make a determination about whether they will apply to have it admitted at the retrial.

[21] The Crown opposed the adjournment on this ground for a number of reasons. First, Crown counsel said that he only received notice from Ms. Cunningham the day before the adjournment application that she intended to reopen the third party suspect issue. Further, this was despite the fact that Crown counsel had asked the defence a number of times during pre-trial conferences whether they intended to pursue this issue. Second, counsel complained that there was no evidentiary basis to support Ms. Cunningham's submissions regarding Dr. Butt, which made it difficult for the Crown to properly respond. Third, Crown counsel pointed to the disclosure resulting from the RCMP investigation of Ms. Isaac and suggested that her whereabouts the night of June

21, 2008, and into the following morning have been largely accounted for. Fourth, if the defence ultimately decides to pursue this issue, the Crown expects that it will face another "barrage" of disclosure requests from the defence, which could lead to a further delay of the trial.

[22] I am sympathetic with the Crown's concerns regarding this ground for an adjournment. However, at the end of the day, I nevertheless accept this as a legitimate ground.

[23] It seems to me that defence counsel have acted in a timely manner in attempting to obtain a second forensic opinion on the wounds to Ms. Billy's head. There were admittedly some delays in the procuring of funding for defence counsel, but those were largely due to matters beyond the control of the defence. Further, the delay by Dr. Butt in not providing his opinion until October 7th was also beyond the control of the defence. Finally, the application for the adjournment was brought on just a little over a week after Ms. Cunningham obtained this final oral opinion.

[24] I am similarly sympathetic to the Crown's concerns regarding the lack of evidence to support this ground for adjournment. I note that *R. v. S.L.J.* (1994), 134 N.S.R. (2d) 24 (C.A.), held that the grounds for an adjournment "must ordinarily be established by affidavit". Accordingly, I have cautioned Ms. Cunningham that this Court will expect greater legal "rigour" in any further pre-trial applications in this matter. That said, it must be remembered that, as of the date of the adjournment application, Dr. Butt had yet to provide his written opinion to defence counsel. Thus, in the circumstances, I feel it is appropriate to rely on the good-faith submissions of Ms. Cunningham, as an officer of the court, in support of this ground.

[25] As for the potential strength of the third-party suspect evidence regarding Leah Isaac, while she may have been exonerated to the satisfaction of the RCMP, as I understand the disclosure thus far, it is nevertheless possible that Ms. Isaac had an opportunity to be in Ms. Billy's presence just prior to her death. Therefore, in accordance with the accused's entitlement to make full answer and defence, she should be given a reasonable opportunity to explore that possibility.

[26] Finally, as for the Crown's concern regarding the expected "barrage" of further disclosure requests on Leah Isaac, that is simply speculative at this stage. We will have to cross that bridge, if we get to it.

3. New Expert on Substance Abuse and Memory

[27] Ms. Cunningham informed me that, in early October 2015, she retained Dr. Timothy Moore to provide an expert opinion on the potential effects of alcohol and crack cocaine abuse on memory. Counsel feels this information may be relevant to the evidence of both Rae Lynne Gartner, who was admittedly under the influence of such substances when the accused allegedly confessed to her, and Tanya Doussept, who was also a periodic substance abuser. However, Ms. Cunningham candidly indicated that she was not sure if she would be calling this witness and that she only thought of this issue "recently".

[28] Crown counsel opposed this ground of adjournment for four reasons. First, it is not one of the enumerated grounds in the Notice of Application filed by Ms. Cunningham on October 13, 2015. Second, counsel said he did not receive notice of this issue from Ms. Cunningham until the day before the adjournment application. Third,

the Crown says this may not even be properly admissible expert evidence. Lastly, Ms. Cunningham has not been diligent in pursuing this issue.

[29] It is trite law that a party seeking an adjournment in order to procure a witness must be guilty of no laches or neglect in omitting to endeavour to procure that attendance earlier. This is well summarized by the Nova Scotia Court of Appeal in *R. v. C.S.P.* (1995), 141 N.S.R. (2d) 207, where the Court stated, at para. 14:

> 14 With respect to adjournments for the purpose of making witnesses available, this court has followed *Darville v. R.* (1956), 25 C.R. 1 (S.C.C.). See *Jackson v. R.* (1994), 134 N.S.R. (2d) 24. Cartwright J. at p. 5 set out the conditions that:
>
> ...must ordinarily be established by affidavit in order to entitle a party to an adjournment on the ground of the absence of witnesses, these being as follows:
>
> (a) that the absent witnesses are material witnesses in the case;
>
> (b) that the party applying has been guilty of no laches or neglect in omitting to endeavour to procure the attendance of these witnesses;
>
> (c) that there is a reasonable expectation that the witnesses can be procured at the future time to which it is sought to put off the trial.

[30] I agree with the Crown that the accused, through her counsel, can be said to have been guilty of laches or neglect in omitting to obtain this evidence earlier. I am also not convinced that this evidence is necessary to the accused's ability to make full answer and defence. Accordingly, I give no effect to this ground for adjournment, either alone or in conjunction with the other grounds.

4. Recovery of Video Evidence

[31] The Crown has disclosed to the defence a DVD from a surveillance camera outside the 202 Motor Inn. Counsel informed me that this shows the comings and

goings of the various patrons of the tavern in the 202 Motor Inn (not far from the '98 Hotel) during the night of June 21, 2008 and the early morning hours of June 22nd. Defence counsel concedes that this disclosure was part of the initial disclosure package provided to the defence, but that she and her client only discovered it in September 2015 that there is an unplayable gap in the DVD. Ms. Cunningham informed me that she is currently having an expert review the DVD to see if the missing portion can be digitally recovered. The potential significance of this evidence is that it may show Leah Isaac and Evangeline Billy in each other's company sometime after 11 PM, when Ms. Billy was last seen. Ms. Cunningham candidly conceded that she could have learned of this gap earlier, but for unexplained reasons did not do so.

[32] The Crown opposed this ground of adjournment for reasons similar to those regarding the memory expert. First, this was not an enumerated ground in Ms. Cunningham's Notice of Application, and the Crown only received notice of the issue the day before the adjournment hearing. Second, the information that the DVD was defective or damaged has been known to the accused for a long time and she has not been diligent in addressing the issue.

[33] I agree with the Crown here. The accused, through her counsel, is guilty of laches or neglect in omitting to obtain this evidence earlier, and in the present circumstances, this evidence cannot be said to be necessary to the accused's ability to make full answer and defence. Accordingly, I would not give effect to this ground for the adjournment either singly or together with the other grounds.

5. Outstanding Disclosure

[34] The final ground for the adjournment was that defence counsel was still awaiting additional disclosure from the Crown on the two key witnesses, Rae Lynne Gartner and Tanya Murphy.

[35] With respect to the former, this is a request for materials which may underlie an occurrence report on Rae Lynne Gartner about an incident on July 6, 2015. Indeed, that was the subject of a separate application before me also made on the day of the adjournment hearing. I ruled that if such materials exist, they must be disclosed. My decision is cited as 2015 YKSC 49. Had I not acceded to the first two grounds for adjournment, I expect this disclosure, if it exists, could have been provided in advance of the trial without any impairment of the right of the accused to make full answer and defence.

[36] With respect to Tanya Murphy, defence counsel submitted that she has recently learned of the existence of yet another occurrence report for this witness. On the day of the adjournment hearing, counsel provided a letter to the Crown requesting production of it. As of the date of the hearing, the Crown had not yet determined whether it would produce the document. None of this information was in the form of affidavit evidence, but was based solely on submissions from Ms. Cunningham. In any event, it is premature to say whether this is a legitimate ground for adjournment, since the Crown has not yet refused to produce the report.

[37] I acknowledge that Ms. Cunningham initially wrote to the Crown on July 7, 2014 seeking any information in the possession of the Crown or the RCMP about Tanya Murphy or Rae Lynne Gartner that could relate to their credibility or reliability. Since

then, as I understand it, there have been dozens of letters and emails exchanged between the Crown and defence counsel regarding ongoing disclosure.

[38] In general terms, the Crown implicitly opposed this ground of adjournment on the basis that there is a public interest in the orderly and expeditious administration of justice: see *R. v. J.E.B.* (1989), 94 N.S.R. (2d) 312 (C.A.); and *R. v. Richard and Sassano*, (1992), 55 O.A.C. 43. Further, the Crown suggested that Ms. Cunningham's requests for additional disclosure are seemingly never-ending and increasingly unmanageable. The Crown submitted that the accused is not entitled to the fairest of all possible trials, but rather a trial which is fundamentally fair: *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para.194.

[39] It must also be remembered that the accused is presently in custody awaiting her retrial.

[40] As is evident from my other decisions, this case has had its share of disclosure-related disputes. It is clear that the Crown has in the past failed to disclose material related to Crown witnesses that should properly have been disclosed under its *Stinchcombe* first party disclosure obligations. However, I am of the view that the additional material sought by defence counsel could be disclosed and digested in advance of the set trial date without compromising the accused's fair trial or necessitating an adjournment. Had the outstanding disclosure for Ms. Gartner and Tanya Murphy described above been the only ground for adjournment, I would not have given effect to it. However, as I have granted the adjournment on the basis of the first two grounds, the point is now moot.

CONCLUSION

[41] The adjournment is granted.

[42] I have provided counsel with alternative dates, but they have asked to put the rescheduling of the trial over to November 6, 2015 to consider their respective positions. I so ordered.

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GOWER J.