SUPREME COURT OF YUKON

Citation: *R v Murphy,* 2015 YKSC 55

Date: 20151119
S.C. No. 08-01518A
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Applicant

And

ALICIA ANN MURPHY

Respondent

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 applicant
Jennifer Cunningham and Michael Dineen	Counsel for the respondent

RULING
(s. 714.4 Application)

INTRODUCTION

[1] This is an application by the Crown for an order permitting a witness to testify by telephone, pursuant to s. 714.4 of the *Criminal Code.* The accused, Alicia Murphy, is charged with the second-degree murder of Evangeline Billy on or about June 22, 2008. The witness is Mr. Mohamed Abdullahi, a Whitehorse taxi driver, who allegedly received three telephone calls from the accused after midnight on June 22, 2008. The timing and circumstances of one of these calls contradicts the anticipated alibi evidence of the

accused. It is also expected that Mr. Abdullahi will testify that the accused was only slightly intoxicated that night, which works against the accused on the issue of the intent required for murder.

[2] Mr. Abdullahi resides in Whitehorse from the spring to the fall each year, but returns to his home city of Mogadishu, Somalia, each winter to spend time with his wife and daughter. Accordingly, he will be unavailable to testify in person during the dates presently being considered for the retrial in January and February 2016.

[3] Defence counsel opposes the application on the basis that Mr. Abdullahi is a significant witness whose reliability is likely to be at issue. The Crown concedes that point. The defence relies upon the common law presumption that the ability to see a witness' face is an important aspect of a fair trial. Accordingly, defence counsel wants Mr. Abdullahi to be physically present and to testify in person.[1]

LAW

[4] Section 714.4 provides:

> The court may receive evidence given by a witness outside Canada by means of technology that permits the parties and the court in Canada to hear and examine the witness, if the court is of the opinion that it would be appropriate, considering all the circumstances including
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> (a) the nature of the witness' anticipated evidence; and
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> (b) any potential prejudice to either of the parties caused by the fact that the witness would not be seen by them.

[1] The Crown applied in the alternative for an order under s. 714.2 of the *Code* permitting the witness to testify by a videoconference link. However, at the hearing, Crown counsel disclosed that there are no such facilities in Mogadishu. The best information available was that there might be such facilities in Nairobi, Kenya, about 1000 km from Mogadishu. However, since that information had not yet been confirmed, the Crown effectively abandoned this aspect of its application.

[5] The law in relation to this application is not in dispute. The court must balance the two concerns of fair treatment of the accused and society's interest in getting at the truth at a trial: *R. v. Li*, 2012 ONCA 291, at para. 46. The common law presumption that an accused ought to be able to see a witness' face, absent compelling circumstances capable of displacing the presumption, was recently dealt with by the Supreme Court of Canada in *R. v. N.S.*, 2012 SCC 72:

> 21 ... The common law, supported by provisions of the *Criminal Code*, R.S.C. 1985, c. C-46, and judicial pronouncements, proceeds on the basis that the ability to see a witness's face is an important feature of a fair trial. While not conclusive, in the absence of negating evidence this common law assumption cannot be disregarded lightly.
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> 22 As a general rule, witnesses in common law criminal courts are required to testify in open court, with their faces visible to counsel, the judge and the jury. Face-to-face confrontation is the norm, although not an independent constitutional right… [T]he record before us has not shown the long-standing assumptions of the common law regarding the importance of a witness's facial expressions to cross-examination and credibility assessment to be unfounded or erroneous.
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> 23 In recent years, Parliament and this Court have confirmed the common law assumption that the accused, the judge and the jury should be able to see the witness as she testifies… Before a witness is permitted to testify by audio link, the *Criminal Code* expressly requires that the judge consider "any potential prejudice to either of the parties caused by the fact that the witness would not be seen by them": ss. 714.3(*d*) and 714.4(*b*). This, too, suggests that not seeing a witness's face during testimony may limit the fairness of a trial.
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> 24 …Non-verbal communication can provide the cross-examiner with valuable insights that may uncover uncertainty or deception, and assist in getting at the truth.
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> …

> 26 Changes in a witness's demeanour can be highly instructive…
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> 27 On the record before us, I conclude that there is a strong connection between the ability to see the face of a witness and a fair trial. Being able to see the face of a witness is not the only -- or indeed perhaps the most important -- factor in cross-examination or accurate credibility assessment. But its importance is too deeply rooted in our criminal justice system to be set aside absent compelling evidence. (my emphasis)

BACKGROUND

[6] The Crown acknowledges that an application under this provision requires a balancing of the right of the accused to make full answer and defence with society's right to have a timely and fair adjudication of this matter on its merits. In particular, the Crown is concerned that if the trial has to be put over until Mr. Abdullahi's returned to Canada, this will contribute to an already serious problem of delay. The offence allegedly occurred in June 2008, over seven years ago, and the Crown says that the further passage of time is likely to have a negative impact on the memories of the various Crown witnesses.

[7] Because the timeliness of the retrial is an issue on this application, some background may be helpful to put the timing into context.

[8] The accused was tried before this Court sitting with a jury between October 13 and 27, 2009. The jury returned a verdict of guilty, but the accused successfully appealed her conviction and, on June 11, 2014, a new trial was ordered. One of the accused's co-counsel, Ms. Cunningham, represented her on the appeal and a subsequent successful bail hearing. However, legal aid declined to authorize Ms. Cunningham to represent the accused for the retrial. Ms. Cunningham applied before

me for a *Rowbotham* order. On November 21, 2014, I released my decision granting a conditional stay of proceedings until the Crown agreed to fund the accused's chosen counsel, Ms. Cunningham. The Crown appealed this decision to the Court of Appeal of Yukon, however the *Rowbotham* order was upheld on May 6, 2015.

[9] The retrial was originally scheduled to take place over four weeks in June 2015. Ms. Cunningham had been writing to the Crown requesting updated disclosure on two key Crown witnesses, Tanya Murphy, the accused's sister, and Rae Lynne Gartner, each of whom claim to have heard the accused confess to the murder of Ms. Billy, since July 2014. Despite these requests, it was not until shortly before the June trial dates that defence counsel received disclosure indicating that Tanya Murphy had a conviction for assaulting the accused with a weapon, and thus an *animus* towards her. Defence counsel was unsatisfied that it had received full disclosure on Tanya Murphy and Ms. Gartner. Accordingly, the retrial was adjourned, without opposition by the Crown, to four weeks in November 2015.

[10] In June 2015, the defence made an application for an order requiring the Crown to disclose specific occurrence reports regarding Tanya Murphy and Ms. Gartner. I granted such an order in July 2015.

[11] Defence counsel was still unsatisfied with the state of the disclosure process leading up to the November 2015 trial dates. As a result, she brought on two further disclosure applications, as well as an application to adjourn the trial. I granted all three applications.[2]

[2] Cited as: 2015 YKSC 48; 2015 YKSC 49; and 2015 YKSC 50.

[12] With respect to the rescheduling of the trial, the trial coordinator provided counsel with dates in January and February 2016, as the earliest possible dates available in the court calendar. These are the dates that are a problem for Mr. Abdullahi.

[13] It is also important to note that the accused is presently in custody. Although she was at one time on judicial interim release on this murder charge, she was re-incarcerated on June 12, 2015, and charged with breaching her recognizance.

[14] The Crown's witness coordinator swore an affidavit stating that Mr. Abdullahi expects to return to Canada during the last week of April 2016. Accordingly, the trial coordinator has indicated that five weeks of trial are available commencing May 24, 2016.[3]

ANALYSIS

[15] Defence counsel emphasizes that the Crown submitted to the jury at the first trial that Mr. Abdullahi's evidence contradicting the accused's alibi was "quite significant and telling". Ms. Cunningham also stresses that the accused's original defence counsel did not cross-examine Mr. Abdullahi on his recollection of the phone call at issue, or on the issue of the state of the accused's intoxication. Accordingly, she expects that rigorous cross-examination of the witness in these areas, especially in relation to known phone records, may well bear some fruit for the defence. I accept this as a legitimate reason for wanting to examine Mr. Abdullahi in person.

[16] I also agree with defence counsel's concerns regarding the potential problems which could arise if the application was to be granted. Any one of these could lead to a mistrial, and yet further delay. First, there is no information before the Court about the

[3] I suggested an extra week be set aside out of an abundance of caution, due to the potential complexity of this matter.

quality of any audio connection that could be established. Thus, a disconnection or poor audio during Mr. Abdullahi's testimony is not inconceivable. Second, Mr. Abdullahi would not be subject to any process from this Court to compel his attendance by telephone in Somalia. I also note that there is an anticipated 12-hour time difference between the two time zones. Thus, the retrial would be significantly interrupted if Mr. Abdullahi simply fails to be present for the telephone connection. Third, defence counsel has indicated that their cross-examination is likely to involve showing the witness documents, such as phone records and statements, which would seemingly be impossible to arrange simply with a telephone connection.

[17] The nature of Mr. Abdullahi's anticipated evidence is significant. It goes to both the accused's alibi and her mental state on this most serious charge of second-degree murder. Both Crown and defence counsel anticipate that the witness' reliability will be at issue. Further, I am satisfied that the potential prejudice to the accused by not being able to see Mr. Abdullahi while he is being examined is not offset by the prospect of further delay if the trial is rescheduled, particularly if it can take place in May and June 2016. I note that Ms. Cunningham has already indicated that these dates are satisfactory to her and her co-counsel, Mr. Dineen. The Crown has yet to confirm whether these dates will work for the Crown witnesses, but I have not heard of any particular anticipated problems, beyond that of Mr. Abdullahi.

CONCLUSION

[18] Because time is of the essence, I dismissed the application on the hearing date of November 13, 2015, with reasons to follow. As the Crown indicated that they were not prepared to go ahead with the trial without Mr. Abdullahi's involvement, the dates in

January and February 2016 were released. These are my reasons for dismissing the application.

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GOWER J.