

SUPREME COURT OF YUKON

Citation: *R v Murphy*, 2015 YKSC 49

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
Jennifer Cunningham and Michael
Dineen

Counsel for the Respondent
Counsel for the Applicant

RULING
(Disclosure Application
re: Rae Lynne Gartner and Tanya Doussept)

[1] The accused is charged with the second-degree murder of Evangeline Billy on or about June 22, 2008. Rae Lynne Gartner is a civilian witness who alleges that the

accused confessed the murder to her. There is very little additional evidence connecting the accused to the murder. Tanya Doussept is a potential alibi witness for the accused.

[2] This is an application for judicial review of the Crown's discretion in refusing to disclose:

- 1) Any information in the possession of the RCMP about occurrence report 2015-828703 in relation to Rae Lynne Gartner, such as: any notes of officers; any VICS video from the police car; or any OCC call.
- 2) Any contact information for Tanya Doussept in the possession of the Crown.

[3] I made an earlier decision on the issue of Crown disclosure on July 8, 2015, cited as 2015 YKSC 31. At paras.6 through 20, I discussed the law relating to the principles governing Crown disclosure. That law continues to apply here.

Rae Lynne Gartner

[4] With respect to the first matter, the Crown has disclosed to the defence an occurrence report about a *Liquor Act* investigation involving Rae Lynne Gartner. The report summary states that on July 6, 2015:

While on patrol, located female walking down Centennial St. No shoes on, stumbling near the middle of the road into traffic. Slurred speech, liquor on breath and unsteady on feet. Rae Lynne Gartner [arrested, cautioned and warned for Liquor Act], and transported to [adult protection unit], to be lodged until sober and able to care for self...

[5] Earlier, on October 20, 2014, the Crown disclosed to the defence an occurrence report for Ms. Gartner describing an investigation for disturbing the peace/causing a disturbance on April 11, 2009. The summary indicates that the RCMP located Ms. Gartner asleep on a couch in a Whitehorse hotel. She was woken up and found to be

intoxicated and was lodged in cells to prevent any further incident. The police did not lay any charges associated with this incident.

[6] Also on October 20, 2014, the Crown disclosed a criminal record for Ms. Gartner which is a 2007 conviction for driving over 80. Defence counsel informs me that the previously disclosed supporting information behind this conviction shows that Ms. Gartner exhibited unusual behaviour in her interaction with the investigating officer on that occasion, ranging from flirting to yelling.

[7] Defence counsel submits that Ms. Gartner's observed behaviour while intoxicated is potentially relevant to her reliability as a witness. She is expected to testify that she heard the accused confess to the murder at a time when Ms. Gartner had consumed substantial amounts of crack cocaine and alcohol. Thus, her observed behaviour on July 6, 2015 may illuminate the effect that alcohol has on her behaviour and her ability to accurately recount events that took place while she was significantly intoxicated. In addition, defence counsel says that there may be evidence in this supporting material that shows how Ms. Gartner was acting and what she was saying during the investigation, which may be relevant to her reliability and credibility.

[8] The Crown submits that any further disclosure with respect to Ms. Gartner in this matter is clearly irrelevant and will not yield any additional information that is necessary for the accused to make full answer and defence. In particular, the Crown submits that the effect of alcohol on one's ability to recollect what took place when intoxicated is not a mystery, but rather that its effects are well-known.

[9] The Crown has not persuaded me that this additional information is clearly irrelevant. Ms. Gartner is a critical Crown witness on a second-degree murder charge. If

there is a recorded 911 call or if there are police officer's notes related to the incident on July 6, 2015, then those may contain further particulars about Ms. Gartner's conduct, which in turn may shed light on her credibility and reliability. Similarly, if there is any video recording, then that should be disclosed for the same reason. It is trite to say that a picture is worth a thousand words.

[10] I am also of the opinion that this is first party disclosure and that the Crown is obliged to make inquiries of the RCMP whether it exists and disclose it if it is relevant. In this regard I rely upon *R v. M.D.*, [2015] O.J. No. 2150 (C.J.), where the Court said, at paras. 9 and 13:

9. The Crown must disclose all non-privileged information in its possession relating to the investigation of an accused to the defence unless that information is clearly irrelevant. Further, once put on notice that other potentially relevant information exists that is in the possession of third party Crown agencies, the Crown is obligated to make inquiries and attempt to obtain those documents. Once in its possession, the Crown is obligated to disclose this information to the defence unless it is clearly irrelevant (i.e. the *Stinchcombe* standard of disclosure). It is only if the Crown is unsuccessful in obtaining the information requested from the third party record holder that the defence must resort to the *O'Connor* procedure...

...

13. ...As was made clear in *McNeil*, Crown counsel has a duty to make inquiries of other Crown agencies or departments when put on notice that records may exist which pertain "to the credibility or reliability of the witnesses in a case"...

Tanya Doussept

[11] 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-a-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 died. 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.

[12] 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 murder. On the actual night of the murder, the accused is now expected to testify that she was once again in Chukka’s apartment in the presence of Tanya Doussept, sitting with her at a table and having a beer for a more extended period of time.

[13] 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.

[14] On July 21, 2015, 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.

[15] 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.

[16] Constable Thur was only able to obtain a cell phone number for Ms. Doussept from her partner, John Williams. Mr. Williams owns the 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.

[17] At the disclosure hearing, defence counsel relied upon two cases as authority for an order to provide the contact information: *R. v. Pickton*, 2005 BCSC 967; and *R. v. Charlery*, 2011 ONSC 2952. Having reviewed those cases, Crown counsel indicated that they would agree to such an order, on the condition that defence counsel would be required to personally interview Ms. Doussept. The concern here was that the private investigator had potentially tainted Ms. Doussept's memory by sharing details of the alleged alibi encounter with Ms. Doussept's mother. The Crown submitted that they wanted to avoid further interference with Ms. Doussept's memory by obliging counsel to personally interview the witness, as was done in the *Pickton* case. At para.16 of that case, Williams J. stated:

In making this order, I rely upon defence representations that counsel will conduct all interviews and will conduct themselves at all times in accordance with their ethical and professional obligations.

[18] Defence counsel opposed the Crown's suggestion, stating that it would unnecessarily complicate their attempts to obtain an interview with Ms. Doussept.

Defence counsel also submitted that the Crown is able to rely upon police officers, such as Constable Thur, to assist in their investigations and Crown counsel are not required to personally interview witnesses. Accordingly, says counsel, the defence should not be held to a higher standard.

[19] While I question the wisdom of the private investigator informing Ms. Doussept's mother of the theory of the defence alibi, I also note that the interview by Constable Thur raises its own concerns. For example, defence counsel questions why Constable Thur chose to ask Ms. Doussept whether she remembered the murder of a "young First Nations girl". This was potentially misleading, says counsel, because of the disappearance and suspected murder of 19-year-old Angel Carlick, the previous year, and also because Evangeline Billy was 28 years old at the time of her death. Further, says defence counsel, there was other information which Constable Thur could have reminded Ms. Doussept about, which might have helped to refresh her memory of her whereabouts the night of June 21, 2008, such as the birthday party of Chukka's roommate at the time, Scott James, and the fact that June 21st was Aboriginal Day.

[20] In the result, I made an order, with reasons to follow, that the contact information be provided, however the order enables either defence counsel or the private investigator to interview Ms. Doussept, should she agree to be interviewed. To address the Crown's concern, I included the following condition:

In complying with this order, Ms. Murphy's private investigator will be acting as agent for Ms. Murphy's legal counsel and will be bound by the same ethical and professional obligations that bind counsel, and any breach of those obligations by the investigator will be deemed to be a

breach by Ms. Murphy's counsel.

GOWER J.