IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *R. v. Buyck*, 2006 YKSC 49 Date: 20060823
Docket No.: T.C. No. 05-00988153
S.C. 05-01514
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

And

ROY KENNETH BUYCK

Before: Mr. Justice L.F. Gower

Appearances:

Jennie Cunningham Counsel for the Accused
Noel Sinclair Counsel for the Crown

RULING

INTRODUCTION

[1] This is an application for a judicial stay of proceedings based upon an alleged breach of the accused's right to disclosure and the consequent impairment of his right to make full answer and defence under s. 7 of the *Charter*. In the alternative, the accused argues that there has been an abuse of process, which should lead to the same remedy.

[2] The accused is charged with four offences alleged to have occurred on December 10, 2005 in Mayo, Yukon: assaulting a peace officer; resisting a peace officer by swinging a shovel; assault with a weapon; and escaping lawful custody. He

elected trial by Supreme Court Judge alone and waived his right to a preliminary inquiry. The trial commenced in Mayo on August 7, 2006. During cross-examination, the investigating officer disclosed the existence of an audio-visual tape of a conversation between the accused and the investigating officer that took place after the date of the alleged offence, while the accused was on judicial interim release. The tape was not preserved by the officer, nor was its existence disclosed to either Crown or defence counsel until the trial. Defence counsel initiated this application at the close of the Crown's case, before electing whether to call evidence, on the basis that the officer's actions constitute a *Charter* breach.

THE CONVERSATION OF MARCH 15, 2006

[3] The principal witness for the Crown, Cst. R. Smith, is also the complainant peace officer. Cst. Smith testified he stopped the accused in Mayo on March 15, 2006 to investigate a possible breach of his release conditions. In the course of that investigation, there was a conversation between them which was recorded on the "VICS" audio-visual system located in the officer's police vehicle. The constable testified that the camera for this system is located near the rear view mirror and can be swivelled approximately 360 degrees. A portable mic is attached to the officer's clothing to record the audio portion of any encounters with suspects or other members of the public. Cst. Smith said the principle reason for recording such encounters is officer safety. The constable further testified that it is R.C.M.P. policy to preserve the audio-video tapes of such encounters for a period of 30 days, after which they are erased and over-recorded, unless otherwise required for investigative or court purposes.

[4] The officer testified that the conversation with the accused on March 15, 2006 included some references to the terms of his release conditions. Those conditions included a term that the accused had to be in the proximity of a surety to be outside his residence for work purposes. The accused explained that he had been fixing his mother's water heater. The accused said that he had a list of nine sureties. He admitted to the officer that he was aware of these release conditions and that he was not following them. The officer indicated that he would use his discretion and only give him a warning. At that point, the accused allegedly asked the officer whether he could talk to him "about what happened", presumably what happened on December 10, 2005. The officer replied in the affirmative. The officer says that the accused then apologized and said that he thanked God that nothing had happened and that he had to "get off the grass" (once again, presumably a reference to his alleged use of marijuana, which was a factor in the initial arrest). The officer also testified that the accused said something like he wanted to get away and then saw the officer reach for his gun. The officer then told the accused that he appreciated his apology and could forgive him, but that there would still be consequences for him in court. According to the officer, the accused acknowledged that he was in breach of his release conditions and was grateful that the officer was allowing him to continue on his way.

[5] On cross-examination, Cst. Smith acknowledged that he interpreted the conversation of March 15, 2006 as "an apology and a confession", but strangely "did not think that it was any evidence of what happened on December 10, 2005". He further conceded that he felt the comments of the accused were "important", particularly regarding his "intent". He admitted that he also said things to the accused in that

conversation. However, he didn't think to preserve the audio-visual tape of the conversation because he "did not feel it was part of the incident of December 10, 2005" and there was nothing of any significance that occurred during or as a result of the conversation. The officer also importantly conceded that he did not remember anything else that he or the accused might have said about that incident.

[6] Cst. Smith testified that he took no notes of the March 15, 2006 conversation, however he sent an email to Crown counsel about it on April 18, 2006, which has been filed as an exhibit in this application. It reads as follows:

> "Hello Noel, . . . I also wanted to brief you on some discretion that I used with Roy Bucyk. On March 15th at approximately 7:35 p.m., I stopped Roy Buyck in his Grey truck, as he was headed West on First Street. I asked him if he was within 3 blocks of his surety, as required by his conditions. He said that he'd gone over to look at his mom's water heater. He said that none of his surety's were currently aware or supervising him at the time. I told him that I'd use discretion in this one instance, but that he should be abiding by his conditions. Buyck then said, "can I talk to you about something." I said "sure." He said, "I just wanted to appologize for what happened. I was totally wrong. I went home and got down on my knees and I thanked God that I was still alive. I have to get off the grass."
>
> I'm not sure if this is of any value Noel, but I wanted it brought up, in the event of sentencing where Malcolm Campbell says that Roy has been strictly abiding by his conditions. We have had the opportunity to breach him."

[7] It is also important to remember that the initial request from defence counsel for disclosure on the charges arising December 10, 2005 was made by a letter to the Crown dated January 4, 2006. There were additional supplementary requests for disclosure by defence counsel on April 18th, July 4th, August 3rd and August 4, 2006. In particular, the letter from defence counsel dated August 3, 2006 asked specifically for disclosure of any notes from Cst. Smith relating to the stop of the accused on March 15, 2006, including a

request for any video or audio recordings formed during that stop. A copy of that letter was faxed by Crown counsel to Cst. Smith and generated the following reply, also by fax, on August 3, 2006:

> "Hello . . . , I just got your fax regarding disclosure of March 15th notes. I did not make any notes in my notebook. Rather, I came back and typed up a report on the incident, in the form of an email to Noel Sinclair. The email is attached. There is nothing else to disclose that I can think of."

The reference to the email to Noel Sinclair is the one I have quoted above.

[8] It was only during the cross-examination of Cst. Smith that he mentioned for the first time that the March 15th conversation had been recorded on the VICS system, but that the tape was erased after the 30-day waiting period, pursuant to R.C.M.P. policy.

[9] I make the following observations about the officer's evidence regarding the March 15th conversation:

1) It is clear that the officer made no handwritten notes of the conversation. In his reply facsimile to the Crown, he said "I came back and typed up a report on the incident, in the form of an email to Noel Sinclair." That suggests that the constable did so immediately after the conversation at the police detachment. However, it is clear that the email was not generated by Cst. Smith until April 18, 2006, which curiously is just after the 30-day waiting period during which the VICS tapes are saved and following which the tape was (presumably at that time) erased and over-recorded. Thus, what is reflected in the email are not notes made at the time or immediately thereafter, but rather over one month after the fact. Therefore, I do not have the confidence which I might have had, in the

case of more contemporaneous notes, that the notes are a reliable reflection of the actual conversation between the officer and the accused.

2) There are a number of portions of the conversation which the constable testified about at trial which are not reflected in the email, including:

    a. The officer's reference to the accused having mentioned that he had a list of nine sureties;

    b. The officer's reference to the accused acknowledging that he was in breach of his release conditions and that he was grateful that the officer was allowing him to continue on his way;

    c. The officer's reference to the fact that the accused said something like he wanted to get away from the officer and then saw the officer reach for his gun; and

    d. The officer's reference to telling the accused that he appreciated his apology and could forgive him, but that there would still be consequences in court.

3) The officer seemed to concede that he did not remember anything else that that was said between them that related to the incident of December 10, 2005. He did not say that there were no such other references, but rather that he did not remember anything else about such references.

[10] Thus, it is clear to me that the combination of the officer's testimony and the April 18th email fall far short of being a verbatim record of the March 15th conversation. Further, the constable concedes that the conversation was, at least in part, a confession by the accused about what happened on December 10, 2005. Therefore, I have no

difficulty in concluding that the now destroyed VICS audio-visual tape of the March 15th conversation was relevant and in the ordinary course it should have been preserved and disclosed to the accused. Indeed, Crown counsel on the application before me very fairly conceded that point.

LAW

[11] The law in this area is not particularly controversial. The basic principles are derived from a number of Supreme Court of Canada cases beginning with *R. v. Stinchcombe (No. 1),* [1991] 3 S.C.R. 326; and followed by *R. v. Egger,* [1993] 2 S.C.R. 451; *R. v. Chaplin,* [1995] 1 S.C.R. 727; *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.); *R. v. Carosella,* [1997] 1 S.C.R. 80; and *R. v. La* (1997), 116 C.C.C. (3d) 97 (S.C.C.). The basic principles of these cases were helpfully summarized by the Nova Scotia Court of Appeal in *R. v. B. (F.C.)* (2000), 142 C.C.C. (3d) 540 at p. 547:

> "(1) The Crown has an obligation to disclose all relevant information in its possession.
>
> (2) The Crown's duty to disclose gives rise to a duty to preserve relevant evidence.
>
> (3) There is no absolute right to have originals of documents produced. If the Crown no longer has original documents in its possession, it must explain their absence.
>
> (4) If the explanation establishes that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached.
>
> (5) In its determination of whether there is a satisfactory explanation by the Crown, the Court should consider the circumstances surrounding its loss, including whether the evidence was perceived to be relevant at the time it was lost and whether the police acted reasonably in attempting to preserve it. The more relevant the evidence, the more care that should be taken to preserve it.
>
> (6) If the Crown does not establish that the file was not lost through unacceptable negligence, there has been a breach of the accused's s. 7 *Charter* rights.
>
> (7) In addition to a breach of s. 7 of the *Charter*, a failure to produce evidence may be found to be an abuse of process, if for example, the

> conduct leading to the destruction of evidence was deliberately for the purpose of defeating the disclosure obligation.
>
> (8) In either case, a s. 7 breach because of failure to disclose, or an abuse of process, a stay is the appropriate remedy, only if it is one of those rare cases that meets the criteria set out in *O'Connor*.
>
> (9) Even if the Crown has shown that there was no unacceptable negligence resulting in the loss of evidence, in some extraordinary case, there may still be a s. 7 breach if the loss can be shown to be so prejudicial to the right to make a full answer and defence that it impairs the right to a fair trial. In this case, a stay may be an appropriate remedy.
>
> (10) In order to assess the degree of prejudice resulting from the lost evidence, it is usually preferable to rule on the stay application after hearing all of the evidence.
>
> The *O'Connor* criteria referred to in the eighth point are as stated by Justice L'Heureux-Dubé at para. 82 of *O'Connor*:
>
> > It must always be remembered that a stay of proceedings is only appropriate "in the clearest of cases", where the prejudice to the accused's right to make full answer and defence cannot be remedied or where irreparable prejudice would be caused to the integrity of the judicial system if the prosecution were continued."

[12] In *R. v. La*, cited above, Sopinka J., for the majority, suggested, at paras. 24 and 26, that even where evidence has been inadvertently lost, if that loss is so prejudicial to the right to make full answer and defence that it impairs the right of an accused to receive a fair trial, a stay may be the appropriate remedy.

[13] In *R. v. Forster*, 2005 SKCA 107, the Saskatchewan Court of Appeal referred to the situation where a peace officer may not know about the duty to preserve certain evidence, and suggested that such conduct may still amount to an excusable negligence. At para. 30, the Court of Appeal commented that it would be hard to believe in the decade or so since *Stinchcombe* that any police officer could be unaware of the duty to preserve his notes. In *Forster*, the notes had been transposed onto a computer

disc, which was subsequently destroyed by the police officer. At para. 31, the Court of Appeal cited the Supreme Court of Canada in *R. v. Buhay*, 2003 S.C.C 30 at pp. 658-9:

> "It should first be noted that the officer's subjective belief that the appellant's rights were not affected does not make the violation less serious, unless his belief was reasonable . . . As Sopinka, Lederman and Bryant note, supra, at p. 450: good faith cannot be claimed if a Charter violation is committed on the basis of a police officer's unreasonable error or ignorance as to the scope of his or her authority."

[14] In *R. v. Carosella*, cited above, Sopinka J., once again for the majority, at para. 35, referred to the judgment of Kerans J.A. in *R. v. Antinello* (1995), 97 C.C.C. (3d) 126 (Alta.C.A.), where he quotes Kerans J.A. as saying that, to establish a breach of s. 7 of the *Charter*, an accused must show on a balance of probabilities that he has "lost a realistic opportunity to garner evidence, or make decisions about the defence" and that a "reasonable possibility" of impairment of the right to a full answer and defence is sufficient.

[15] Later, at para. 36, Sopinka J. quotes the Supreme Court of Canada's earlier decision in *R. v. Egger*, cited above:

> "One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed . . . This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence."

[16] At para. 39, Sopinka J. quoted *R. v. Stinchcombe* (No. 2) (1994), 149 A.R. 167 (C.A.), aff'd [1995] 1 S.C.R. 754 as follows:

> "Before the remedy such as a judicial stay of proceedings can be granted, the accused must establish on a balance of probabilities that the failure to produce or disclose what he seeks has impaired his right to make a full

> answer and defence or was so oppressive as to amount to an abuse of process."

[17] Finally, at para. 55 of *Carosella*, Sopinka J., noted that the two-part test for a stay of proceedings set out by L'Heureux-Dube J., in *O'Connor*, cited above, is an alternative one. The first part of the test is that there must be no other remedy that would cure the prejudice to the ability of the accused to make a full answer and defence. The second part of the test is that there must be irreparable prejudice to the integrity of the judicial system if the prosecution were continued. However, the presence of either factor justifies the exercise of discretion in favour of a stay.

ANALYSIS

[18] There is no question that the credibility of Cst. Smith is a central issue in this trial. His description of the actions of the accused in resisting arrest and assaulting him with a shovel are only partially corroborated by the other independent civilian Crown witness, Mike Sheppard. Cst. Smith testified that when he went to place the accused in handcuffs, the accused resisted, pulled a shovel out of the box of his pickup truck, and swung it twice at the officer. After the first such swing, the constable said that he pepper sprayed the accused, pushed him against the pickup truck and caused him to fall down. The accused then peeled off his jacket, picked up the shovel and swung it again. The officer pepper sprayed the accused a second time. At one point the officer said that he unsnapped the holster of his sidearm and started to go forward after the accused. The accused then retreated to his truck and drove away.

[19] Mr. Sheppard testified that he saw the incident from his home which was only a few meters away from where the police vehicle and the accused's vehicle were stopped.

He said that he observed the scene for about one or two minutes. He saw the police officer attempt to handcuff the accused, but said that the accused slipped out of his grasp. He did not see the police officer use any pepper spray, although he conceded that he didn't always have a clear view of the officer. He also conceded that he did not see everything that happened, but that he had a clear view of the accused until the accused drove away from the scene. He said that he did not see the accused swing his shovel, but rather that he held it with both hands across his chest at an angle.

[20] Cst. Smith further testified that his VICS system was operational on the evening of December 10, 2005, but that he had turned it off just prior to stopping the accused to conserve the police vehicle's battery power. For the first few minutes of the stop, during which time the officer initially approached the accused, checked his licence plate, and made certain observations of the interior of the accused's pickup truck, the VICS system was not operating. When the officer remembered to turn it on, he did not think to swivel the camera in the direction of the accused's vehicle. Consequently, all that is recorded on the VICS audio-visual tape of the incident on December 10, 2005, is a partial audio recording of what took place.

[21] Defence counsel argues that the actions of the constable in failing to preserve the VICS tape of the March 15, 2006 conversation not only impair the right of the accused to make full answer and defence, but also go to the constable's credibility. For example, defence counsel points out that the constable received a specific request for "any video or audio recordings" which were performed by him during the stop on March 15, 2006. In reply to that very specific request, the constable's facsimile said, in effect, that the only record of the March 15th conversation was the email he sent to Crown counsel on

April 18, 2006 and that there was “nothing else to disclose” that he could think of. I agree with defence counsel that this would clearly suggest that there had never been a video or audio recording of that conversation and in that regard, the constable’s reply is indeed misleading when viewed objectively. Had the constable said that a tape existed at one time, but was subsequently destroyed, this may have lead defence counsel to a further or different line of discovery in her cross-examination of the officer. Indeed, it may have prompted her to elect to proceed with a preliminary inquiry to pursue this and possibly other issues relating to disclosure and the officer’s credibility.

[22] Further, defence counsel submits that the evidence thus far in the trial has set the ground for a possible defence of self-defence. She says the accused has been prejudiced by not having a verbatim record of the March 15th conversation, because that might well have included statements which could support such a defence. While there is precious little in the way of evidence to support self-defence at this stage, there is at least a discrepancy between the description of the accused’s actions by Cst. Smith and those observed by Mr. Sheppard. There is also the admitted evidence of Cst. Smith of his application of force on the accused.

[23] Crown counsel says that I should not speculate on what additional statements may have been made in the March 15th conversation, but rather that I should look at the evidence adduced in this trial so far as to what was contained in that conversation. However, as I have attempted to demonstrate above, it appears that the combination of the constable’s testimony at the trial and the April 18th email fall far short of being a verbatim record of the conversation. Further, since the officer himself concedes that the tenor of the conversation was at least in part “a confession” by the accused about what

had happened on December 10, 2005, it is only logical to conclude that there may well have been other things said about what took place between the two of them on December 10th. In my respectful view, that is not an exercise of pure speculation, but one of deductive logic.

[24] Further, the Crown's submission on this point in this application is similar to that referenced by Kerans J.A., in *R. v. Antinello*, cited above, as quoted by the Supreme Court of Canada in *R. v. Carosella*, also cited above, at para. 35:

> "The Crown . . . made the remarkable claim that an accused who alleges a breach of the right to make a full answer and defence as a result of non-disclosure must prove that this Crown failing probably deprived him of a fair trial. To take that view would mean that the accused, to enforce his right to disclosure, must first show the very thing of which he complains he stands deprived, knowledge of the full significance of what was not revealed."

[25] In any event, the Saskatchewan Court of Appeal in *Forster*, cited above, at para. 29, concluded that it was open to the trial judge in that case to find, as she impliedly did, that the destroyed evidence contained material which the defence could have used, even though it was difficult to specify the precise manner in which the information could have been used without knowing the exact content of the material.

[26] I find that the failure of Cst. Smith to preserve the VICS audio-visual tape of the conversation between he and the accused on March 15, 2006 was unacceptably and inexcusably negligent. As the Crown fairly conceded on this application, the content of that conversation was 'relevant in the broadest sense' and should have been preserved and disclosed.

[27] I agree with Crown counsel that the officer testified in a generally candid and forthright way, but there was also a certain naiveté to his ignorance of the possible

relevance of the conversation. Further, as I noted earlier, it is curious that the officer felt that the conversation was “important” enough to advise Crown counsel about, but yet he failed to do so until April 18, 2006, presumably after the VICS tape had been erased and over-recorded, following the 30-day waiting period. It is further curious that Cst. Smith suggested to the Crown in his facsimile of August 3, 2006 that he “came back and typed up a report” on the March 15th conversation, when in fact that did not occur until April 18th. Finally, it is objectively misleading that the officer said there was “nothing else to disclose” about that conversation, when in fact there had been a VICS audio-visual tape of same, which had since been erased and over-recorded. Therefore, notwithstanding my impression of the constable’s testimony in the witness box, these facts tend to counter the suggestion by the Crown that the constable was acting in good faith. As noted in *R. v. Buhay*, cited above, good faith cannot be claimed if the *Charter* violation is based on a police officer’s unreasonable error or ignorance.

[28] Consistent with what I have just said, I disagree with the Crown’s submission that the breach was “not a particularly serious one”, and that at most the accused would have suffered a “very limited disadvantage” to his ability to test the constable’s evidence as a result. On the other hand, I would not go so far as to suggest the officer’s conduct is capable of supporting a claim of abuse of process.

CONCLUSION

[29] In summary, I find that the accused has established a violation of his right to disclosure and his correlative right to make full answer and defence under s. 7 of the *Charter*.

[30] I was invited by Crown counsel, in the event I found there was a *Charter* breach, to delay my decision on the remedy, if any, until the end of the trial, so that I might better assess the issue of prejudice resulting from the breach. While the Supreme Court of Canada suggests that is generally advisable, I decline to do so for two reasons. First, I cannot imagine that my opinion on the prejudice to the accused would be changed by hearing any further evidence. Second, it would be unfair to the accused to make him elect whether to call evidence in the face of such a breach.

[31] Accordingly, I find that the prejudice to the accused's right to make full answer and defence cannot be remedied here by anything other than a stay of proceedings. Neither an adjournment nor the exclusion of the constable's evidence of the March 15th conversation would be capable of remedying the prejudice. There is simply too much about that conversation which remains unknown and which the accused might have used to his benefit. I am also of the view that despite the officer's relatively straightforward evidence at trial, the fact that he objectively misled both Crown and defence counsel as to the prior existence of the VICS tape gives rise to the prospect of irreparable prejudice to the integrity of the judicial system if the prosecution were continued in such circumstances. Therefore, I stay the proceedings.

GOWER J.