NOVA SCOTIA COURT OF APPEAL
Citation: ***R. v. Murphy***, 2011 NSCA 54

Date: 20110609
Docket: CAC 313182
Registry: Halifax

Between:

Her Majesty the Queen

Appellant

v.

Marcel Shawn Murphy,
also known as Shawn Marcel Murphy

Respondent

Judges: Fichaud, Farrar and Bryson, JJ.A.

Appeal Heard: March 31, 2011, in Halifax, Nova Scotia

Held: Appeal allowed, acquittal set aside and a new trial ordered per reasons for judgment of Farrar, J.A.; Fichaud and Bryson, JJ.A. concurring.

Counsel: Mark A. Scott, for the appellant
Trevor K. F. McGuigan, for the respondent

Reasons for judgment:

Background

[1] As part of an integrated and combined Halifax Regional Municipality Police and Royal Canadian Mounted Police Task Force, operating under the code name "Operation Takeback", a series of simultaneous raids targeted five residential search sites. As a result, at least 2,000 items of stolen property were seized.

[2] The Task Force arrested, detained and charged, jointly and severally, 15 persons. The arrested individuals included Peter Frederick Adams and the respondent Marcel Shawn Murphy. The individuals were charged with multiple counts of theft, break, enter and theft, possession of stolen property and weapons offences.

[3] Following numerous pre-trial conferences, motions and agreements to sever counts and parties, the accused persons, with the exception of Adams and Murphy, were severed from the charges that went forward to trial.

[4] The trial commenced before the Honourable Judge Castor Williams in August of 2008 and it was initially estimated it would take 9½ months to conduct the prosecution against Adams and Murphy.

[5] In December, 2008, an arrangement was made with Adams to resolve the charges against him which resulted to him pleading guilty to several consolidated counts. The trial continued against Murphy on 53 counts, however, in the end, only 43 counts that were the subject matter of the trial judge's decision remained against him.

[6] This appeal relates to 32 of the original charges for which Murphy was found not guilty by the trial judge. All of the charges allege either break, enter and theft, or possession of property obtained by criminal offences. The Crown appeals alleging errors on the part of the trial judge in refusing to admit evidence.

[7] By way of context, one of the issues that arose early in the trial was the admissibility of affidavits of ownership pursuant to s. 657.1 of the **Criminal Code of Canada**, R.S.C. 1985, c. C-46. Section 657.1 of the **Criminal Code** permits

affidavit evidence to be admitted by the person who claims to be the lawful owner or the person lawfully entitled to possession of property that is the subject-matter of the offence and, in the absence of evidence to the contrary, is evidence of the truth of the statements contained therein.

[8] The defendant objected to the affidavits being admitted into evidence. The trial judge agreed with the defendant that the affidavits were deficient. The Crown had the option of either rectifying the alleged deficiencies in the affidavits or calling *viva voce* evidence to prove the contents of the affidavits. The Crown chose the latter. Included in the affidavits which were ruled inadmissible was photographic and videotape evidence.

[9] The Crown then proceeded to call testimony to introduce the evidence. What follows is the evidence ruled inadmissible by the trial judge and is the subject matter of this appeal.

Kent Video

[10] On January 7th, 2009, Berat Selimi, Loss Prevention Supervisor for Kent Building Supplies testified with respect to an alleged theft of an electric fireplace from Kent on October 20, 2006. The Crown sought to tender through Mr. Selimi a CD of the surveillance video from Kent which purportedly showed the commission of the theft. The trial judge ruled that the witness would not be allowed to view the contents of the CD in order to authenticate it, holding that, without markings on the outside of the CD to identify its origin, the witness was not entitled to view the CD contents. As a result the trial judge ruled the CD inadmissible.

Photographs

[11] The issue with respect to the admissibility of the police photographs arose on February 12, 2009. Cst. Mike Barkhouse had taken a number of photographs of the stolen property with a digital camera. The photographs were stored on a secured hard drive under a particular file heading. Det. Cst. Sandra Johnston, another Crown witness, then copied the photographs taken by Cst. Barkhouse and two other officers to a compact disk for disclosure and trial purposes. The CD was marked as C91.

[12] The Crown called Cst. Barkhouse for the purpose of introducing the photographs taken by him contained on C91. The defence objected arguing that, since the officer did not create the copies onto the CD, and was not present when Det. Cst. Johnston did so, he could not speak to the contents of the disk. The defence argued that there had to be evidence of control over the particular hard drive in order for the exhibits to be sufficiently reliable.

[13] The trial judge agreed with defence counsel holding that admissibility of C91 involved proving its continuity beyond a reasonable doubt. Consequently, the photographs taken by Cst. Barkhouse contained on C91 could not be entered through him.

[14] The Crown then called Det. Cst. Sandra Johnston. She testified she burned two CDs of photographs which were part of the Operation Takeback investigation. A CD which was marked as C89 contained photographs taken solely by Det. Cst. Johnston. As noted above, the other CD marked as C 91, contained photographs taken by Cst. Barkhouse and two other officers.

[15] Det. Cst. Johnston detailed the process of taking the photographs, comparing them for accuracy, storing them, and then reorganizing them for the purpose of burning C89 for presentation to the court. She testified that when she burned C89, she reviewed the photographs to ensure that they were accurate depictions of what she viewed through the lens on the day the photographs were taken.

[16] When the Crown sought to tender C89, defence counsel objected arguing the number of photographs and the dates they were taken would have to be established before the CD could be accessed. The trial judge, again, agreed ruling that the number of photographs and the dates on which they were taken would have to be established to prove continuity before the CD could be accessed. Further, he held that proof of continuity of the photographs beyond a reasonable doubt was a critical pre-condition to admissibility.

[17] The Crown asked the trial judge to formally rule on the admissibility of the CDs. Although the trial judge's ruling is quite lengthy, the ultimate conclusion, after citing concerns he had regarding who could access the computer and potentially contaminate the disks, is relatively short:

> So questions do arise. Nagging questions do arise. And the numbers -- again, I keep returning to the numbers. So there are a series of missing data, or information I should say, that sheds some doubt as to the continuity of these photographs, of the -- of the disk. Actually, the photographs that was ostensibly produced on the disk.
>
> The Crown was given ample opportunities to correct the concerns that were expressed, but we are here, what we are today. This, in my respectful opinion, is not a case of authenticating a photograph. This, in my view, is the issue of whether the continuity of the photograph or the proposed evidence has been established beyond a reasonable doubt. And in my opinion, based on the evidence before me, I conclude that the continuity, and I emphasize the continuity, of the particular exhibit, that is the disk, has not been established beyond a reasonable doubt. So at this stage, that particular exhibit is not admissible. [Emphasis added]

[18] The Court noted that Det. Cst. Johnston was a credible witness, but not sufficiently trustworthy and reliable with respect to the integrity, continuity and authenticity of the CD. The Court indicated that she did not provide sufficient evidence to prove the integrity of the contents of the CD beyond a reasonable doubt. Moreover, the Court found that Det. Cst. Johnston's credibility "was never restored by belief, rehabilitation or supportive evidence." (¶ 52)

[19] The CD's were ruled inadmissible.

Exhibit Report

[20] On February 13th, 2009, Cst. John Riggins, property overseer for "Operation Takeback", testified that multiple searches on multiple properties arose within the investigation. He was assigned to mark and log seized property on a master list. He designated officers at each scene to log property as it was seized. From the search sites, the property was transferred to a warehouse under the supervision of the Halifax Regional Police. Cst. Riggins oversaw the storage of the items until the warehousing switched venues. Prior to the move, the inventory became smaller due to certain properties being returned to the owners.

[21] With respect to cataloguing the inventory, exhibit logs were compiled for each scene. Each scene, i.e., address, was designated a specific code. Each item

seized received a scene code and exhibit number. The search scene exhibit logs were handwritten and then recreated on a computer printout.

[22] When the Crown sought to tender the Exhibit Log, as compiled by Cst. Riggins, defence counsel objected arguing that Cst. Riggins could only testify to those items seized by himself. Otherwise, the other police officers would have to testify to the logs that they created, before handing the logs over to Cst. Riggins.

[23] The trial judge agreed with defence counsel, adding that the Crown was also required to prove continuity of the exhibit logs.

[24] Discussion between the trial judge and counsel disclosed that the Crown intended to call a particular seizing officer from one of the search sites. Eventually, the argument progressed to the defence arguing that if the Crown were seeking to tender the unedited Exhibit Log, the Crown would be required to prove everything with respect to that log, including each and every search site from the investigation including search sites which had no bearing on the counts applicable to the respondent. In other words, even the entries relating to the other accused parties, no longer part of the prosecution, would have to be proven. The trial judge, again, agreed with the defence, and ruled the Exhibit Log inadmissible unless all of the entries were proven. (The written decision of the trial judge suggests he made no such ruling. I will address this issue in more detail later in the decision.)

Issues:

[25] The Crown has narrowed its grounds of appeal from the original notice of appeal. The issues remaining are:

1. Did the trial judge err in law in ruling inadmissible in evidence (a) the Kent video; (b) photographs of the stolen property tendered by the Crown; and (c) the Exhibit Log.

2. Did the trial judge err in law in refusing the Crown's motions for adjournment to call witnesses to establish continuity of the photographic exhibits and the property items contained in the Exhibit Log.

3. If the trial judge erred, should a new trial be ordered?

[26] It is not necessary to address the second issue on appeal. For the reasons I will develop, I would allow the appeal on the first issue and order a new trial, on all counts, before a new judge.

Standard of Review:

[27] The parties agree, and I concur, that the standard of review with respect to admissibility of evidence is one of correctness [**R. v. Grouse**, 2004 NSCA 108, ¶ 32].

Analysis:

1. Did the trial judge err in law in ruling inadmissible in evidence (a) the Kent video; (b) photographs of the stolen property tendered by the Crown; and (c) the Exhibit Log?

a) the Kent Video

[28] The Crown sought to tender video surveillance capturing the theft of an electronic fireplace from Kent Building Supplies. It called the loss prevention supervisor to give evidence. He testified that the incident took place on October 20, 2006 at approximately 5:30 p.m. The apparent theft occurred between the sliding doors at the entrance of the store where the fireplace was on display. The witness testified about the particulars of the surveillance system, and the sales for the particular fireplace which had been stolen. At that point the Crown moved to introduce the video. When it did the trial judge interjected:

> THE COURT: How does he recognize it? Are there any markings or anything on it that he knows, any identifying thing for him to say that's the CD that he had? Check it out.
>
> ...
>
> MR. HUBBARD: Well, it would be difficult for anybody to determine, Your Honour, based on a CD exterior what's on it, but what I would intend to do is show the start of it...

> THE COURT: No, no, no, this is about continuity. If he produced it. If he gave the police a CD, did he put his initials on it, did he mark it, did he do something? The usual evidential -- evidential continuity evidence that we -- where there's some identifier that he can say, "That's my initial. I gave it to the police and I gave it to the police on such and such a date."

[29] Inexplicably, the trial judge required, as a pre-condition to the admissibility of the video, proof of continuity which he equated to authenticity. However, he would not allow the witness to access the contents of the CD in order to authenticate that it actually portrayed the subject-matter to which he had testified. The trial judge found that as a result of there being no identifying markers on the disk to allow the witness to objectively identify it without reviewing its content, the "evidential threshold" for admissibility had not been met and the video was ruled inadmissible.

[30] It is difficult to understand how the trial judge expected the witness to authenticate the contents of the video without accessing it.

[31] Further, and of greater concern, is the trial judge's failure to recognize that videos depicting the theft itself may be self-authenticating. In **R. v. Nikolovski**, [1996] 3 S.C.R. 1197, the Supreme Court of Canada held:

> 23 It is precisely because videotape evidence can present such very clear and convincing evidence of identification that triers of fact can use it as the sole basis for the identification of the accused before them as the perpetrator of the crime. It is clear that a trier of fact may, despite all the potential frailties, find an accused guilty beyond a reasonable doubt on the basis of the testimony of a single eyewitness. It follows that the same result may be reached with even greater certainty upon the basis of good quality video evidence. Surely, if a jury had only the videotape and the accused before them, they would be at liberty to find that the accused they see in the box was the person shown in the videotape at the scene of the crime committing the offence. If an appellate court, upon a review of the tape, is satisfied that it is of sufficient clarity and quality that it would be reasonable for the trier of fact to identify the accused as the person in the tape beyond any reasonable doubt then that decision should not be disturbed. Similarly, a judge sitting alone can identify the accused as the person depicted in the videotape.

[32] The trial judge's error is obvious. So much so, that the respondent, in his factum, appropriately concedes that the trial judge erred by precluding the loss prevention supervisor from accessing and viewing the contents of the video tendered by the Crown before providing testimony regarding the exhibit's authenticity, integrity and accuracy. However, the respondent submits that the viewing of the video would not otherwise have impacted on the trial judge's verdict. I will address the submissions on that issue later in these reasons.

[33] I am satisfied that the trial judge erred in failing to allow the video to be accessed for the purpose of testifying to its authenticity, integrity and accuracy. The trial judge compounded this error by concluding the issue was one of continuity and equating continuity to admissibility. The distinction between the two is discussed in more detail under the next issue.

(b) The Police Photographs

[34] The issue of the introduction into evidence of the photographs is addressed in the trial judge's decision now reported at 2009 NSPC 15. The trial judge points out the critical importance of the photographic images to the Crown's case:

> ...In whatever manner presented, of critical importance were the photographic images that were on the computer generated disc, Exhibit "A" of Exhibit C 89 that Johnston created. This disc, in the Court's opinion, was therefore an essential solder that was required to join and to make coherent the respective unconnected but outstanding strands of evidence regarding the seizure, storage, ownership and continuity of property. (¶ 15)

[35] As noted earlier, the Crown sought to introduce the photographs by way of affidavit, pursuant to the provisions of the **Criminal Code**. The trial judge found the affidavits were deficient and inadmissible. The Crown then decided to proceed by calling *viva voce* evidence to prove the photographs.

[36] A summary of what the trial judge had to say about the *viva voce* evidence of the constable responsible for taking the photographs on Exhibit C 89 is as follows:

> The constable testified that she attended several search sites and took photographs, downloaded them to the computer, and was satisfied as to their

> accuracy. She further testified that the photograph images that were viewed, when they were taken at the scene, was the image that she actually saw. Finally, she was satisfied that the computer disk which was thought to be introduced into evidence was a copy of the original photographs and they were both fair representations of each other. (¶ 26-30)

[37] The trial judge then goes on to conclude that it was incumbent upon the Crown to prove the exhibits' integrity, continuity and authenticity (¶31). He held that in order to satisfy this burden, the Crown had to satisfy and establish, beyond a reasonable doubt, evidence capable of supporting "the crucial proof of the issue of the continuity and hence the data integrity and authenticity of the exhibit". (¶ 32)

[38] The trial judge continued and held, in excluding the photographs, as follows:

> [37] In any event, no matter how, the Crown presented no further evidence through Johnston to advance and to maintain, beyond a reasonable doubt, its theory of the continuity and hence the authenticity of the proposed exhibit. Instead, it persisted that the Court makes a ruling with respect to the admissibility of the exhibit "A," the computer disc.
>
> [38] Therefore, based on the evidence then presented, and the submissions of counsel, it was the Court's view that there still were critical gaps in the evidence of continuity that were neither addressed nor corrected that, in the end, affected adversely the proper admission of the exhibit into evidence. It must be remembered that the computer disc was an exhibit to the affidavit of Johnston, Exhibit C 89 that, although tendered, was ruled inadmissible for the purpose for which it was tendered. Yet, the data contained thereon still could become admissible to support and to maintain the Crown's theory of the case, if they were proved properly by Johnston.

[39] Finally, the court concluded that the constable's *viva voce* evidence did not, "without a reasonable doubt", satisfy the onus of admissibility (¶ 53).

[40] With respect, the trial judge was in error in ruling that the continuity of the CD containing the photographs had to be proven beyond a reasonable doubt in order to be admissible into evidence.

[41] The trial judge's treatment of the standard of proof for admissibility essentially required the photographs to be proven as if they were an essential element of the offence. In **R. v. Jeffrey**, [1993] A.J. 639 (Q.L.), the Alberta Court of Appeal held:

> 18 The appellant argues that the Crown must prove irreconcilable separation beyond a reasonable doubt. Because s. 7 of the *Charter* guarantees every accused a trial according to the principles of fundamental justice, no lesser standard of proof can obtain.
>
> 19 A very basic principle of fundamental justice is that the standard of proof in a criminal proceeding is proof beyond a reasonable doubt. However, proof beyond a reasonable doubt is only applicable to the elements of the offence and the ultimate issue. It is not applicable to each and every piece of evidence *R. v. Morin* (1988) 44 C.C.C. (3d) 193 (S.C.C.). If each and every piece of evidence does not have to answer to the criminal burden of proof, it is illogical to assert that the admissibility of such evidence must be proven by that standard.
>
> 20 One instance in which admissibility does require proof of an issue beyond a reasonable doubt said by the appellant to support his position is the threshold test of the voluntary nature of a confession: *Park v. The Queen* (1981) 59 C.C.C. (2d) 385 (S.C.C.) *R. v. Pickett* (1975), 28 C.C.C. (2d) 297 (Ont. C.A.). However, a confession is substantively different from other kinds of evidence, since it goes directly to the ultimate issue of guilt or innocence, and, historically, by its very nature is suspect because of the form in which it comes to the court.

[42] The trial judge was in error in treating the photographs as if they were an element of the offence. To borrow from the words of the court in **R. v. Jeffrey, supra**, it is illogical to assert that the admissibility of such evidence would have to be proven beyond a reasonable doubt.

[43] Indeed, this error is also acknowledged by the respondent, however, again, the respondent submits that even though the trial judge was in error, there was some merit to the trial judge having excluded the evidence and argues:

> The court's findings reveal that even if the cd had been admitted into evidence the weight attached to it would have been diminished.

[44] This is a unique position. How could the trial judge have ruled on the weight to be given to the photographic images when they were not admitted into

evidence? The trial judge's error foreclosed his being able to properly consider, assess, and weigh this crucial evidence.

[45] The trial judge compounds his error by confusing the concept of continuity and admissibility of the photographs. The relationship between continuity and admissibility was addressed by this Court recently in **R. v. West**, 2010 NSCA 16:

> [130] Generally, the continuity of an exhibit goes to weight, not to admissibility. There was, therefore, no legal requirement for the Crown to call Ms. McLaughlin, and the trial judge cannot be said to have erred in law in failing to compel the Crown to call a witness when the defence never requested that it should do so.

[46] Similarly, in **R. v. Krole**, 1975 CarswellMan. 119, a decision of the Manitoba Court of Appeal:

> 27 In the case at bar, it is my respectful view that the learned trial judge created an artificial problem and has posed an artificial question of law. The question before the trial judge was a straightforward one: Was the blood sample tendered by the Crown the blood sample taken from accused by the police? Continuity of possession is not solely determinative of that question. (Cf. *R. v. Donald* (1958) 121 CCC 304). A party tendering physical evidence may not be able to prove absolute continuous possession; that in itself would not preclude admissibility. Other factors could convince the tribunal that the article was in fact the very thing which it was supposed to be. Or, alternatively, it is conceivable that a piece of evidence, even if proved to be in the continuous possession of a party tendering it, could be tampered with. In my view, continuity of possession; although a very important factor, may not be the governing one in determining admissibility.

[47] Similarly, the trial judge here created two artificial legal hurdles for the Crown — proof of continuity equating to authenticity and proof of continuity beyond a reasonable doubt. With respect, he erred by approaching the introduction of the photographs in this manner. More importantly, he precluded himself from considering the evidence that he considered to be of "critical importance" and the "solder" required to bring together the evidence regarding the seizure, storage, ownership and continuity of property (¶ 15).

[48] The proper considerations for the introduction of the photographs were as set out in **R. v. Creemer and Cormier**, [1968] 1 C.C.C. 14 and in **R. v. Schaffner**, [1988] N.S.J. No. 334 (Q.L.), both decisions of this court, where it was held that

photographs are admissible provided that they accurately and truly represent the facts, are fairly presented and without any intent to mislead and are verified on oath by a person capable of doing so. The person verifying the photographs need not be the taker of the photographs. **Creemer**, **supra**, held at p. 22:

> All the cases dealing with the admissibility of photographs go to show that such admissibility depends on (1) their accuracy in truly representing the facts; (2) their fairness and absence of any intention to mislead; (3) their verification on oath by a person capable to do so. The photograph here questioned, and others, was taken by Constable Sulewski, R.C.M.P., who for the past 4½ years has been engaged in photography, fingerprints and related fields. He testified that the coloured photograph in question is a true representation as he saw it. The defence does not contend that this photograph was inaccurate or that it was introduced with an intention to mislead, but that it was calculated to arouse a sympathetic reaction. For the reasons noted, I would dismiss ground 1 of the appeal.

[49] In requiring the Crown to establish the admissibility of the photographs by proving their continuity beyond a reasonable doubt in order for them to be authenticated, the trial judge erred.

[50] In his decision, the trial judge makes reference to provisions of the **Canada Evidence Act**, R.S.C. 1985, c. C-5 and, in particular, s. 31 dealing with the authentication of documents. The applicability of the **Canada Evidence Act** was not an issue raised or addressed with respect to the admissibility of the photographs at trial. Its applicability and role in the introduction of photographic images was not a live issue at trial and it is not necessary to discuss it in these reasons. If and when the issue arises, with a proper factual foundation in argument, it can be addressed.

(c) The Exhibit Log

[51] As with the photographs and the video from Kent Building Supplies, the trial judge's treatment of the admissibility of the Exhibit Log is, to say the least, problematic.

[52] By way of background, Constable John Riggins, property overseer for "Operation Takeback" testified that multiple searches on multiple properties arose

within the investigation. He was assigned to mark and log seized property on a master list. He designated officers at each scene to log properties which were search seized. From the search site the property was transferred to a warehouse under the supervision of the Halifax Regional Police.

[53] An Exhibit Log, particular to each address, was designated a specific code. Each item received a scene code and exhibit number. The search scene exhibit logs were handwritten and recreated on a computer print out.

[54] The Crown sought to tender the Exhibit Log, as compiled by Constable Riggins, and it was met with objection. The defence argued that Constable Riggins could only testify to those items which he seized. Otherwise the police officers would have to testify to the logs they created before handing the logs over to Constable Riggins.

[55] The trial judge agreed with defence counsel. However, he went even further, noting that the total Exhibit Log would have to be proven before it would be admissible, including those search sites which would have no bearing on the counts applicable to the respondent.

[56] The trial judge, in his written decision, said the Crown did not seek a ruling from the court on the admissibility of the Exhibit Log nor did the court offer one:

> [58] Thus, the submission in view of the Defence was that the document should be presented as a whole document. However, after some further discussions, the Crown did not formally seek to enter the document even though it could have done so with the immaterial information and subject to further proof of its contents. The Crown appeared to have made a decision concerning the document and, what is more, it neither sought a definitive ruling from the court nor did the Court offer one. Thus, in these circumstances, the Court concludes and finds that the Crown formally neither introduced nor tendered, for admission into evidence, any exhibit through the testimony of Riggins.
>
> (Emphasis added)

[57] With all due respect to the trial judge, his written decision does not reflect the ruling he made at trial. Any reasonable interpretation of the trial judge's comments at trial was that he had ruled the Exhibit Log inadmissible unless it was proven in its entirety. At trial, the following discussion took place.

THE COURT: It seems to me that the exhibit has to be taken as a whole. There has been no agreement with respect to the contents of the exhibit and whether the exhibit can be -- or agreed that the exhibit can be severed from issues that does not relate to Mr. -- Mr. Murphy.

The problem that I see is that once Mr. Adams was separated from the trial, if no adjustments were made with respect to Mr. Murphy as far as exhibits and logging of documents were concerned, then whatever is tendered is a whole document, see, and unless there was agreement in advance as to the document itself. There's no agreement as to the document, so the document has to speak, and we'll have to -- if the document is tendered or is admitted, then issues would arise or arguments can be made otherwise, but it's a complete document, you know what I mean, and it's not truncated in any way, you know what I mean, and...

MR. HUBBARD: Well, Your Honour, I guess the position of the Crown on that point, we'd question the relevancy of evidence that would tend to go towards Mr. Adams, for example.

THE COURT: Well, the document, you see -- oh, sorry, sorry to interrupt you. But it's a document you are purporting to present as a whole document. You have not edited the document, for example. You have not done anything with the document. You're just presenting it. Here's the document. But -- and so, therefore, you can't argue against yourself. It seems to me, that anything on the document that relates blah, blah, blah, because it's on the document, you see. If it were excised and some explanation were given, you will have a stronger position to be on, but that hasn't been done presumably, know what I mean, so...

MR. HUBBARD: I take Your Honour's point, and in light -- I wouldn't want Your Honour to interpret this the wrong way. I'm well aware of what Your Honour said yesterday, the rulings that Your Honour made. However, I feel obliged to say at this point that Mr. Craig has indicated a desire to comment on this, the admissibility of these -- this exhibit, and he is asking that the matter now be adjourned to Tuesday morning for him to do that. So... [Emphasis added]

THE COURT: Well, the matter is closed now, you know what I mean, it's -- Mr. Serbu, do you have any comment on that?

(Emphasis added)

[58] The trial judge was not prepared to entertain any further argument on the issue of the admissibility of the Exhibit Log.

[59] During these exchanges with the Crown, at no time did the trial judge say he was not making a ruling on the admissibility of the Exhibit Log. To the contrary, Crown counsel sought to make further submissions with respect to the admissibility of the Exhibit Log and was told by the trial judge the matter was "closed". Further, Crown counsel refers to the trial judge's "ruling" on the Exhibit Log in seeking to make further submissions. Again, at no time did the trial judge indicate that he was not making a ruling either at the time that the matter was being discussed during the trial or when the Crown subsequently asked for an adjournment.

[60] After discussing the Crown's application for an adjournment the trial judge says as follows:

> RULING ON APPLICATION FOR ADJOURNMENT
>
> **THE COURT**: Mr. Craig, on behalf of the Crown, has made an application for an adjournment of the trial on the basis that:
>
> (a) The Crown did not anticipate the rulings of the court on the admissibility of certain exhibits that it tendered. Refers in particular to the CD tendered as part of Exhibit C89, the affidavit of Constable Sandra Johnston and an exhibit log prepared by Constable John Riggins. [Emphasis added]
>
> ...
>
> (c) With respect to the exhibit report, in order to comply with the court's ruling, it would probably involve 20 to 30 police witnesses whom the Crown did not anticipate it would have to call, given that their testimony would relate to search sites and property not related to Mr. Murphy and all property from those sites. The Crown has neither spoken to these witnesses, nor has disclosed their names to the accused. Therefore, the Crown is not in a position to commence.
>
> (d) The time requirement to hear these witnesses would be an additional two months of testimony.

> Mr. Serbu, on behalf of the accused, objects to the adjournment. He submitted that this matter has been before the court since January '07 and that his client has spent time on remand and is currently on bail under house arrest. The issues that were ruled upon by the court should have come as no surprise to the Crown as they ought to have foreseen them. ...

[61] As the record reflects, the trial judge referred to his "rulings" and, in particular, with respect to the Exhibit Log, said that in order for the Crown to comply with the court's ruling it would probably have to involve 20 to 30 police witnesses. That ruling could be no other ruling than that the Crown had to prove the Exhibit Log in its entirety, including, irrelevant entries not related to the charges against Mr. Murphy.

[62] The only logical conclusion from the record is that the trial judge had ruled on the admissibility of the Exhibit Log and he was going to require the Crown to prove each and every aspect of it. To suggest that the Crown did not seek to formally enter the document or the court did not formally rule on its admissibility, with respect, is not reflective of the record.

[63] Once again, the trial judge created an artificial impediment to the introduction of an exhibit. He could have simply disregarded any portion of the exhibit which was irrelevant to the charges against Mr. Murphy or not proven by the Crown. To require that each and every aspect of the Exhibit Log be proven, even if it did not relate to the prosecution against Mr. Murphy, was not necessary and the trial judge erred in so ruling.

2. Did the trial judge err in law in refusing the Crown's motions for adjournment to call witnesses to establish continuity of the photographic exhibits and the property items contained in the Exhibit Log?

[64] As noted earlier, it is not necessary to decide this issue as I am satisfied a new trial should be ordered as a result of the trial judge's errors on the admissibility of evidence issues.

3. If the trial judge erred, should a new trial be ordered?

[65] It is acknowledged by the respondent that the trial judge's decision is not without error, in particular, he acknowledges the trial judge erred in requiring continuity of the CD containing the photographs had to be proven beyond a reasonable doubt. He also acknowledges that the trial judge erred in ruling a Crown witness could not view the surveillance video before providing testimony on its authenticity, integrity and accuracy. In addition, as I have found, the trial judge erred in failing to allow the introduction of the Exhibit Log. However, the respondent says the errors do not warrant a new trial.

[66] Section 686(4) of the **Criminal Code** sets out the power of an appeal court where the appeal is from acquittal. It provides:

> **686(4)** If an appeal is from an acquittal or verdict that the appellant or respondent was unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal may
>
> (a) dismiss the appeal; or
>
> (b) allow the appeal, set aside the verdict and
>
> (i) order a new trial, or
>
> (ii) except where the verdict is that of a court composed of a judge and jury, enter a verdict of guilty with respect to the offence of which, in its opinion, the accused should have been found guilty but for the error in law, and pass a sentence that is warranted in law, or remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.

[67] It has long been established that a new trial will not be ordered purely on an abstract or hypothetical possibility that the accused would have been convicted but for the error of law. The Crown must satisfy the appellate court that the errors of the trial judge might reasonably be thought, in the circumstances of the case, to have a material bearing on the acquittal. The burden is not on the Crown to persuade the appellate court that the verdict would necessarily have been different. **R. v. Gravline**, 2006 SSC 16, ¶ 14. The statements from **Gravline, supra**, were adopted by this Court most recently in **R. v. Spinney**, 2010 NSCA 4.

[68] The question, therefore, becomes, has the Crown satisfied its onus that the errors of the trial judge "might reasonably be thought ... to have a material bearing on the acquittal."

[69] I am satisfied that the Crown has met this burden and the trial judge's errors can reasonably be thought to have a material bearing on the acquittal. The trial judge, in his decision, says as much.

[70] With respect to the Exhibit C89 containing the photographs, the trial judge said and I repeat:

> In whatever manner presented, of critical importance were the photographic images that were the computer generated disk, exhibit C89 that Johnstone created. This disk, in the court's opinion, was therefore an essential solder that was required to join and make coherent the respected unconnected but outstanding strands of evidence regarding the seizure, storage, ownership and continuity of property. (¶ 15)

[71] In the trial judge's own words, it is clear, he viewed the photographic evidence as essential to the Crown's case. Had it been introduced it could reasonably be thought to have a material bearing on the acquittal. Without more, this is sufficient for the ordering of a new trial.

[72] However, the trial judge goes further:

> [67] Moreover, there was insufficient or no evidence that reasonably would have established without doubt proof of the chain of continuity of possession and/or ownership. For example, there was insufficient or no evidence, on all those property counts that Murphy faced, of who seized the subject property; from where was the property seized; where was the property stored or detained from the time of its seizure until it was photographed, or, that it was not altered in any manner before it was photographed or delivered to its ostensible owner. ...

[73] This is precisely what the Crown was seeking to establish by the introduction of the Exhibit Log. The trial judge's erroneous ruling on the requirements for the admissibility of the Exhibit Log precluded the Crown from doing so and precluded the trial judge from considering and weighing that evidence. I am satisfied that the test is also met for this error.

[74] Finally, with respect to the Kent video, I refer again to **R. v. Nikolovski, supra**, where it was held that videotape evidence can present such clear and convincing evidence of the commission of the offence and identification that can be used as the sole basis for finding the accused as the perpetrator of the offence. Despite all of the frailties that may exist in other parts of the evidence, the videotape evidence may be the basis of a conviction. There can be no doubt that the introduction of the videotape might reasonably be thought to have a material bearing on the trial judge's acquittal on those charges.

[75] I am satisfied that the Crown has met its onus and that it is appropriate in these circumstances to order a new trial on all counts before a different trial judge.

Conclusion

[76] The appeal is allowed, the acquittal set aside and a new trial ordered.

Farrar, J.A.

Concurred in:
Fichaud, J.A.
Bryson, J.A.