

IN THE PROVINCIAL COURT OF NOVA SCOTIA

Citation: R. v. Kennedy, 2007 NSPC 15

Date: April 23rd, 2007

Docket: 1676153,54

Registry: Halifax

Her Majesty the Queen

v.

Francis Elliot Kennedy

DECISION

Judge: The Honourable Judge Jamie S. Campbell

Heard: March 8th, 2007

Oral decision: April 23rd, 2007.

Charges: Criminal Code Section 264.1(1)(b), 145(3), 145(5).1

Counsel: Crown - John W. MacDonald
Defence - Don MacLennan

[1] Francis Kennedy has been charged with arson and three counts of breaching an undertaking. Mr. Kennedy has made an application for a stay of proceeding under section 24 of the Canadian Charter of Rights and Freedoms, based on the loss of evidence by the police investigating the matter.

[2] The facts are not in dispute. On August 4, 2006 two members of the Cape Breton Regional Police Service were investigating a complaint about a disturbance on MacLean Street in Glace Bay. As a result of that investigation Mr. Kennedy was charged with uttering a threat and two counts of breaching an undertaking. During the investigation the police took an audio recorded statement from the complainant Barbara Steele. That statement was taken on August 4th and was disclosed to Mr. Kennedy's counsel.

[3] In that statement Ms. Steele said that Mr. Kennedy had told her that on August 2, 2006 he had set fire to a car owned by Clarence Slade. On August 6, 2006 that information was passed onto the officers who were at that time already investigating the car fire. Those officers decided to obtain a separate audio recorded statement from Ms. Steele dealing exclusively with the car fire. They took that statement on the afternoon of August 6, 2006. The applicant, Mr. Kennedy was charged with arson in connection with the car fire and with three counts of breaching an undertaking arising from that incident.

[4] The recording of the August 6, 2006 interview was so distorted that it could not be transcribed. There was no explanation offered for the failure of the recording equipment.

[5] On October 25, 2006 the police took a third statement from Ms. Steele. That statement was transcribed and disclosed to Mr. Kennedy's counsel.

[6] Mr. Kennedy has applied for a stay of proceeding based on his assertion that his right to make full answer and defense under section 7 of the Charter has been infringed by the loss of the statement made by Ms. Steele on August 6, 2006.

Issues:

[7] Has the Applicant's right to make full answer and defense been infringed?

[8] If so, should a stay of proceedings be granted under section 24 of the Charter?

Law:

[9] The right of a an accused person to make full answer and defense can be impaired by the loss of evidence. The Supreme Court of Canada in *R. v. La* [1997] 2 S.C.R. 680, 116 C.C.C. (3d) 97, 8 C.R. (5th) 1, confirmed the obligation that rests on the investigating authorities to preserve evidence that is known to be relevant.

[10] When evidence is lost the Crown must satisfy the court that the evidence has not been lost or destroyed because of some unacceptable negligence. As the relevance of the evidence increases the degree of care expected of the police for its preservation increases correspondingly. Even if the loss of the evidence is not due to unacceptable negligence a stay may be granted if the accused person's right to a fair trial has been compromised.

[11] The failure of recording equipment and the inability to transcribe a witness statement is a loss of evidence. No transcribed statement came into existence. No physical evidence was misplaced or destroyed. The malfunctioning of recording equipment and the consequent inability to produce a record of the interview have been consistently held to justify the same inquiries as circumstances in which physical evidence has been lost or destroyed. *R. v. R.C.S.* [2004] N.S.J. No. 445, *R. v. Hill* [2002] N.S.J. No 379, 207 N.S.R. (2d) 362, *R. v. D.J.W.* {2003} O.J. No. 3057, *R. v. J.E.L.* N.S.J. 202 (Prov. Ct.)

[12] There is no right to a flawless investigation. Equipment is not always reliable. Human errors are made. In those circumstances the court must consider whether the police conduct has been informed by an improper motive or by a degree of unacceptable negligence such that it gives rise to an abuse of process. In doing so, the court must consider the significance of the evidence in terms of the affect of its loss on the right to a fair trial. The more significant the evidence in that regard, the higher the obligation placed on the police to preserve it. If the

evidence is so significant that the right to a fair trial has been prejudiced by its loss, the degree of negligence in police conduct is not the issue. Similarly, if the police conduct has been characterized by bad faith or improper motive, the lost evidence may not need to be particularly significant.

[13] In determining whether the right to a fair trial has been prejudiced or compromised, the significance of the lost, destroyed or otherwise unavailable evidence cannot be based on speculation. There must be actual prejudice shown. *R. v. La* (supra.)

[14] The requirement for a fair trial under section 7 of the Charter does not mean a perfect trial. The Charter does not guarantee the fairest of all possible trials but a trial that is fundamentally fair.

“ What constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process, like complainants and the agencies which assist them in dealing with the trauma they have suffered. Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfection in justice but fundamentally fair justice.”
R. v. B.(J. G.) (2001) 151 C.C.C. (3d) 363.

[15] The system and those within it should, of course, never stop in the pursuit of perfection. The knowledge that the system of justice is imperfect and the almost irrational desire to achieve

perfection are what make an imperfect system one of our society's proudest achievements. A fair trial however, is a trial that is fair not only to the accused person. If in achieving perfect fairness to the accused the other interests are denied fairness, the perfect has become the enemy of the good.

[16] The law regarding lost evidence is a recognition of that. A stay should be granted when the loss of the evidence has created a situation where the right to a fundamentally fair trial has been denied. That may occur because of the circumstances under which the evidence was lost or the significance of that evidence.

[17] The more precise issues in this case are then, first whether the absence of an audible version of the second statement of the complainant Barbara Steele was caused by unacceptable police negligence and second the extent to which the right to a fair trial has been compromised by the inability to recover that statement.

Analysis:

[18] There is no allegation in this case that the police who attempted to record Barbara Steele's second statement on August 6, 2006 acted in bad faith or with any improper motive.

[19] The first question is whether their failure to get an audible recording was “unacceptable negligence”. Their behaviour must be assessed against the significance of the evidence they were intending to obtain, which is closely related to the second issue of whether the loss of that statement compromises the right to a fair trial.

[20] The lost or perhaps more accurately called the unintelligible statement, was the second in a series of three statements given by Barbara Steele. The police acknowledged that no testing was done on the recording equipment prior to their attending with Ms. Steele to take her statement. Testing of the equipment would not have been a time consuming or particularly onerous precaution to have taken. There were apparently no notes taken of the interview. When the statement was taken, and determined to be unintelligible, the police then did not take the third statement until October 25, 2006 more than eleven weeks later. The evidence of Barbara Steele is the only evidence upon which the Crown would intent to rely at trial and any statement made by her would be understood to have considerable importance.

[21] Counsel for Mr. Kennedy asserts that he has lost the opportunity to cross examine Ms. Steele on any inconsistencies that might have existed with that second statement and the first taken on August 2nd and the third taken on October 25th. While it may be purely speculative to suggest that there would be such inconsistencies Mr. MacLennan, on behalf of Mr. Kennedy made the practical point that when evidence is lost any consideration of its potential benefit to

the accused may be considered speculative. Mr. MacLennan pointed out inconsistencies between the two existing statements and made the logically sound contention that, if they are inconsistent, the second statement cannot then be consistent with both. The loss of the ability to cross examine the complainant means the loss of a tool of cross examination.

[22] When the police met with Barbara Steele on August 6th they were in many respects taking an extra statement to confirm what she had said in her August 4th statement. While her evidence is the basis to the Crown's case against Mr. Kennedy they already had one statement from her. While this second statement was important it was by no means as critical to their interests as her first statement.

[23] The police, albeit rather late, did take the only step possible to rectify the situation by getting the third statement from Ms. Steele and then disclosing that statement to Mr. Kennedy's counsel.

[24] The Crown case against Mr. Kennedy at trial would consist largely of the testimony of Ms. Steele. She would be required to give evidence and to be cross examined on her testimony. The defense would have two statements from her with which to test her recollection and credibility.

[25] Her testimony would not be taking Mr. Kennedy or his counsel by surprise. There was proper disclosure of what Ms. Steele would say in her testimony. If the second statement were the only one given and there were recording problems that resulted in its being unintelligible the defense could argue the lack of disclosure. That is not the case here.

[26] To the extent that there are inconsistencies between the two existing statements the defense would have the ability to put those inconsistencies to her.

[27] The police efforts in attempting to obtain the August 6th statement certainly did not meet a standard of perfection, nor were their techniques the stuff of television crime drama. Their mistake however was an understandable human one and was not improperly motivated. They made at least some attempt to rectify the situation by obtaining the third statement.

[28] The August 4th statement of Ms. Steele may well have been helpful to the defense. The fact that Ms. Steele will be available for cross examination on two other statements, the fact that the second statement is lost to both sides, and the fact that there has, with the two existing statements, been adequate disclosure mean while that Mr. Kennedy might be deprived of one tool of cross examination he would not be deprived of the right to fundamental fairness in a trial. The actions of the police were not of such a quality as to change that balance.

[29] The granting of a stay of proceedings would give insufficient weight to legitimate interests of the Crown and disproportionate weight to the effort to obtain the perfect trial for Mr. Kennedy. Despite the loss of a tool of cross examination, Mr. Kennedy's right to a fundamentally fair trial has not been compromised.

[30] The application is denied.

Judge Jamie S. Campbell