IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. J.E.L., 2004 NSPC 21

Date: 20040420
Docket: 1381289
Registry: Shubenacadie

Between:

R.

v.

J. E. L.

Publication restriction: There is an order for non-publication of the identity of the complainant or of a witness and any information that could disclose the identity of the complainant or witness shall not be published in any document or broadcast in any way. (s. 486(3) of the **Criminal Code**)

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Judge James H. Burrill

Heard: March 29, 2004 at Shubenacadie, N.S.

Counsel: Robert Hagell, Crown Attorney
Robert A. Carruthers, Defence Attorney

By the Court:

[1] The accused, J. E. L., is before the Court charged with the following offence:

> "on or about the 2nd day of October, 2003, at or near *, Nova Scotia, did commit a sexual assault on R. C., contrary to Section 271 of the **Criminal Code**."

[2] The accused seeks a stay of proceedings with respect to this charge pursuant to s. 24 of the **Charter.** The accused alleges that he suffered a violation of his **Charter** rights as embodied in s. 7 and s. 11(d) of the **Charter.**

[3] The accused alleges that the Crown failed to disclose fully all relevant evidence gathered in the course of the investigation of the charge. In particular, he alleges that the Crown has failed to provide the entire contents of a videotaped statement taken from the complainant, the day after the alleged offence, on October 3rd, 2003.

[4] The accused claims that the Crown's failure to make full disclosure with respect to the charge amounts to an abuse of process, sufficient to require the Court to order a stay of proceedings. He also claims that his s. 7 **Charter** right to make full answer

and defence has been breached through the incomplete disclosure of the videotaped statement. He argues that the incomplete disclosure is so prejudicial to his right to receive a fair trial that a stay of proceedings is the only appropriate remedy.

THE FACTS

[5] On October 3rd, 2003, in the morning, the child complainant, R. C., attended at the R.C.M.P. Detachment in * , Nova Scotia. He was there to give a videotaped statement to Cst. D. Sack of R.C.M.P. and to Colleen Maloney, an Intake Worker with the Department of Community Services. The interview was to be conducted by both agencies as per a protocol that had been established.

[6] In preparation for the interview, Cst. Sack tested the video recording equipment and found that it was not functioning properly. As a result, the interview was postponed until that afternoon. The venue for the interview was changed to the offices of Community Services.

[7] Before beginning the interview in the afternoon, Cst. Sack tested the video equipment which consisted of two video recorders. She tested both and found them to be functioning properly. She was familiar with the equipment. She had used it

many times before. She inserted video cassettes in both recorders and started to record the interview session at approximately 2:31 p.m. using both machines.

[8] The video recorders each recorded the interview until approximately 3:01:52 p.m. when for unexplained reasons both recorders stopped working. At that point in the interview, the complainant had identified his penis as a part of his body where he would not like to be touched. He had identified “J.” as having touched him on his penis while he was in his bed at his home. He also told the interviewers that when this happened his father was at work.

[9] The interview continued for some time after the recorders stopped working. It was estimated by Cst. Sack that sixty-five (65) to seventy (70) per cent of the interview had been captured on the video. Ms. Maloney estimated that the total interview lasted between forty-five (45) minutes to one hour.

[10] The vast majority of the taped portion of the interview could be described as the rapport building stage and it was only the very last portion of the recording that contained relevant disclosures.

[11] At the conclusion of the interview, the interviewers went to the recording area to turn off the video tapes. They noticed that both VCR's had stopped working. Why both machines stopped recording remains a mystery. I accept Ms. Maloney's evidence when she testified that no one other than the interviewers would have access to the VCR's in order to turn them off. I accept that neither of the interviewers turned the recorders off.

[12] After the interview, Ms. Maloney made notes concerning the interview. This was her usual practice, but since she realized that the VCR's had stopped recording, she made notes that were more extensive than was usual. A copy of these notes had not been made available to the defence on the date this voir dire was held although I accept that the contents of the notes were summarized in a document commonly known as a "Crown Sheet" that was given to the defence. In any event, Ms. Maloney's notes of the interview exist and are in Ms. Maloney's possession. I am advised that disclosure of these notes may be the subject of a further application by the defence at this trial.

[13] Cst. Sack made no notes after realizing that the VCR's had failed to record all of the interview and conceded that her memory about exactly what was said had faded somewhat with the passage of time.

[14] Due to the failure of the tape, arrangements were made to have the complainant child re-interviewed. This was accomplished four days later on October 7th, 2003. This interview was conducted by a different police officer and social worker. This interview was recorded on tape and was approximately twenty-six minutes in length.

[15] The video of the October 7th interview was entered as an exhibit at the voir dire. The rapport building stage of this interview was very brief and almost all of the tape involved a discussion of allegations against "J.". From the totality of the evidence on the voir dire, I conclude that similar allegations were made at both interviews.

ABUSE OF PROCESS

[16] It is indisputable that the Crown has a duty to disclose its case against an accused. Courts, however, have been faced with situations where the evidence is no longer available to be disclosed because the evidence has been lost or destroyed.

[17] The legal procedure which should be used in Nova Scotia to analyze "lost evidence" is set out in **R. v. F.C.B.** (2000), 182 N.S.R. (2d) 215 (N.S.C.A.) at pages 220-221.

> "(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.
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> (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.
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> (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.
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> (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.
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> (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.
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> (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.
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> (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.
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> (11) The **O'Connor** criteria referred to in the eighty point are as stated by Justice L'Heureux-Dube at para. 82 of **O'Connor**:
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>> "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."

[18] The first issue to be decided is whether there has actually been a loss of evidence. While I am satisfied that 65% - 70% of the interview was recorded, the vast majority of the interview that was relevant to the charge before the Court was not recorded.

[19] Cst. Sack took no notes during or after the interview and has only her memory which admittedly is lacking with regard to the exact words spoken by both the interviewers and the complainant. Ms. Maloney did make notes following the interview which were more comprehensive than they would have been had the interview been fully recorded, but one cannot expect those notes to be a substitute for a complete video.

[20] As a result, and on the whole of the evidence, I am driven to conclude that there was a loss of relevant evidence because of the failure to record the whole of the interview on October 3rd.

[21] Having concluded that there was a loss of relevant evidence does not end the matter. I must go on to consider whether this evidence was lost intentionally or through “unacceptable negligence” and was therefore a breach of s. 7. The Crown has a duty to explain.

[22] In assessing this issue, guidance is given by the Supreme Court of Canada in the case of **R. v. La**, (1997) 116 C.C.C. (3d) 97 where at pp. 107-08 Sopkina, J. states:

> "This obligation to explain arises out of the duty of the Crown and the police to preserve the fruits of the investigation. The right to disclosure would be a hollow one if the Crown were not required to preserve evidence that is known to be relevant. Yet despite the best efforts of the Crown to preserve evidence, owing to the frailties of human nature, evidence will occasionally be lost. The principle in Stinchcombe No. 2, supra, recognizes this unfortunate fact. Where the Crown's explanation satisfies the trial judge that the evidence has not been destroyed or lost owing to unacceptable negligence, the duty to disclose has not been breached........"

[23] In order to determine whether there has been "unacceptable negligence", all of the circumstances surrounding the loss of the evidence need to be considered. The main consideration is whether reasonable steps were taken in the circumstances to preserve the evidence for disclosure.

[24] In this case, the interview was held at the offices of Community Services in an area set up specifically for the purpose of videotaping such statements. Two recorders were used to record the interview. The equipment was tested and each recorder was found to be working properly. In fact, each recorder did function properly for a substantial portion of the interview. Cst. Sack was familiar with the equipment and had used it, apparently without difficulty, many times. No one other than the interviewers had access to the video equipment recorders.

[25] In all of the circumstances, I find that there was no negligence on the part of the interviewers. While it is easy to suggest that this loss of evidence might have been prevented if another person had monitored the recorders throughout the interview, such a suggestion comes only from the benefit of hindsight. Being familiar with the equipment, having tested it, and utilizing two recorders was more than reasonable in the circumstances.

[26] I am satisfied from the evidence that the failure to videotape the entirety of the first interview was entirely accidental and unintentional. As a result, there was no breach of the duty to disclose in this case.

Right to Make Full Answer and Defence

[27] Even with my finding regarding the issue of abuse of process (by failure to disclose), I am required to consider whether the Crown's inability to provide a videotape of the full interview has violated the accused's s. 7 right to make full answer and defence. If it does, then the accused cannot receive a fair trial as guaranteed by s. 11(d) of the **Charter.**

[28] In this case had the recorders captured the entire interview, both the Crown and defence would have been able to watch and listen to the entire interview. While this would have provided a further piece of disclosure to the accused, it is unclear if it would have assisted him in his defence of the charge. While I have found that there has been a loss of a significant portion of the statement, it is clear that all information concerning the statement has not been lost. A portion of the interview is captured on tape. Cst. Sack has some memory of the statement. Ms. Maloney has her memory and notes of the statement that were made shortly after the interview concluded. Each of those individuals are available to testify about the statement.

[29] In addition, a second interview was conducted with the complainant. This was conducted three days after the original interview and four days after the alleged offence.

[30] That interview was fully recorded and presented as evidence on the voir dire. As I have found, it appears that the disclosures in the second interview were substantially the same as those made by the complainant in the first statement.

[31] I am satisfied that the available evidence from the first interview together with the complete videotaped statement of the complainant on the subsequent interview held three days later provides the accused with the ability to conduct a meaningful review of the complainant's out of court statements. It will allow the defence to assess the complainant's credibility and to use the statements as a foundation to cross-examine him in a meaningful way in relation to his right to make full answer and defence.

[32] In considering whether there has been a breach of the accused's right to make full answer and defence, the following excerpt from **R. v. B. (J.G.)** (2001), 151 C.C.C. (3d) 363 (Ont. C.A.) At pp 369-70 is helpful:

> "[6] In assessing the prejudice to the accused's right to make full answer and defence as secured by s. 7 of the **Charter**, it is important to bear in mind that the accused is entitled to a trial that is fundamentally fair and not the fairest of all possible trials. As stated by McLachlin J. in **O'Connor, supra**, at pp.78-79:
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> ...**the Canadian Charter of Rights and Freedoms** guarantees not the fairest of all possible trials, but rather a trial that is fundamentally fair: **R. v. Harrer,** ([1995] 3 S.C.R. 562, 101 C.C.C. (3d) 193]. 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 may have suffered. Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice but fundamentally fair justice.

> [7] In a similar vein, Justices McLachlin and Iacobucci commented in **R. v. Mills**, [1999] 3 S.C.R. 668 at 718, 139 C.C.C. (3d) 321, that fundamental justice embraces more than the rights of the accused and that the assessment concerning a fair trial must not only be made from the point of view of the accused but the community and the complainant. The fact that an accused is deprived of relevant information does not mean that the accused's right to make full answer and defence is automatically breached. Actual prejudice must be established: **Mills, supra**, 719-720, citing **R. v. La**, [1997] 2 S.C.R. 680 at 693, 116 C.C.C. (3d) 97.
>
> [8] The fact that a piece of evidence is missing that might or might not affect the defence will not be sufficient to establish that irreparable harm has occurred to the right to make full answer and defence. Actual prejudice occurs when the accused is unable to put forward his or her defence due to the lost evidence and not simply that the loss of evidence makes putting forward the position more difficult. To determine whether actual prejudice has occurred, consideration of the other evidence that does exist and whether that evidence contains essentially the same information as the lost evidence is an essential consideration."

[33] In assessing how prejudicial the absence of the complete videotape of the first interview is I have, as well, been mindful of the following passage from **R. v. Hill**, [2002] N.S.J. 379 (N.S.S.C.) where at para. 19, Goodfellow J. cited with approval the case of **R. v. Court** [1997] O.J. 3450 (C.S. at p. 11:

> "The prejudice may result from the inability to actually use the materials in cross-examination, or to use them as the foundation for cross-examination, to point to other opportunities to garner evidence, or to benefit the defence in making appropriate decisions relevant to the conduct of its case. Rather than requiring the defence to demonstrate the specific prejudice arising from the loss of the materials which is no longer available, the defence can meet its onus by persuading the Court to conclude, on the basis of the general nature of the records, what is

> known to them, of the circumstances surrounding the creation of the records, and of the facts in issue in the case, the prejudice has occurred to the defence ability to make full answer and defence. It is not necessary that the lost evidence be in itself directly admissible at trial."

[34] On the evidence before me, I am not satisfied that the ability to assess the credibility of the complainant has been significantly impaired. Unlike the unreported decision of Associate Chief Judge Gibson in **R. v. Toney**, (2002) Docket #1177255-57 (N.S. Prov. Ct.) where a faulty video was the only statement available to assess the credibility of the complainant there is other evidence available that can be utilized for that purpose. In this case I am not persuaded that there has been any significant prejudice to the right of the accused to make full answer and defence to the charge before the Court. Accordingly, there is no breach of the accused rights and, therefore, no need to consider a remedy under s. 24 of the **Charter.**

[35] In delivering judgement on this issue at this time, I am mindful that I have not yet heard the Crown's evidence in this case. By consent the Crown has outlined the case that they will be presenting. They will be relying on the child's testimony in this case as eyewitness evidence. If the child is not able to testify, then the Crown will attempt to tender, as alternate evidence, the second videotape for the truth of its

contents.

[36] While it is often preferable to proceed with the trial and assess the issue of the violation in the context of the evidence as it has unfolded, I am satisfied that I have sufficient information from the evidence presented on the voir dire and the outline of the Crown's case to deliver judgment at this time.

[37] A ruling at this time, of course, does not preclude the defence from renewing the application should there is a material change in the circumstances that affects the level of prejudice. See **R. v. La** (1997) 116 C.C.C. (3d) 97 (S.C.C.) at p. 110.

JAMES H. BURRILL
JUDGE OF THE PROVINCIAL
COURT OF NOVA SCOTIA