IN THE YOUTH JUSTICE COURT OF NOVA SCOTIA

Citation: *R. v. W.(N.)*, 2017 NSPC 38

Date: July 19, 2017
Docket: 3015277
Registry: Halifax

Between:

Her Majesty the Queen

v.

W.(N.)

RESTRICTION ON PUBLICATION:

section 110 YCJA - Identity of Young Person and section 111 – Identity of Victim or Witness

DECISION ON THE EVIDENCE OF ALIBI

Judge:	The Honourable Judge Anne S. Derrick
Heard:	July 19, 2017
Decision:	July 19, 2017
Charges:	section 235, *Criminal Code*
Counsel:	Terry Nickerson and James Giacomantonio, for the Crown
	Roger Burrill and Anna Mancini, for W. (N.)

By the Court:

[1] During N.W.'s direct examination, in response to questioning about his activities on the night J.C. was murdered, he said the night ended for him when M.B. drove him home and he went inside and to bed.

[2] The Crown identified this evidence as evidence of alibi. This has raised several questions:

1) Is this alibi evidence?
2) If it is, was the Crown given timely and adequate notice of it?
3) If it is alibi evidence, can the Crown cross-examine N.W. on it?
4) Was there late notice such that an adverse inference may be drawn?

[3] Mr. Burrill says this is not alibi. He says it is "a denial with supplemental alibi aspects."

[4] I find it is alibi evidence. It is a claim that N.W. was elsewhere at the time of J.C.'s murder. (*R. v. Nelson, [2001] O.J. No. 2585, para. 8*) The inference he is inviting me to draw is that he therefore could not have killed him.

[5] Mr. Burrill relies on *R. v. Wright*, an Ontario Court of Appeal decision, [2009] O.J. No. 3550 (C.A.)

[6] I find *R. v. Wright*, to be distinguishable. In that case, the witness' evidence was incorrectly characterized as alibi evidence. On that basis, it was concluded by the court that the trial judge should not have given the adverse inference instruction.

[7] In *Wright*, the Ontario Court of Appeal concluded that had Mr. Wright disclosed his defence – that he went along part of the way but did not ultimately participate with his associates in their commission of a violent robbery –

> **24**…he would have implicated himself by acknowledging his presence at the outset of the transaction with those who eventually committed the crimes. Prior disclosure of this kind of defence could well generate new theories of liability based

> on accessorial responsibility. To require an accused to disclose this kind of defence and thereby implicate himself in the crime, or risk an adverse inference instruction is to impose a significant intrusion on the accused's right to silence.

[8] That is not comparable to what I am dealing with in N.W.'s case. N.W.'s alibi would not have implicated him in the murder. It could have implicated him in other offences arising out of his presence in a stolen car, where there was a loaded prohibited weapon that was used in the Lakecrest Drive shooting. But his claim of being at home in bed in the very early morning hours of March 29, 2016, if ultimately believed, constitutes a complete defence to the murder charge.

[9] The next issue I must confront is the issue of alibi notice. The Crown says it did not receive notice from the Defence of N.W.'s alibi. As the Supreme Court of Canada established in ***R. v. Cleghorn***, [1995] 3 S.C.R. 175, "…proper disclosure of an alibi has two components: adequacy and timeliness." (***para. 3***) The Crown says learning during direct examination what N.W. had to say about his whereabouts around the time J.C. was shot is neither timely nor adequate.

[10] What the Crown did know before N.W. testified was that N.W.'s mother had been spoken to by a police officer assisting the homicide investigators. I heard about the facts from retired Cst. Daniel Berrigan who testified in the *voir dire*.

[11] Mr. Berrigan testified that he had spoken to N.W.'s mother, [M...] on a couple of occasions on the telephone and also at her residence on Kennedy Drive. This was in early May 2016. It was before N.W. was arrested. Cst. Berrigan knew [M…] and had a positive rapport with her. He encouraged her to have N.W. talk to the police. [M…] was harbouring some resentment over how investigators had conducted a search of her residence on April 1. She and Cst. Berrigan talked about that too. [M…] also told Cst. Berrigan that she knew N.W. wasn't involved in the murder of J.C. because he had been helping her all night with her migraine headache. Mr. Berrigan remembers that she told him N.W. was getting compresses. [M…] said this had lasted all night.

[12] Mr. Burrill says this is all the notice the Crown needed in relation to N.W.'s alibi. Equipped with this information the Crown has not been taken by surprise and

had the opportunity to conduct a meaningful investigation into N.W.'s whereabouts.

[13] The problem with Mr. Burrill's argument is that what [M…] provided to Cst. Berrigan cannot be considered adequate in my view. It is only reasonable to compare it to what I know N.W. would have provided in the nature of specifics. In his testimony N.W. said he was helping his mother deal with her migraine but that he then played video games with his little brother and afterwards went out. He was out for awhile with M.B., L.D., L.C. and J.C. He says M.B. dropped him off home in the very early morning and he went to bed, his younger brother sleeping with him. That is what a sufficient notice of his alibi would have looked like.

[14] It would be speculative to suggest that there could have been no meaningful investigation of an alibi disclosed by N.W. with the details he testified to in his direct evidence. The Ontario Court of Appeal in *R. v. Borde*, 2011 ONCA 534 refers to the placing of "an impossible burden on the Crown to show what the investigation it was unable to do would have yielded." (*para 18*)

[15] There is now no opportunity for the Crown to meaningfully investigate N.W.'s alibi. The night of March 29 is almost 16 months in the past. Also, the Crown indicates that N.W.'s mother has sat through most of this trial. What meaningful opportunity may have existed to investigate the alibi has largely, if not entirely, evaporated.

[16] What is the significance of these conclusions?

1) I expect I will be invited by the Crown to draw a negative inference from N.W.'s late disclosure of an alibi. I may do so. That is not a bridge I must cross now.
2) What the Crown is seeking now is the right to cross-examine N.W. on the reasons for his later disclosure. The Ontario Court of Appeal in *R. v. Alphonso*, 2008 ONCA 238 held that:

> **9** The Crown was entitled to explore the appellant's alibi evidence on cross-examination and test that evidence for details or the absence of details as a means of challenging the appellant's credibility. Details can

> include questions concerning the appellant's whereabouts and the people the appellant was with at the relevant time…

Conclusion

[17] I find this is a classic alibi situation with implications for N.W.'s right to silence due a lack of timely and adequate notice. The Crown may cross-examine on the alibi and seek to have a negative inference drawn.

Derrick, P.C.J.