

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Butcher*, 2018 NSSC 106

Date: 2018 04 19

Docket: HFX No. 455873

Registry: Halifax

Between:

Her Majesty the Queen

v.

Nicholas Jordan Butcher

DECISION: *VOIR DIRE* 13
Defence Application – Admissibility of Electronic Communications

Judge: The Honourable Justice Joshua M. Arnold

Heard: April 19, 2018, in Halifax, Nova Scotia

Written Decision: May 2, 2018

Counsel: Carla Ball and Tanya Carter, for the Crown
Peter Planetta and Jonathan Hughes, for the Defence

By the Court:

Overview

[1] The Crown alleges that Mr. Butcher murdered Kristin Johnston on March 26, 2016. Mr. Butcher wishes to introduce into evidence a series of text messages between himself and Ms. Johnston. Both the Crown and Mr. Butcher agree that all evidence called at the trial, including all evidence called on the pre-trial *voir dire*s, can be relied on in this *voir dire*.

[2] In an earlier decision (*R. v. Butcher*, 2018 NSSC 74), based on the information presented at *Voir Dire* 1, I admitted antemortem hearsay evidence proposed by the Crown to show Ms. Johnston's state of mind and present intention as it related to her relationship with Mr. Butcher.

[3] The witnesses on *Voir Dire* 1 presented evidence that Ms. Johnston wanted to end her relationship with Mr. Butcher, but was unsure of how to best end things. She said her feelings for him were not as strong as his feelings for her. Her business was closing and she wanted to eventually relocate and start a new life without him.

The Text Messages

[4] The text messages on this *voir dire* involve Ms. Johnston and Mr. Butcher exchanging romantic and affectionate comments with each other. They include a lot of small talk. They also include introspective comments about issues of concern to each individual in their day to day lives. This includes their financial and employment issues.

[5] These text messages were not provided to the court for consideration during *Voir Dire* 1. Mr. Butcher says he was exercising his constitutional right to silence and did not want to reveal any aspect of his defence until the Crown closed its case. For its own part, the Crown offers no explanation as to why these text messages were not presented to the court during *Voir Dire* 1, although the inference is that since they were not asking for them to be admitted, and because they did not believe Ms. Johnston was being truthful with Mr. Butcher in her texts to him, they were not produced for the court.

[6] The text messages in question on this *voir dire* are not hearsay evidence. They are direct written communications between Ms. Johnston and Mr. Butcher. Mr.

Butcher has indicated that he will be testifying, and will introduce these text messages while on the witness stand.

[7] These text messages were a spontaneous back and forth between Mr. Butcher and Ms. Johnston. In the context of this trial, they were written contemporaneous with March 26, 2016.

The Decision in *Voir Dire 1*

[8] The antemortem hearsay statements from *Voir Dire 1* were introduced under a recognized exception to the hearsay rule. There were some aspects of the earlier proposed hearsay evidence that were not admissible, because the specific reporting witnesses' testimony on those aspects of the evidence was unreliable, speculative, opinion, or were mere summaries by the witnesses of Ms. Johnston's state of mind or present intention. Here we have Ms. Johnston directly communicating with Mr. Butcher in writing.

[9] Additionally, the comment, "I just broke up with Nick", that the Crown wanted introduced for the truth of its contents was not admissible. I was not satisfied on a balance of probabilities, considering the test in *Bradshaw*, that the corroborative evidence led on the *voir dire* rules out alternative explanations such that the only remaining likely explanation for the statement is the declarant's truthfulness about, or the accuracy of, the material aspects of the statement.

[10] The remainder of the antemortem hearsay statements were admitted to show Ms. Johnston's state of mind regarding her relationship with Mr. Butcher and her stated intention regarding continuing her relationship with him. The jury was given very clear instructions in this regard.

[11] I found the probative value of Ms. Johnston's statement of intention regarding her relationship with Mr. Butcher to be significant. That evidence tends to describe the nature of the relationship between Ms. Johnston and Mr. Butcher. It indicates her desire to end the relationship. They provide evidence of possible animus and a possible motive on the part of Mr. Butcher and go to the identity of Ms. Johnston's killer. The trier of fact should have this information in order to make an accurate decision. Admission of the text message evidence proposed by Mr. Butcher is now necessary for the jury to come to a fair determination of the guilt or innocence of Mr. Butcher.

State of Mind and Present Intention

[12] In the alternative, if the texts are hearsay evidence, the jury requires the text messages proposed by Mr. Butcher to counterbalance the Crown evidence regarding Ms. Johnston's state of mind and present intention as it related to her relationship with Mr. Butcher. These text messages also go to Ms. Johnston's state of mind and present intention regarding her relationship with Mr. Butcher. For the jury to have only half of the picture on this issue would be unfair to Mr. Butcher.

[13] Similarly, the texts that relate to Ms. Johnston's finances, the closing of her yoga studio and being sued are admissible for a limited purpose. They cannot be introduced for the truth of their contents, i.e. to establish that she was actually being sued or that her yoga studio was closing, but they are admissible to show Ms. Johnston's state of mind and possible stress levels at the relevant times.



Arnold, J.