SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Khan*, 2022 NSSC 222

Date: 20220615
Docket: **CRH** No. 502325
Registry: Halifax

Between:

Her Majesty the Queen

v.

Dederick Eric Khan

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D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	October 28, 2021, May 4, 25 and June 15, 2022 in Halifax, Nova Scotia
Written Decision:	August 4, 2022
Counsel:	Stephen Anstey, for the Provincial Crown Joel Pink, Q.C. and Grace Levy (Articled Clerk), for Dederick Eric Khan

By the Court (Orally):

[1] During our last Court appearance on May 25 I ruled that there had been a violation of the Rule in *Browne v. Dunn,* [1893] J.C.J. No 5. In the result, I ordered the recall of Cst. Dylan Carter for today's trial resumption. The Crown then sought leave for Cst. Carter to review his testimony from when he initially testified on October 28, 2021.

[2] At first blush I determined this to be a reasonable request and had my Judicial Assistant email counsel to this effect. I then received written submissions from the parties on June 7, 2022. Today I confirmed with the parties that they did not require oral submissions on the issue.

[3] Had the Rule in *Browne v. Dunn* been followed in the first instance the additional questions (which will presumably be put to Cst. Carter today), would have immediately followed his testimony. Due to the delays in the resumption of the trial (beyond the control of the parties and the Court), the recall of Cst. Carter will come over seven months after his initial testimony.

[4] The Crown has submitted a brief in which they argue, among other things that:

> …fairness dictates that Cst. Carter be permitted to refresh his memory of the prior testimony before being asked further questions. This puts him in as close as possible to the position he would have been in had the questioning proceeded in the normal course.

[5] As for the Defence, I quote from Mr. Pink's opening paragraph of his June 7 correspondence as follows:

> The Crown has advised that they wish to show Cst. Carter the evidence that he gave during direct examination in order to refresh his memory. The Defence takes objection to this and he should be able to testify as to his memory of the events without referring to his previous testimony.

[6] Mr. Pink supplied three cases for the Court's review:

1. *R. v. Rutigliano,* 2013 ONSC 2514, Ontario Superior Court of Justice;
2. *R. v. Heath*, [2013] O.J. No. 6470, Ontario Court of Justice; and
3. *Van der Steen v. Canada*, [2016] T.C.J. No. 170.

[7] The Crown cited *Rutigliano* and *Van der Steen* as well as a number of authorities including:

1. *R. v. Quansah*, 2015 ONCA 237
2. *R. v. Muise* (1974), 11 NSR (2d) 104 (NSSCAD)
3. Nova Scotia Barristers' Society, *Code of Professional Conduct*
4. *R. v. Montgomery* (1998), 126 CCC (3d) 251 (BCSC)
5. *MacLean v. MacLean*, 2009 NSSC 126
6. *R. v. Sandeson*, 2017 NSSC 197
7. *R. v. Paul Simpson* (8 October 2015), Dartmouth 2713670, Partial Transcript (NSPC)

[8] The last case, *R. v. Simpson*, is a decision of Judge Tax. At pp. 118 and 119 of the transcript he says as follows:

> I'll leave it open to … One of the things we have done in the circumstances where something like this happens through getting to a point in the trial where we are and it's not, you know, a week or two or a month that the witness is coming back, I have ordered a transcript in those circumstances, so that everybody refreshes their memory, number one, but, two, the witness is permitted to read the transcript of what was said before the continuation date, so that it isn't a matter of … or if not permitted to read the transcript, that if any question was asked … so there's two, two versions that have worked, depending on how the counsel see it. One version is that the witness reads the transcript before and is ready for cross-examination, based on a refresher of what they said the previous date. The other version, which we've done about fifty-fifty, is the transcript is prepared but not provided to the witness. The questions are answered on the basis of what's recollected by the person, but if there is a situation where somebody says something, because of the passage of time, then, of course, the witness is given the opportunity to refresh, in this case, her memory, by reading that excerpt of the transcript.

[9] With respect, and on reflection, I take issue with a witness reading their transcript or listening to their prior testimony before they are recalled to the witness stand. Having said this, I am familiar with the practice of counsel, if there has been a long break between trial dates, reviewing transcripts for their own trial preparation. I am not familiar with the approach outlined by Judge Tax wherein a witness is permitted to read his or her prior testimony.

[10] It occurs to me that irrespective of how much time has passed, a witness ought to remember what he or she testified about. In this case Cst. Carter testified on

October 28, 2021 about what was said in the back of his police car on March 27, 2019. He was driving when he heard the alleged utterances and made notes upon his return to the station. Accordingly, his initial testimony was about something that transpired approximately two and a half years before, a not uncommon circumstance. He swore to tell the truth and his evidence went in.

[11] We are now over three years from the matters in issue. To my mind, this does not appreciably change things. The officer may recall exactly what he said nearly eight months ago and be asked to elaborate today. If Cst. Carter does not recall what he testified to before, no doubt he will be permitted to consult his relatively contemporaneous notes (made at the police station).

[12] In all of the circumstances and given the submissions and caselaw, I will not permit him to listen to his October 28, 2021, testimony in advance of testifying today. In this regard I am especially mindful of Justice Hill's comments of paras. 12 to 19 of *Rutigliano*:

> [12] Assuming that an email from Crown counsel to Constable Winter attaching electronic copies of the days of prior testimony could be characterized as "a conversation" "about the witness' evidence or any issue in the proceeding" within the meaning of Rule 4.04(d), the application here is for leave of the court to do so and accordingly is squarely within the contemplation of the text of the Rule considering its preamble, "[s]ubject to the direction of the tribunal".
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> [13] Resolution of the application is dependent upon an exercise of judicial discretion having regard to trial fairness and efficient case management. Trial fairness takes account of not only the fair trial interests of the respondents but also the public interest in fairness to the prosecution and its witnesses. Case management considerations include fair justice effectively administered without unnecessary confusion or delay.
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> [14] It has become apparent that Constable Winter's credibility is critical to evidentiary development of the defence theory of police involvement in constitutional transgressions respecting the respondents' *Charter* rights.
>
> [15] While, in the experience of the court, five months is on its face an atypical gap in a cross-examination, providing transcripts to Constable Winter inviting reading of that material may not be essential to her recall of committed positions in her prior testimony. To some degree the application to have the witness refresh her memory before resuming cross-examination is both speculative and premature. Largely on the basis of the passage of time, the nature of the witness' evidence, and the real prospect of a revisiting of earlier subjects already addressed in cross-examination, the application presumes the potential for pervasive lack of recall on the part of the witness.

> [16] Given the constable's notes as well as emails and other relevant documents as the predominant source of tracking her activities, it cannot be said that it is likely that the witness will be unable to recall her prior evidence. Put differently, while the exercise might well be helpful to the witness and the flow of the continued proceedings, it is by no means clear that it is sufficiently necessary to support the application.
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> [17] In these circumstances, the safer course is to maintain the *status quo*. Should Constable Winter express a lack of recall respecting an earlier exchange with counsel, she will be permitted to refresh her memory from a relevant transcript.
>
> [18] The court will of course be in a position having regard to any number of matters including the clarity and fairness of counsel's questioning, the passage of time, and the nature of the detail at hand, to assess, if necessary, whether any expressed lack of recall is genuine, or feigned in the sense of an instance of an artificial attempt to simply check on the last version committed to.
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> [19] In addition, counsel will be held to a standard of fairness in closing submissions in dealing with instances of lack recall by Constable Winter, such as they may be.

[13] In exercising my judicial discretion having regard to trial fairness I am of the view that it would be speculative and premature to have Cst. Carter refresh his memory prior to giving evidence today. In the result, I deny the Crown's application and order the recall of Cst. Carter without him listening to his earlier testimony.

Chipman, J.