SUPREME COURT OF NOVA SCOTIA
Citation: *R. v. Mohammed*, 2023 NSSC 226

Date: 20230711
Docket: *Syd*, No. 510112
Registry: Sydney

Between:

His Majesty the King

Respondent

v.

Abdel-Rahman Mohammed

Applicant

Decision on Charter Application

s. 7 of the Charter

Judge:	The Honourable Justice Robin Gogan
Heard:	March 8, 2023, in Sydney, Nova Scotia
Final Written Submissions:	March 7, 2023
Counsel:	Mark Gouthro, for the Respondent Nick Burke, for the Applicant

By the Court:

Introduction

[1] This decision considers the appropriate remedy for a failure to disclose discovered just before trial.

[2] Abdel-Rahman Mohammed is charged with assault and sexual assault. Broadly speaking these offences allegedly took place between January 1, 2020 and June 30, 2021.

[3] The trial of this matter was originally scheduled to take place on March 7, 8 and 9, 2023. It was adjourned on March 7 as a result of a disclosure issue. This issue was described in the Crown brief:

> This application surrounds the turning over of late disclosure material to the defence last Friday before the trial was scheduled to start this Tuesday …
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> On March 3, the Crown disclosed a jump drive to Mr. Burke pursuant to a waiver signed by the complainant. I phoned Mr. Burke on March 1 to let him know that the Crown seized material (recordings etc.) that was not previously disclosed to him. I reviewed the material on March 2 after I got back from court and determined that the were (*sic*) records as defined under section 278 of the *Criminal Code*. As such, the Crown needed a waiver from the complaint (*sic*) in order to disclose/use the material.
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> Its unfortunate that this material was not initially disclosed by the police to the Crown. It appears that they (*sic*) were seized by police, but not forwarded to the Crown for disclosure. I asked the police on February 22, 2023 to disclose them. I was advised on February 28 that after searching for them, they could not be located.

> Cst. MacDonald and I met with the complainant on March 1 in the afternoon where (*sic*) the late disclosure material was obtained.
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> The following files were included on the jump drive:
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> - 12 audio recorded phone conversations between the complainant and Mr. Mohammed
> - 20 screen shots of the test messages between the complainant and Mr. Mohammed
> - A file which appears to be a dead *iCloud* link
> - An MS Word file that appears to be a journal entry of the complainant.
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> The Crown is seeking to use the two recordings in its case *in chief*. One recording is approximately 5 minutes 52 seconds in length and the other is approximately 7 minutes 37 seconds in length.

[4] Mr. Mohammed seeks an exclusion of evidence on the basis that his s. 7 *Charter* rights have been breached. This remedy is sought in addition to the adjournment already granted.

[5] The hearing of the *Charter* application took place on March 8, 2023. The original trial dates were adjourned to July 13, 14, 17 and 18, 2023. This gave Mr. Mohammed a period of just over four months to consider the impact of the late disclosed material and pursue any other remedies. During this period, Mr. Mohammed awaited trial while subject to a Release Order.

Background and Evidence

[6] Mr. Mohammed was charged with the offences now before the Court on September 14, 2021.

[7] The first contact between the complainant and police took place on July 20, 2021. Cst. Oldford's notes from the meeting confirm that the complainant had an audio recording that she felt was relevant.

[8] The file was assigned to the Domestic Violence Unit on July 29, 2021. Cst. Ashley MacDonald became the investigating officer on August 13, 2021. A statement was taken from the complainant on August 16, 2021. In the statement, the complainant says that she has audio recordings of the accused. She tried to play one of them for Cst. MacDonald. Although referenced in the statement, the Crown concedes that the quality of the recording makes it difficult to hear the content of the playback.

[9] Recordings from the complainant's computer were seized by police following the statement on August 16, 2021.

[10] Cst. MacDonald testified about the seizure of the recordings. She recalled that the recordings were saved on the complainant's work computer. The officer gave the complainant a thumb drive and she inserted it into her computer and

downloaded the audio files. The officer then took the thumb drive and returned to the police detachment.

[11] At some point, the officer reviewed the audio recordings on the thumb drive. She testified that she recalled some of the audio files were lengthy, perhaps ten to fifteen minutes and that she believed the recordings were of conversations between the complainant and the accused about the impugned conduct. She could not give any more particulars about the recordings. There was no inventory taken of the recordings, nor any notes made about the material. She recalled that there were some text messages. She did not recall screen shots.

[12] Subsequent to her review, the thumb drive was lost. Normally, material downloaded to a thumb drive would be transferred to a police desktop and a new thumb drive created for disclosure purposes. Officer MacDonald described the normal process was to seize, log and deposit material like this into the evidence system. The process was not followed in this case. She could not say why.

[13] Cst. MacDonald first became aware of the missing information when contacted by the Crown on February 23, 2023. She explained that she played no part in the disclosure process which is carried out by records clerks. When asked about the missing disclosure, she conducted a search to no avail. She said that she

"turned the place upside down" and did not find the thumb drive. She advised the Crown on February 28, 2023, that the material could not be found. She and Crown counsel met with the complainant on March 1, 2023, and were provided with copies of 12 audio files, 20 screen shots, a "dead iCloud link", and a Word file. On March 3, 2023, these materials were disclosed to the defence.

[14] Cst. MacDonald was asked about her notes and occurrence reports. She confirmed that she made no record of seizing any items and that the Crown sheet she prepared did not reference any photographs.

[15] I pause here to observe several significant things evident from the evidence. No explanation was offered for obvious failures in the preservation of evidence and subsequent disclosure. The officer admitted to: (1) not following the exhibit handling process, (2) improper storage of thumb drives containing evidence in a locked desk drawer, (3) failure to inventory the content of the thumb drive or record its existence or content in any way, and (4) losing the thumb drive. She said that the loss of the evidence only came to her attention when it did because the Crown asked for it over two years later. She did not realize earlier because she was not part of the disclosure process. Obviously, such a disconnection underscores the importance of following the exhibit protocols.

[16] Officer MacDonald could not explain what happened to the thumb drive except to say that it was lost and could not be found. She testified that the failures here resulted from complacency. She offered that she believed the late disclosure was the same as the material originally seized. But she could not provide any real basis for this conclusion other than on both occasions it was provided by the complainant.

[17] On the basis of the evidence, I conclude that the lost and late disclosure was the product of something more than an isolated oversight. The conduct here falls short of intentional non-disclosure or obstruction. I would describe it as gross complacency. It is certainly negligent and far below the required standard.

[18] Before moving on, I also observe that the handwritten notes of Officer Oldford were only disclosed on March 7, 2023 (the first day of the original trial), even though his contact with the complainant took place on July 20, 2021. Cst. Oldford was the first point of contact with the complainant and his notes reference that the complainant had audio recordings. Disclosure of these notes resulted from defence inquiries in preparation for trial.

[19] I turn now to a brief discussion of the issue and positions of the parties, followed by an analysis and a conclusion.

Issue

[20] The issue for determination is whether there has been a breach of Mr. Mohammed's s. 7 *Charter* rights. If so, what is the appropriate remedy?

[21] In my view, the real issue is whether Mr. Mohammed has established that it is appropriate to grant any relief in addition to the adjournment already granted.

Positions of the Parties

Abdel-Rahman Mohammed

[22] Mr. Mohammed says that the present case is a "rare circumstance that involves (1) a failure to disclose, (2) lost evidence with no notice provided that the loss had occurred, and (3) late disclosure (Friday afternoon before a trial commencing on Tuesday)". The evidence is important and the Crown now seeks to rely on some of it as part of its case. The disclosure issues are negligent, egregious, and an abuse of process. There is a breach of his *Charter* rights that has impaired his ability to make full answer and defence.

[23] Mr. Mohammed goes on to say that the adjournment period is not enough. The conduct here requires more of a remedy. He submits that it is appropriate to exclude the evidence.

[24] Mr. Mohammed relies on an extensive list of authorities, some of which will be referred to below.

The Crown

[25] The Crown concedes a failure to disclose and a corresponding breach of Mr. Mohammed's *Charter* rights. The Crown provided new disclosure on the eve of trial and admitted lost disclosure. Although it conceded an adjournment is necessary, it contests the need for any further remedy.

[26] The Crown submits that an exclusion of evidence is an exceptional remedy and that the Court must focus on curing the prejudice from the disclosure issue. Exclusion is only appropriate where prejudice cannot be cured. Here, the prejudice can be cured by disclosure and adjournment.

[27] The Crown relied on the decision of the Supreme Court of Canada in ***R. v. McQuaid,*** 1998 CarswellNS 7.

Analysis

The Charter and the Relief Sought

[28] Mr. Mohammed says that his rights under s. 7 of the *Charter* have been breached. Section 7 provides:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[29] He seeks a remedy under s. 24(1) of the *Charter* which provides:

> 24. (1) Anyone whose rights and freedoms, as guaranteed by this Charter, have been infringed or denied, may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

[30] Remedies under s. 24(1) of the *Charter* are flexible and contextual. While exclusion of evidence is a remedy more commonly sought under s. 24(2), it is an available remedy under s. 24(1). However, exclusion of evidence is only available under s. 24(1), "in those cases where a less intrusive remedy cannot be fashioned to safeguard the fairness of the trial process and the integrity of the justice system" (***R. v. Bjelland***, 2009 SCC 38, at para. 19).

[31] Mr. Mohammed has the burden to establish a breach of his *Charter* rights on a balance of probabilities (***R. v. Collins***, [1987] 1 S.C.R. 265 (S.C.C.), at p. 277). As noted in ***McQuaid***, at p. 9, the right to disclosure is but one component of the right to make full answer and defence. In order to permit full answer and defence, the Crown must provide the accused with complete and timely disclosure (***R. v. Stinchcombe***, [1991] 3 S.C.R. 326). A failure to disclose evidence does not, in and of itself, constitute a violation of s. 7. Rather, an accused must generally show

"actual prejudice to [his or her] ability to make full answer and defence" (***R. v. O'Connor***, [1995] 4 S.C.R. 411, at para. 74) in order to grant a remedy under s. 24(1).

[32] The next stage in the analysis was reviewed by the Nova Scotia Court of Appeal in ***R. v. Sandeson***, 2020 NSCA 47 at para. 67:

> [67] Once an infringement of the right to make full answer and defence is shown, the accused is entitled to a remedy under s. 24(1) of the *Charter*. At this stage, the degree of prejudice to the accused's rights must be considered (*Dixon*, para. 35). When the late disclosure occurs at the trial level, an adjournment and disclosure order will usually suffice (*Dixon*, para. 33) unless the accused shows another remedy is necessary to cure trial unfairness or maintain the integrity of the justice system (*Bjelland*, paras. 23-27). Ultimately, as Steel, J.A. explained in *R. v. Korski*, 2009 MBCA 37, para. 93:
>
> > … remedies for late or non-disclosure … must be responsive to the circumstances of the breach of the accused's disclosure rights. The analysis is context-dependant. Remedies for late or non-disclosure may range from an adjournment to a stay of proceedings. In deciding which remedy is appropriate, a court may take into account a variety of factors, including the stage of the proceedings and the impact of the evidence on the proceedings …

[33] In the present case, the Crown conceded both non-disclosure, lost disclosure and late disclosure. The timing of the late disclosure and the concessions came on the eve of trial. Clearly, there was prejudice to trial fairness. The Crown was correct to further concede to an adjournment of the existing trial dates.

[34] In the circumstances, on the eve of trial on serious charges, it was necessary to permit the accused time to properly assess the impact of the disclosure issues on his ability to (1) challenge the Crown's case on the merits, and (2) pursue reasonable *Charter* and/or process-oriented responses to the charges (NSCA appeal decision in ***Sandeson***, at para. 76). Time to consider impacts and remedies are part of the right to make full answer and defence.

Determination

[35] The question remains as to whether any additional remedy is appropriate in the circumstances. Mr. Mohammed argues that the actions of the police resulting in non-disclosure, lost disclosure and late disclosure amount to an abuse of process and should result in exclusion of the evidence (***R. v. Greganti***, [2000] O.J. No. 34, at paras. 147-179, citing ***R. v. O'Conner*** (1995), 103 C.C.C. (3d) 1 (S.C.C.).

[36] In support of his position, Mr. Mohammed relies on the decision of the Supreme Court of Canada in ***Bjelland*** as well as ***R. v. Horan***, 2008 ONCA 589, ***R. v. Rajalingam***, [2003] O.J. No 530 (Ont. Sup. Ct. J.), ***R. v. Harrer***, [1995] 3 S.C.R. 562 and ***R. v. MacLellan***, 2012 NSPC 46. A summary of the principles extracted from these authorities is contained in his written submission beginning with the reasons of Rothstein, J. in ***Bjelland***:

[24] Thus, a trial judge should only exclude evidence for late disclosure in exceptional cases: (a) where the late disclosure renders the trial process unfair and this unfairness cannot be remedied through an adjournment and disclosure order or (b) where exclusion is necessary to maintain the integrity of the justice system. Because the exclusion of evidence impacts on trial fairness from society's perspective insofar as it impairs the truth seeking function of trials, where a trial judge can fashion an appropriate remedy for the late disclosure that does not deny procedural fairness to the accused and where admission of the evidence does not otherwise compromise the integrity of the justice system, it will not be appropriate to exclude evidence under s. 24(2).

[25] This view is reflected in cases such as *O'Connor* that have considered a stay is the appropriate remedy for the late or insufficient disclosure under s. 24(1). As L'Heureux-Dube J. for the majority, stated in *O'Connor*, at para. 83:

> In such circumstances [of late or insufficient Crown disclosure and a consequent s. 7 breach], the court must fashion a just an appropriate remedy, pursuant to s. 24(1). Although the remedy for such a violation will typically be a disclosure order and adjournment, there may be some extreme cases where the prejudice to the accused's ability to make full answer and defence or to the integrity of the justice system is irremediable. In those "clearest of cases", a stay of proceedings will be appropriate.

[26] This statement recognized that the appropriate focus in most cases of late and insufficient disclosure under s. 24(1) is the remediation of prejudice to the accused, but that safeguarding the integrity of the justice system will also be a relevant concern. Of course, the prejudice complained of must be material and not trivial. For example, the exclusion of evidence may be warranted where the evidence is produced mid-trial after important and irrevocable decisions about the defence have been made by the accused. Even then, it is for the accused to demonstrate how the late disclosed evidence would have effected the decisions that were made. For purposes of trial fairness, only where prejudice cannot be remedied by an adjournment and disclosure order will exclusion of evidence be an appropriate and just remedy.

[27] There may also be instances where an adjournment and disclosure order may not be appropriate because admission of evidence compromises the integrity of the justice system. For example, as Rosenberg, J.A. stated in *Horan*, at para. 31:

> In some cases, an adjournment may not be an appropriate or just remedy if the result would be to unreasonably delay the trial of an in-custody accused. In such a case, an appropriate remedy could be exclusion of undisclosed evidence. However, the burden is on the accused to demonstrate that exclusion of evidence was appropriate.

> In other words, where an accused is in pre-trial custody, an adjournment that significantly prolongs the custody before trial may be seen as compromising the integrity of the justice system. The exclusion of evidence may also be an appropriate and just remedy where the Crown has withheld evidence through deliberate misconduct amounting to an abuse of process. Yet even in such circumstances, society's interest in a fair trial that reaches a reliable determination of the accused's guilt or innocence based on all of the available evidence cannot be ignored. This will especially be true where the underlying offence is a serious one: see *O'Connor*, at para. 78. In clear cases, however, the exclusion of evidence may be an appropriate and just remedy under s. 24(1) in order to preserve the integrity of the justice system.

[37] Mr. Mohammed submits that trial fairness includes consideration of impacts on the integrity of the administration of justice. In ***Rajalingam***, the court held a "breach of s. 7 of the *Charter* occurs if late disclosure either impairs the ability of the accused to make full answer and defence or where the integrity of the administration of justice is threatened by an unfair trial". Trial fairness was addressed by McLachlin, J. (as she then was) in ***R. v. Harrer***, [1995] 3 S.C.R. 562, at para. 45:

> [45] At base, a fair trial is a trial that appears fair, both from the perspective of the accused and the perspective of the community. A fair trial must not be confused with the most advantageous trial possible from the accused's point of view: *R. v. Lyons*, [1987] 2 S.C.R. 309, at p.362, *per* LaForest J. Nor must it be conflated with the perfect trial; in the real world, perfection is seldom attained. A fair trial is one which satisfies the public interest in getting at the truth, while preserving basic procedural fairness for the accused.

[38] In ***Bjelland***, the Crown provided late disclosure to the accused and the trial judge granted a stay of proceedings. On appeal, a new trial was ordered. The

Supreme Court of Canada recognized that the late disclosure did not flow from deliberate Crown misconduct, unethical, or malicious behaviour. While the integrity of the justice system was a concern, evidence should only be excluded in exceptional circumstances. In most cases of late or insufficient disclosure, focus should be on remediation of the prejudice to the accused. An adjournment would have preserved society's interest in a fair trial while curing the prejudice to the accused.

[39] The present case has similarities to ***Bjelland***. While the conduct leading to late disclosure was negligent, it was not intentional, malicious or obstructionist. It was the result of gross complacency and inattention to basic standards of evidence preservation and disclosure.

[40] I am not satisfied that this is one of the exceptional cases that requires exclusion of evidence. The unfairness created by the disclosure issues here is addressed by the adjournment already granted. Although there are reasons to be concerned about the conduct here, I am satisfied, on the record presented, that these concerns are outweighed by society's interest in a trial on the merits.

[41] Before concluding, I want to address one final point raised by the Crown. In its submissions, defence diligence was raised as a factor to be considered. On this point, the Crown cites ***McQuaid***, at para. 37. The principles are not in dispute.

[42] As I understand the record on this application, there is no basis to say that the defence failed to address disclosure issues as soon as they were aware of them. There is no evidence of tactical or strategic decisions delaying notice to the Crown. To the contrary, it was defence diligence that resulted in at least some of the issues being identified at a point where prejudice could be cured.

[43] In contrast to defence diligence, Crown counsel candidly acknowledged that it had asked for this matter to be reassigned. Pending reassignment, counsel only "checked in on the matter periodically" and did not return to it until late January of 2023. As a result, the Crown failed to discover the disclosure issues until it was too late to rectify before the existing trial dates.

[44] On this point, Mr. Mohammed cited ***R. v. Amuzu***, 2021 ONCJ 610, at paras. 31 and 32:

> [31] First, while it is true that the defence is required to be diligent in their pursuit of disclosure, that requirement does not require the defence to persistently hound the Crown to disclose significant elements of its case that it actually plans to rely on to prove its case. The missing disclosure was not peripheral. It comprised material that the Crown planned to rely on as part of its own case. …
>
> [32] … the rationale behind the diligence requirement is to put the Crown on notice when disclosure is missing. The defence did that here. There is some irony in the Crown accusing the defence of not being diligent when it fell far short of complying with its constitutional disclosure obligation …

[45] I find no merit in the submission that there was a lack of diligence by the defence or that a lack of defence diligence contributed to the disclosure issues in this case.

Conclusion

[46] For the reasons above, I am satisfied that there was a breach of Mr. Mohammed's s. 7 *Charter* rights. On the eve of trial, significant additional disclosure was provided. This late disclosure impaired the ability of Mr. Mohammed to prepare his defence and fulsomely defend the serious charges he faces.

[47] The Crown conceded that an adjournment of the trial was required to remedy the breach. The question is whether an enhanced remedy is due to the accused. After careful consideration of the context in which this breach arose, I conclude that the adjournment of the original trial is sufficient to remedy any prejudice suffered by Mr. Mohammed as a result of the breach. In my view, nothing more is required, based on the record thus far, to ensure a fair trial and uphold the integrity of the administration of justice.

[48] During arguments, Crown counsel indicated that they intended to rely on some of the audio recordings that have now been disclosed. Counsel are cautioned that this decision is about the appropriate remedy flowing from the disclosure issues

in this matter. This decision does not address the procedural or substantive issues that may relate to the admissibility of such evidence.

[49] The trial of this matter shall begin as presently scheduled on July 13, 2023.

Gogan, J.