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Docket: CR 22-03-00572
(Portage la Prairie Centre)
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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

HIS MAJESTY THE KING,	)	Deborah L. Carlson
	)	W. Rustyn Ullrich
	)	Larissa Campbell
	)	for the Crown
- and -	)	
	)	
RYAN NATHAN PETERS,	)	Saul B. Simmonds, K.C.
	)	William G. Marks
accused,	)	A. Karl Gowenlock
	)	for the accused
	)	
	)	JUDGMENT DELIVERED:
	)	January 25, 2024

MENZIES J.

[1] Ryan Peters stands charged with second degree murder and accessory to murder of Tamara Benoit. Ms. Benoit died in May of 2020. Tova Peters pled guilty to a charge of manslaughter in relation to Ms. Benoit's death and received a sentence of incarceration for five years. T.S. pled guilty to second degree murder as a youth and has served the custodial portion of his sentence.

[2] Ryan Peters was charged on January 6, 2021. A preliminary inquiry was held on February 14, 2022. The trial in this matter commenced before a judge alone on May 8, 2023.

[3] In accordance with the ongoing duty of disclosure to defence counsel, the Crown sent materials to the defence in mid-March 2023, in anticipation of the upcoming trial. In reviewing the materials, defence counsel noticed a notation made by the investigating officer referring to phone calls between Tova Peters and her daughter S.P. S.P. is a material witness for the Crown against the accused.

[4] On April 30, 2023, a recording of 6 hours of phone calls was disclosed to defence. On May 8, 2023, the first scheduled day for trial, a further 40 hours of recorded conversations were disclosed covering a period between January and May of 2023.

[5] The accused brings a motion claiming a violation of s. 7 of the ***Canadian Charter of Rights and Freedoms***. The accused argues that the disclosure of the telephone records on the day the trial was scheduled to commence constitutes late disclosure. The accused also argues that the late disclosure also prevented him from securing records of the phone conversations between Tova Peters and S.P. which took place before January 2023. The accused claims the failure to advise him at an earlier date has resulted in the loss of evidence he needs to properly present his defence.

[6] By way of remedy, the accused asks for a stay of the proceedings. In the alternative, the accused asks that the evidence of S.P. be excluded from the trial.

DUTY OF DISCLOSURE

[7] Since the decision of ***R. v. Stinchcombe*** (1991), 68 C.C.C. (3d) 1, it is a recognized principle of law that the Crown bears a duty to disclose the results of a criminal investigation to an accused (para 14):

> With respect to what must be disclosed, the general principle to which I have referred is that all relevant information must be disclosed subject to the reviewable discretion of the Crown. The material must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence.

[8] In ***R. v. Egger*** (1993), 82. C.C.C. (3d) 193 (S.C.C.), the court said:

> One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed -- *Stinchcombe*, *supra* at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.

[9] As was recognized in ***R. v. Bero***, [2000] O.J. No. 4199, 151 C.C.C. (3d) 545, an accused's right to disclosure of relevant information is part and parcel of the accused's right to make full answer and defence as enshrined in s. 7 of the ***Charter***. It is a principle of fundamental justice.

LATE DISCLOSURE

[10] The Crown does not dispute that the disclosure or the records of the conversations between Tova Peters and S.P. in May of 2023 constitutes late disclosure. The Crown argues that the defence has failed to demonstrate any prejudice to the accused's right to make full answer and defence as guaranteed by s. 7 of the ***Charter***.

[11] In the decision of ***R. v. Bjelland***, 2009 SCC 38, Rothstein J. commented on the issue of late disclosure (at paras 20, 21 and 24):

> Before being entitled to a remedy under s. 24(1), the party seeking such a remedy must establish a breach of his or her Charter rights. In a case of late disclosure, the underlying *Charter* infringement will normally be to s. 7. Section 7 of the *Charter* protects the right of the accused to make full answer and defence. In order to make full answer and defence, the Crown must provide the accused with complete and timely disclosure: see *R. v. Stinchcombe*, 1991 Can LII 45 (SCC), [1991] 3 S.C.R. 326. The purpose underlying the Crown's obligation to disclose is explained by Rosenberg J.A. in *R. v. Horan*, 2008 ONCA 589, 237 C. C. C. (3d) 514, at para. 26:
>
> > Put simply, disclosure is a means to an end. Full prosecution disclosure is to ensure that the accused receives a fair trial, that the accused has an adequate opportunity to respond to the prosecution case and that in the result the verdict is a reliable one.
>
> However, the Crown's 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 (S.C.C.), at para 74) in order to be entitled to a remedy under s. 24(1).
>
> ….
>
> 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 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 and just to exclude evidence under s. 24(1).

[12] It would have been highly prejudicial to the accused to have forced him to cross-exam the witnesses S.P. and T.S. during the initial three weeks set for the trial of this matter in May 2023. The late disclosure was too voluminous for defence counsel to properly prepare their cross-examination with such short notice. However, the trial was adjourned to late July 2023 to allow defence to review the late disclosure and prepare

their cross-examinations of S.P. and T.S. No request to recall any of the Crown witnesses was presented at the conclusion of the cross-examinations of S.P. and T.S.

[13] I find the adjournment addressed any potential prejudice the accused may have suffered from the late disclosure of the telephone conversations. Cross-examination of the witnesses evidenced an extensive use of the late disclosure material. Lacking any proven prejudice to the accused as a result of the late disclosure, I am not satisfied that it would be appropriate to order an exclusion of the evidence of S.P. under s. 24(1) of the ***Charter***.

LOST EVIDENCE

[14] Tova Peters was arrested on January 7, 2021. She was not released on judicial interim release and remained in custody. As a result, any conversation by telephone between her and S.P. would have been recorded by the custodial institution. However, those records are only preserved for 120 days and then destroyed.

[15] The accused argues that as a result of the late disclosure that Tova Peters and S.P. were having ongoing conversations, a record of those conversations which took place prior to January 1, 2023 was lost. Defence says that the Crown had an obligation to obtain and preserve a record of those conversations. At the very least, defence contends that if they had been advised of the ongoing conversations, they could have taken steps to obtain the recordings of the conversations for use in the conduct of the defence.

[16] When an allegation of failure to preserve evidence is presented, the approach to be followed was set out in the decision of ***R. v. La***, [1997] 2 S.C.R. 680, S.C.J. No. 30

(QL), and succinctly summarized by Roscoe J.A. in ***R. v. B. (F.C.)*** (2000), 142 C.C.C. (3d) 540 (N.S.C.A.) at 547-548:

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.
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.
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.
5. In the 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.
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 the evidence was deliberately for the purpose of defeating the disclosure obligation.
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 full answer and defence that it impairs the right to a fair trial. In this case, a stay may be an appropriate remedy.
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.

[17] In the decision of ***R. v. La***, at paras 20 and 21, the Supreme Court held:

> The obligation to explain arises out of the duty of the Crown and the police to preserve the fruits of the investigation. The right of 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. Where the Crown is unable to satisfy the judge in this regard, it has failed to meet its disclosure obligations, and there has accordingly been a breach of s. 7 of the

> *Charter*. Such a failure may also suggest that an abuse of process has occurred, but that it is a separate question. It is not necessary that an accused establish abuse of process for the Crown to have failed to meet its s. 7 obligation to disclose.
>
> In order to determine whether the explanation of the Crown is satisfactory, the Court should analyze the circumstances surrounding the loss of the evidence. The main consideration is whether the Crown or the police (as the case may be) took reasonable steps in the circumstances to preserve the evidence for disclosure. One circumstance that must be considered is the relevance that the evidence was perceived to have at the time. The police cannot be expected to preserve everything that comes into their hands on the off-chance that it will be relevant in the future. In addition, even the loss of relevant evidence will not result in a breach of the duty to disclose if the conduct of the police is reasonable. But as the relevance of the evidence increases, so does the degree of care for its preservation that is expected of the police.

[18] Tova Peters is S.P.'s mother. The Crown was contacted by S.P.'s social worker on April 8, 2022. The social worker indicated that S.P. and Tova Peters may be having conversations despite a non-contact order. As a result, the R.C.M.P. obtained a production order for any phone calls between January 11, 2022 and April 25, 2022. Sargeant Amirault and Corporal Robinson listened to the recorded calls. Sargeant Amirault testified that there was no discussion of the investigation against Ryan Peters nor was Tova Peters telling S.P. what to say in court.

[19] I agree the R.C.M.P. were justified in concluding that the initial conversations between Tova Peters and S.P. had little or no relevance to the proceedings against Ryan Peters. I do not find that it was unacceptably negligent to fail to preserve the record of the conversations in light of what the R.C.M.P. knew at the time. Nor was it unacceptably negligent to fail to disclose to the defence the fact that Tova Peters and S.P. were communicating with one another. I find that neither the Crown nor the R.C.M.P. breached their duty to preserve evidence pursuant to s. 7 of the ***Charter***.

[20] However, if I am wrong in that conclusion, I am not satisfied that the accused has shown that he has been prejudiced by the loss of any evidence.

[21] As a result of a production order made by this court on May 8, 2023, records of conversations between Tova Peters and S.P. between January 1, 2023 and May 1, 2023, were disclosed to the defence. These records did disclose conversations between Tova Peters and S.P. as to what S.P. should say in court. Defence put these conversations to use in cross-examination of S.P. and T.S. Defence argues that if the earlier records had been preserved, there would have been further evidence with which to attack the credibility of S.P. and T.S.

[22] While I agree there may well have been further evidence useful for attacking the credibility of Crown witnesses, I am mindful of the comments in ***R. v. Shueng***, 2010 ONCA 296, 254 C.C.C. (3d) 153. The court held that the availability of other evidence to attack a complainant's credibility is critical to the assessment of the degree of prejudice suffered as a result of lost evidence. In this case the lost evidence would have been further evidence of what was disclosed in the records of conversations in 2023. Defence counsel were not hampered in putting their theory of the defence forward in cross-examination. The degree of prejudice, if any, suffered in this case was not substantial.

ABUSE OF PROCESS

[23] Abuse of process in a disclosure matter was addressed in ***R. v. La***, at para 22:

> What is the conduct arising from a failure to disclose that will amount to an abuse of process? By definition it must include conduct on the part of government authorities that violates those fundamental principles that underlie the community's sense of decency and fair play. The deliberate destruction of material by the police or other officers of the Crown for the purpose of defeating the Crown's obligation to disclose the material will, typically, fall into this category. An

> abuse of process, however, is not limited to conduct of officers of the Crown which proceeds from an improper motive. See *R. v. O'Connor*, 1995 CanLII 51 (SCC), [1995] 4 S.C.R. 411 (SCC), at paras. 78-81, per Justice L'Heureux-Dubé for the majority on this point. Accordingly, other serious departures from the Crown's duty to preserve material that is subject to production may also amount to an abuse of process notwithstanding that a deliberate destruction for the purpose of evading disclosure is not established. In some cases, an unacceptable degree of negligent conduct may suffice.

[24] A deliberate destruction of disclosure material is not alleged against the Crown nor the R.C.M.P. The evidence before the court does not disclose an unacceptable degree of negligence by the Crown nor the R.C.M.P. which would justify a finding of an abuse of process in this matter.

STAY OF PROCEEDINGS

[25] The Ontario Court of Appeal addressed the granting of a stay of proceedings under s. 7 of the ***Charter*** in the decision of ***R. v. Bero***, at paras 42 - 44:

> A stay of proceedings is a remedy of last resort. The prosecution's failure to preserve evidence does not automatically entitle the accused to a stay of proceedings even when that failure amounts to an abuse of process: *R. v. La*, *supra*, 108. A stay is an appropriate remedy where the breach of an accused's s. 7 rights has caused harm to the accused's ability to make full answer and defence that cannot be remedied, or where irreparable harm would be caused to the integrity of the justice system if the prosecution were allowed to continue: *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.), per L'Heureux-Dubé, in dissent, approved in *R. v. La*, *supra*, at p. 108.
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> The reluctance to stay criminal proceedings reflects the strong preference for a verdict on the merits. A stay of proceedings is sometimes necessary, but it is nonetheless an unsatisfactory result which denies both the accused and the community their legitimate expectation of a true verdict based on the merits.
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> The integrity of the judicial process will generally be put at risk where the conduct of the state involves a deliberate attempt to compromise an accused's ability to make full answer and defence, otherwise undermines the fairness of the trial process or deliberately frustrates the court's ability to reach a proper verdict: *R. v. Carosella* (1997), 112 C.C.C.(3d) 289 at 310-312 (S.C.C.).

[26] The evidence does not establish a deliberate attempt on behalf of the Crown or the R.C.M.P. to undermine the accused's ability to make full answer and defence. Nor am I satisfied that the actions of the R.C.M.P. in failing to preserve and disclose the phone records was due to unacceptable negligence. An abuse of process by the Crown **and/**or the R.C.M.P. has not been established. The late disclosure and adjournments granted to review that disclosure has ensured the ability of the accused to make full answer and defence. This prosecution is not an appropriate proceeding for the granting of a stay of proceedings.

CONCLUSION

[27] To summarize, the evidence in this matter discloses that the Crown is guilty of late disclosure of the telephone records between Tova Peters and S.P. between January 1 and May 1, 2023. However, as a result of a number of adjournments and diligent preparation by defence counsel, I am not satisfied that the accused was prejudiced by the failure to provide disclosure in a timely fashion.

[28] As for the lost evidence of earlier conversations between Tova Peters and S.P., the explanation from the R.C.M.P. as to why these earlier records were not preserved is reasonable and does not disclose any degree of unacceptable negligence. In addition, as a result of the material that was available to defence counsel, I do not find that the accused was prejudiced in the presentation of his defence to any degree justifying a remedy under s. 24(1) of the ***Charter***.

[29] The evidence before the court would not justify a finding of abuse of process against the Crown nor the R.C.M.P.

[30] The facts of this case do not justify the granting of a stay of proceedings.

[31] Accordingly, the accused's application for the exclusion of the evidence of S.P. is denied. Similarly, the request for a stay of proceedings is dismissed.

_____ J.