
CANADA / JUDGMENT

R. v. Baker

2017 BCSC 997

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 997 R. v. Baker

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Baker,

2017 BCSC 997

Date: 20170509

Docket: 41396

Registry: Prince George

Regina

v.

Lyle Baker, Kevin Zaporoski and Dustin Lindgren

Restriction on Publication:

pursuant to s. 486.5 of the Criminal Code of Canada

Before: The Honourable Mr. Justice Tindale

Ruling Re: O'Connor Application

Counsel for the Crown:

M.K. Brown

P. Backhouse

S. Dworkin

J. Katz (by teleconference)

Counsel for the Accused Baker:

G. Docolas

Counsel for the Accused Lindgren:

R. Dieno

Counsel for the Accused Zaporoski:

S. Buck

Place and Date of Hearing:

Prince George, B.C.

May 8, 2017

Place and Date of Judgment:

Prince George, B.C.

May 9, 2017

- [1] THE COURT: Kevin Zaporoski, along with Lyle Baker and Dustin Lindgren, are charged with the first degree murder of Mr. Jordan Reno.
- [2] Mr. Zaporoski, pursuant to a notice of application filed April 12, 2017, seeks the production of the entire investigative file in the possession of the Royal Canadian Mounted Police with respect to the murder of Maurice Seguin Jr., which occurred on April 27, 1995 in Mackenzie, British Columbia, (the "Mackenzie file").
- [3] The Attorney General of Canada, on behalf of the RCMP, is opposed to the application. The Provincial Crown, as well as Mr. Baker, are also opposed to the application.

Background

- [4] In 1995, Mr. Murray, as well as Mr. Fulljames were charged with the first degree of Mr. Seguin. A preliminary inquiry was held on October 26, 1995, and January 5, 1996. Mr. Baker was called as a witness for the Crown at the preliminary inquiry.
- [5] During the preliminary inquiry on the Mackenzie file, Mr. Baker testified that he saw Mr. Murray and Mr. Fulljames kill Mr. Seguin. Mr. Baker also testified that he had lied under oath to the police about matters related to the investigation.
- [6] Mr. Zaporoski, through his counsel Mr. Buck, requested a copy of the entire investigative file. Crown counsel disclosed the following from the Mackenzie file:
 - (1) the Report to Crown Counsel;
 - (2) five statements made by Mr. Baker to the RCMP; and

- (3) the transcript of Mr. Baker's evidence at the preliminary inquiry.
- [7] This application deals with the first stage of the procedure for obtaining third party records set out in the Supreme Court of Canada decision in *R. v. O'Connor*, [1995] 4 S.C.R. 411.

Position of the Parties

Mr. Zaporoski

- [8] Mr. Buck argues that the entire investigative Mackenzie file is required in order for Mr. Zaporoski to make full answer and defence.
- [9] The application comes about as a result of a statement that Mr. Zaporoski gave to the police. Exhibit 1 on this application is an excerpt from that statement. During that statement, the interviewing police officer told Mr. Zaporoski that Mr. Baker "got off on a murder once".
- [10] Mr. Buck made submissions that Mr. Baker gave a statement to the police which indicates that Mr. Zaporoski killed Mr. Reno inside Mr. Baker's house. Mr. Zaporoski hit Mr. Reno with his fists and stomped on his head with two feet, ultimately killing him. Mr. Baker placed Mr. Reno's body under a bed for a period of time until Mr. Zaporoski returned with some other guys to remove the body.
- [11] Mr. Buck argued that this account by Mr. Baker does not accord in any way with the evidence of the pathologist, and is an attempt to lie his way out of a bad situation.
- [12] Mr. Buck draws the court's attention to the Supreme Court of Canada's decision in *R. v. McNeil*, [2009] 1 S.C.R. 66, which summarizes the test for the first stage of an application of the production of third party records. In that case, the court says, at paras. 28 and 29, the following:
- [28] The first step in any contested application for production of non-privileged documents in the possession of a third party is for the person seeking production -- in this case the accused -- to satisfy the court that the documents are likely relevant to the proceedings. This threshold burden simply reflects the fact that the context in which third party records are sought is different from the context of first party disclosure. We have already seen that the presumptive duty on Crown counsel to disclose the fruits of the investigation in their possession under *Stinchcombe* is premised on the assumptions that the information is relevant and that it will likely comprise the case against the accused. No such assumptions can be made in respect of documents in the hands of a third party who is a stranger to the litigation. The applicant must therefore justify to the court the use of state power to compel their production -- hence the initial onus on the person seeking production to show "likely relevance". In addition, it is important for the effective administration of justice that criminal trials remain focussed on the issues to be tried and that scarce judicial resources not be squandered in "fishing expeditions" for irrelevant evidence. The likely relevance threshold reflects this gate-keeper function.

- [29] It is important to repeat here, as this Court emphasized in O'Connor, that while the likely relevance threshold is "a significant burden, it should not be interpreted as an onerous burden upon the accused" (para. 24). On the one hand, the likely relevance threshold is "significant" because the court must play a meaningful role in screening applications "to prevent the defence from engaging in 'speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming' requests for production". The importance of preventing unnecessary applications for production from consuming scarce judicial resources cannot be overstated; however, the undue protraction of criminal proceedings remains a pressing concern, more than a decade after O'Connor. On the other hand, the relevance threshold should not, and indeed cannot, be an onerous test to meet because accused persons cannot be required, as a condition to accessing information that may assist in making full answer and defence, "to demonstrate the specific use to which they might put information which they have not even seen".
- [13] Mr. Buck argues that the Crown has already provided some of the content of the Mackenzie file, and as such the "relevancy bubble has already been burst". Credibility is a live issue in the case at bar. If Mr. Baker takes the witness stand and is believed, Mr. Zaporoski could be convicted of murder and face life imprisonment.
- [14] Mr. Buck argues that Mr. Baker is doing now what he has done before. That is, he is telling the police that he was an innocent bystander in witnessing the murder of Mr. Reno, the same as he told the police in 1995, that he was an innocent bystander in witnessing the murder of Mr. Seguin.
- [15] Mr. Buck argues that Mr. Zaporoski needs to show that he has been falsely accused by Mr. Baker who has done the same thing before. Mr. Buck argues that he does not require the entire Mackenzie file. He is only seeking materials pertaining to the circumstances of the offence, including the pathologist's report, and whether or not the police located the rocks which were apparently used to murder Mr. Seguin, and any DNA test results. In addition, he is seeking any evidence with regard to agreements between Mr. Baker and the police or Crown counsel. Finally he is seeking any materials which connect Mr. Baker to that offence.
- [16] Mr. Buck argues that it is not clear why the Crown stayed the charges on the Mackenzie file. He notes that Mr. Zaporoski is facing serious charges and again requires this information to make full answer and defence.
- [17] Mr. Buck argues that there is a connection between the Mackenzie file and the case at bar. If Mr. Baker testifies, he will do the same in this case as he did in relationship to the Seguin murder.

RCMP

- [18] The RCMP agree that the test at this stage of the application for disclosure of third-party records held by them is "likely relevance".

- [19] The RCMP argue that there is no evidence before the court as to the likely relevance of the materials requested. There are only submissions of counsel.
- [20] The RCMP note that the Crown took the request of the applicant seriously and asked the RCMP to produce any material that was likely relevant.
- [21] The RCMP argue that the applicant is referring to the issue of credibility of Mr. Baker at large, and notes that there was no temporal connection between the case at bar and the Mackenzie file. The RCMP argue that other than Mr. Baker's own words which have been disclosed in the form of his statements and the preliminary hearing transcript, there cannot be anything else relevant in the Mackenzie file.
- [22] In support of their position, the RCMP filed an affidavit of Sgt. Scott Stoughton sworn on April 26, 2017. Sgt. Stoughton deposes that he, along with Constable Engel searched the Mackenzie file and identified all five of Mr. Baker's statements to the police and his transcript of the evidence given at the preliminary inquiry.
- [23] Sgt. Stoughton deposes that the Seguin murder is an open and active homicide investigation. He states the following at para. 9 of his affidavit:

At the completion of the preliminary inquiry in the Seguin case, the accused in that case were committed to stand trial, although the Crown stayed the charges. Further investigation by the RCMP ultimately cleared those accused of responsibility for the homicide.

- [24] The RCMP argue that the applicant has all the information required to attack the credibility of Mr. Baker and to demonstrate that Mr. Baker's allegation against Mr. Murray and Mr. Fulljames were false.

- [25] In *R. v. Sipes*, 2011 BCSC 150, the court said the following at para. 16:

While accused persons are not required "to demonstrate the specific use to which they might put information which they have not seen", the mere assertion that the contents of the records sought may be relevant to the credibility of the witness is not sufficient to justify production. In *R. v. Batte*, Doherty J. explained, at para. 75:

... The mere assertion that a record is relevant to credibility is not enough. An accused must point to some "case specific evidence or information" to justify that assertion. In my view, an accused must be able to point to something in the record adduced on the motion that suggests that the records contain information which is not already available to the defence or has potential impeachment value.

- [26] The RCMP argue that the applicant is in fact engaging in a speculative, disruptive and time consuming request.

Provincial Crown

- [27] The Crown is opposed to the application and supports the position of the RCMP.

- [28] The Crown argues that there has been no factual foundation supplied on this application by Mr. Zaporoski. There is no affidavit nor is there any evidence that has been heard on the trial so far that would support the application.
- [29] The Crown argues that Sgt. Stoughton found all of the relevant material and the Crown facilitated the disclosure of that material. The Crown notes that the applicant has the Report to Crown counsel, as well, the statements of Mr. Baker and the preliminary inquiry testimony.
- [30] The Crown argues that at present the applicant has a theory, but has not provided a foundation for disclosure of the records sought.

Mr. Baker

- [31] Ms. Docolas, on behalf of Mr. Baker, brought to the court's attention that considerations as to the admissibility or privacy of the disclosure should not enter into the analysis at this stage.

Decision

- [32] If Mr. Baker takes the witness stand, Mr. Zaporoski argues that in order to make full answer and defence, he will have to vigorously attack the credibility of Mr. Baker. In that regard he requires the contents of the Mackenzie file.
- [33] Mr. Buck in his submission says that the circumstances surrounding the death of Mr. Seguin are strikingly similar to that of Mr. Reno in the case at bar. Mr. Buck made submissions as to the potential evidence of Mr. Baker if he takes the stand based on the statement he apparently gave to the police.
- [34] I do not have any affidavit evidence in support of Mr. Zaporoski's application, nor have I been provided with a statement from Mr. Baker on this application.
- [35] Mr. Zaporoski has been provided the Report to Crown counsel, five statements of Mr. Baker and the preliminary inquiry transcript of Mr. Baker's evidence from the Mackenzie file.
- [36] Mr. Baker has not been charged in the murder of Mr. Seguin, which is over 20 years ago. The disclosure that has been provided from the Mackenzie file that is relevant to the issue of Mr. Baker's credibility; however it is not readily apparent what other material may be in the Mackenzie file that is likely relevant to the issue of credibility.
- [37] Mr. Buck argues that he has identified the categories of disclosure which he requires as:
- (1) relating to the circumstances of the offence;
 - (2) relating to any agreement between Mr. Baker and the police or Crown counsel and;
 - (3) relating to any evidence that links Mr. Baker to the Seguin murder.

- [38] There is no evidence or any basis to conclude that there was an agreement between Mr. Baker and the police or Crown counsel in the Mackenzie file. In my view, that is mere speculation on the part of Mr. Zaporoski, without any evidentiary foundation.
- [39] Even if there was an agreement between Mr. Baker and the police or Crown counsel in the Mackenzie file, it would not be likely relevant to the identified issue of credibility of Mr. Baker in the context of the case at bar.
- [40] The request for any evidence that links Mr. Baker to the Seguin murder is also mere speculation. The evidence provided by Sgt. Stoughton is that the investigation into the murder of Mr. Seguin is ongoing and that Mr. Baker has never been charged in that regard.
- [41] Finally, Mr. Zaporoski is in possession of the Report to Crown counsel as well as the various statements made by Mr. Baker which outline the circumstances of the offence in the Mackenzie file. Mr. Zaporoski has been provided evidence from Sgt. Stoughton that the two accused in the Seguin murder were later cleared by the police. It is difficult to understand what other information may be in the Mackenzie file that is likely relevant to an issue on this trial.
- [42] The burden of the accused at the first stage of an O'Connor application is not onerous; however the accused does have to establish the likely relevance of the disclosure beyond mere speculation.
- [43] On this application, Mr. Zaporoski has not discharged that burden and the application is dismissed.

"The Honourable Mr. Justice Tindale"

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