
CANADA / JUDGMENT

R. v. Burke

2016 BCCA 402

COURT

British Columbia Court of Appeal

DECIDED

27 September 2016

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2016 BCCA 402 R. v. Burke

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Burke,

2016 BCCA 402

Date: 20160927

Docket: CA42263

Between:

Regina

Respondent

And

Jody Matthew Burke

Appellant

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Before:

The Honourable Mr. Justice Fitch

(In Chambers)

On appeal from: an order of the Supreme Court of British Columbia, dated

April 4, 2014 (conviction) and October 8, 2014 (sentence) (R. v. Burke,
New Westminster Registry No. 76626)

Oral Reasons for Judgment

Appellant appearing In Person:

Counsel for the Respondent:

M. Street

Place and Date of Hearing:

Vancouver, British Columbia

September 27, 2016

Place and Date of Judgment:

Vancouver, British Columbia

September 27, 2016

Summary:

The appellant applies for the issuance of a subpoena duces tecum in relation to medical records said by him to be in the possession of hospitals in Cornwall, Ontario. The appellant was convicted of eight offences involving the physical and sexual abuse of the complainant over an 11 month period. The complainant testified that some of the assaults left her with bruising and swelling. With the exception of scars on her wrists from an occasion on which she was handcuffed by the appellant, the complainant does not appear to have testified that the assaults left permanent marks or injury. In cross-examination, the complainant testified that she went for a CT scan in Cornwall after fleeing the relationship. Pre-trial disclosure was made of the fact that the complainant attended for a CT scan in Cornwall and that the results of the scan were normal. The appellant was represented by experienced counsel at trial. No application was made at trial to subpoena the medical records that are the subject of this application. The appellant appeals from conviction and sentence. He applies for a subpoena duces tecum as a preliminary step towards an application pursuant to s. 278.1 (and following) of the Criminal Code. If he is successful in obtaining production of these third-party records, he plans to mount a fresh evidence application in conjunction with his appeal from conviction. In support of this application, the appellant asserts that the medical records of the complainant, including the CT scan and other unidentified medical examination records, are material to his appeal because they will undermine the basis upon which the conviction rests. Held: Application dismissed. The CT scan is not likely to be a source of material evidence for any issue that arises on appeal. Further, the appellant's assertion that other relevant medical examination records exist and likely contain a source of evidence material to his appeal from conviction is based on speculation and conjecture.

- [1] FITCH J.A.: The appellant, Jody Matthew Burke, applies pursuant to s. 698 of the Criminal Code, R.S.C. 1985 c. C-46, for the issuance of a subpoena duces tecum in relation to medical records said by him to be in the possession of hospitals in Cornwall, Ontario. The application is made as a preliminary step towards a future application by the appellant for the production of third-party records relating to medical attention the complainant is said to have received in Cornwall following the commission of the offences that are the subject of this conviction appeal.
- [2] Issuance of the subpoena would not entitle the appellant to receive the records in issue. If the subpoena issues, the appellant would, to obtain disclosure of the records he seeks, be obliged to meet the tests set out in ss. 278.1 - 278.7 of the Criminal Code, R.S.C. 1985 c. C-46. Should the appellant be successful in obtaining production of the records, he hopes to be able to use them to mount a fresh evidence application in conjunction with his appeal from conviction.
- [3] By way of background, on April 4, 2014, the appellant was convicted by Associate Chief Justice Cullen of a total of eight offences arising out of the physical and sexual abuse of the complainant between October 1, 2011, and September 6, 2012. Specifically, he was convicted of two counts of assault, two counts of uttering a threat to cause death or bodily harm, two counts of assault with a weapon (a belt and a knife), one count of assault causing bodily harm, and one count of sexual assault.
- [4] The complainant testified that she was physically and emotionally abused by the appellant on a fairly consistent basis over the period of time set out in the indictment. The first act of physical abuse occurred in October or November of 2011. She described multiple occasions thereafter in which he slapped and struck her. She testified that his assaults sometimes left her with lumps on her head. On another occasion, she testified that he struck her nose until it started to bleed. She testified that on July 17, 2012, he handcuffed her against her will. She testified she still has scars on her wrists from this event. On the same occasion, he attempted to suffocate her with a pillow and hit her on the head a couple of times with his fists. On other occasions, she testified that he choked her. She said he used a belt on one occasion to strike her on the buttocks and legs, and one time on her vagina. She described being sexually abused by the appellant in a variety of different ways and testified that she generally complied with his demands because of the application of force, or fear of the application of force by him. Some of the acts underlying the sexual assault conviction involve degrading behaviour, but I am not aware of any evidence from the complainant that she was physically harmed in the course of the sexual assaults, or harmed in a way that would be apparent long after the event.

- [5] I summarize her evidence because the abuse found by the trial judge to have occurred covers a broad spectrum of assaultive behaviour extending over a considerable period of time. The complainant testified that she was injured in some of the assaults but, with the exception of the scars on her wrists, she does not appear to have testified that the assaults left permanent marks or injury. The injuries she alleged to have been caused by the appellant were in the nature of swelling and bruising.
- [6] The appellant testified at trial and denied all of the allegations. The trial judge rejected his evidence. The trial judge was satisfied that all of the offences had been proved beyond a reasonable doubt. He found the complainant to be credible and her testimony to be confirmed by: (1) photographs taken of her the day after she fled the relationship depicting relatively fresh bruising and marks on her buttocks and neck in areas she says the appellant struck her and held a knife to her throat; (2) text messages and recordings of statements made by the appellant after the complainant fled the relationship acknowledging the "harm" and "damage" he caused, pledging his commitment to change, asking for "mercy" and "not to have [him] incarcerated", and telling the complainant that he would change and "make it so [she] will never have to fear [him] again". The trial judge found that the complainant did not consent, in law, to the appellant's application of force, including the sexual indignities he was found to have perpetrated upon her.
- [7] On October 8, 2014, the appellant was sentenced to a global sentence of six years' imprisonment. After giving credit for pre-trial custody, the effective sentence was three years' imprisonment.
- [8] The appellant is scheduled to be released on statutory release on October 7, 2016.
- [9] The appellant appeals from conviction and sentence.
- [10] With respect to the appeal from conviction, the appellant asserts, among other things, that the trial judge "erred when he accepted that the victim had a full medical exam including a CT scan, with no medical evidence at trial to support Count 5" (a charge of assault in relation to the July 17, 2012 incident). The appellant also attacks the credibility findings of the trial judge, and alleges that the verdicts on particular counts are unreasonable and unsupported by the evidence.
- [11] I should note that the only reference the trial judge made to the CT scan evidence was in the context of recounting the various issues on which the complainant was cross-examined. In that context, he noted (Reasons for Judgment at para. 71) that the complainant "agreed she had no medical records of complaints about being assaulted by the accused, but later said she did go to a doctor in Cornwall to have a CT scan". The issue was not, to my knowledge, explored further at trial by either the Crown or the defence.

- [12] The appellant's application for the appointment of counsel under s. 684 of the Code was dismissed by Madam Justice Stromberg-Stein on June 9, 2015. She found that the appeal from conviction had little merit. It would appear that no steps have been taken to perfect the appeal since that time.
- [13] On May 17, 2016, the appellant appeared before a division of this Court following a referral made pursuant to Rule 13(3) of the Criminal Appeal Rules. The matter was adjourned to October 21, 2016 - two weeks after the appellant's scheduled release date - to give him an opportunity to sell his vehicle and use the money so derived to pay for transcripts and appeal books necessary to prosecute his appeal from conviction. The division before whom the appellant appeared advised him that this was his "last chance" to demonstrate that he was moving the appeal forward. Failing this, he was advised that the appeal from conviction would be dismissed for want of prosecution.
- [14] The appellant's notice of application for the issuance of the subpoena, which was filed September 12, 2016, seeks medical records relating to the complainant during the time period between September 6, 2012 and October 3, 2012 from the Cornwall General Hospital and the Hotel-Dieu Hospital, both of which are said to be located in Cornwall, Ontario. When the complainant fled the relationship on September 6, 2012, she went to the appellant's mother's residence in Cornwall. As noted earlier, in response to a suggestion put to her in cross-examination that she had no medical records documenting complaints about being assaulted by the appellant, she said she did see a doctor in Cornwall to have a CT scan.
- [15] In his affidavit filed in support of this application, the appellant describes the medical records sought as "CT Scan and Medical Exams" that "would have taken place" in one or both of the aforementioned hospitals in the time frame set out above. It is unclear what the medical exams specifically relate to or whether the appellant simply posits that a physical examination would likely have occurred before the administration of a CT scan.
- [16] The appellant deposes that the medical information is critical to his appeal from conviction because it "will disprove the allegations of violence". He alleges, in essence, that the sought-after records are material to his proposed miscarriage of justice claim.
- [17] The appellant further deposes that the medical records now sought were not disclosed before the trial by the Crown. He alleges that these records should have been disclosed by the Crown. He says he asked his trial counsel to request these medical records but "nothing was even done". I note that incompetence of counsel is not a ground of appeal set out in the appellant's further amended notice of appeal.
- [18] In essence, the appellant, who is a large man with mixed martial arts experience, says that if he struck the complainant on some occasions with the force she described, those injuries would likely be permanent and would be revealed in a CT scan. He says there is a likelihood that the medical records he seeks would undermine the reliability of the complainant's evidence and establish a miscarriage of justice.

- [19] Some further background is necessary to give context to this application.
- [20] First, on the basis of submissions made by Crown counsel in response to this application, I accept that the Crown was never in possession of the medical records now sought by the appellant.
- [21] Second, the appellant was represented at trial by "experienced counsel" (Reasons for Judgment of Stromberg-Stein J.A. at para. 6) who "cross-examined the complainant thoroughly and skilfully" (Reasons for Judgment of Cullen A.C.J. at para. 58).
- [22] Third, the appellant's trial counsel was aware well in advance of the trial (from disclosure made by the Crown) that the complainant told an investigating officer she had seen a doctor in Cornwall, Ontario, after she left the relationship and obtained a CT scan with normal results. There is no indication, at least on the material put before me in support of this application, that the complainant referenced any other medical examinations at trial. In any event, no application was made in advance of the trial to obtain any of these records. The appellant's application, at this late stage, is the first occasion on which any steps to obtain these records have been taken.
- [23] Obtaining a subpoena duces tecum is a necessary first step a party must take to obtain production and disclosure of third-party records, whether the application is governed by the common law or the Code provisions: see *R. v. McNeil*, 2009 SCC 3 at para. 27(1); s. 278.3(5) of the Code.
- [24] Section 698(1) of the Code sets the threshold test for the issuance of a subpoena. The court must be satisfied that the proposed witness is likely to give material evidence. In this context, the court must be satisfied that the records sought to be subpoenaed are material to an issue or issues arising on the appeal from conviction. The threshold test for the issuance of a subpoena was stated by Watt J. (as he then was) in *R. v. Baltovich* [*Finkle v. Ontario*], [2007] O.J. No. 3506 at para. 70 (Sup. Ct. J.):

The statutory terms "is likely to give material evidence" refers to a probability, not a mere possibility something that exists only in the fevered imaginings of the party seeking the subpoena. Something is likely if it is probable, not merely possible.

[Emphasis added].

This formulation of the threshold test was endorsed by this Court in *R. v. Blais*, 2008 BCCA 389 at paras. 22-23.

- [25] Material evidence is simply evidence that is pertinent to the issues in dispute. Assessment of the materiality of evidence must be contextualized to the specific case. The test contemplates, in this context, some articulation of facts by the applicant supportive of the pleaded belief that the sought-after records will likely contain evidence material to the determination of an issue or issues arising on the appellant's appeal from conviction.

- [26] The appellant was invited on the hearing of the application to identify the issue(s) in respect of which the records can be said to be material. As I understand his position, the records are material to his contention that he is innocent of the offences charged and that his convictions are the product of a miscarriage of justice. He says they are material to the assessment of the complainant's veracity and that the normal CT scan result wholly undermines her evidence and the basis upon which the convictions rest.
- [27] There are a number of impediments to the relief the appellant seeks.
- [28] First, he has not shown how the medical records - which appear to focus on a diagnostic examination of the complainant for head injuries about a year after the assaults began - are pertinent to any issue that arises on the appeal. The assaults were found to have occurred over a lengthy period of time and to have ranged considerably in terms of the degree of force that was applied. The trial judge was satisfied that the injuries depicted in photographs taken of the complainant the day after she left the relationship confirmed her evidence that she had been assaulted by the appellant and that he had held a knife to her throat. That the complainant may have had a negative CT scan sometime after leaving the relationship, and as long as one year after the assaults began, is not pertinent to the appellant's contention that his convictions are the product of a miscarriage of justice. Even assuming that the CT scan revealed no abnormalities (consistent with the complainant's version of events as disclosed to the investigating officer) I do not, in the factual matrix of this case, see how this evidence (even if it was subsequently ordered to be disclosed to the accused) could possibly undermine the propriety of the convictions under appeal. In my respectful view, the appellant has failed to demonstrate the materiality of this evidence to any issue that arises on his appeal.
- [29] Second, insofar as the medical examination records are concerned (in other words, medical examination records apart from the CT scan) no basis has been shown upon which a reasonable finding could be reached that it is probable that the sought-after records even exist, let alone contain a likely source of material evidence. The appellant's application is, at least in this respect, premised on speculation and conjecture.
- [30] For these reasons, the appellant's application for the issuance of a subpoena duces tecum is dismissed.

"The Honourable Mr. Justice Fitch"

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