

CANADA / JUDGMENT

R. v. Christhurajah

2016 BCSC 2553

COURT

Supreme Court of British Columbia

DECIDED

16 December 2016

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2016 BCSC 2553 R. v. Christhurajah IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Christhurajah, 2016 BCSC 2553 Date: 20161216 Docket: 26117 Registry: Vancouver Regina v. Kunarobinson Christhurajah Lesly Jana Emmanuel Nadarajah Mahendran Thampeernayagam Rajaratnam Restriction on publication: pursuant to s. 648(1) of the Criminal Code of Canada Before: The Honourable Mr. Justice Ehrcke Oral Ruling on Voir Dire #7 Counsel for the Crown: C.F. Hough C.B. Tait Counsel for the Accused K. Christhurajah: C.L. Leggett Counsel for the Accused L.J. Emmanuel: R.A. (Sandy) Ross Counsel for the Accused N. Mahendran: M. Nohra M.J. Gismondi Counsel for the Accused T. Rajaratnam: V.M. Williams Place and Date of Hearing: Vancouver, B.C. December 16, 2016 Place and Date of Judgment: Vancouver, B.C. December 16, 2016

- [1] THE COURT: This is a ruling on Voir Dire #7, and in particular whether certain evidence of Sean Murphy is admissible as past recollection recorded.
- [2] In the ruling I delivered on December 14, 2016, on Applications 43 to 44, I held that the objection made by counsel for Mr. Rajaratnam to admissibility of certain evidence from Sean Murphy, on the basis that it did not qualify as past recollection recorded, was premature and might need to be determined on a voir dire. That voir dire was held today.
- [3] Sean Murphy testified that, in the course of his employment as an inland enforcement officer for the Canadian Border Services Agency, he interviewed a number of migrants from the MV Sun Sea in 2010. The purpose of the interviews was to determine the admissibility of the migrants into Canada.
- [4] Mr. Murphy interviewed Migrant B158, Mr. Gandhi, on September 20, 2010, and during that interview he showed Mr. Gandhi some photographs. Entered as Exhibit Number 1 on this voir dire were photocopies of four of those photographs with notations on some of them. Mr. Murphy identified the handwriting as his own. He testified that the procedure he used was this: when he showed the photographs, if Mr. Gandhi identified one as being someone he recognized, Mr. Murphy immediately wrote the name given by Mr. Gandhi onto the photograph itself. Mr. Murphy testified that his writing on the photographs is upside down because he was sitting across from Mr. Gandhi and the photograph was facing towards Mr. Gandhi when Mr. Murphy made the notations on it. Mr. Murphy testified that he wrote,

"Dhayabaran - France" on Photograph 1, because that was what Mr. Gandhi told him at the time. Similarly, he wrote, "Seelan" on Photograph 2, because that was the name Mr. Gandhi gave him. On Photograph 4, Mr. Murphy wrote, "Shokan", because Mr. Gandhi said that was the person depicted in the photograph. On Photograph 7, Mr. Murphy wrote, "Suganthan?" because Mr. Gandhi gave him that name but said he was not certain.

- [5] Mr. Murphy testified that his notes on the photographs accurately record the names given to him by Mr. Gandhi at the time that Mr. Gandhi identified the photographs, and in particular the note "Shokan" accurately records who Mr. Gandhi identified in Photograph 4.
- [6] Mr. Murphy testified that he no longer has the original colour photographs that he showed to Mr. Gandhi, but that Exhibit 1 on the voir dire is a photocopy of the photographs that he showed and the notes he made during the interview on September 20, 2010.
- [7] In cross-examination, Mr. Murphy agreed that, in addition to writing on the photographs, he made other notes on loose pieces of paper during the interview and then used those handwritten notes to make typewritten notes. The typed notes were not a verbatim account of what was on the handwritten notes, but they were made within a few business days of making the handwritten notes. He no longer has the original handwritten notes.
- [8] Ms. Williams, counsel for Mr. Rajaratnam, submits that the typed notes are not admissible as past recollection recorded. However, the Crown, as I understand it, is not tendering the typed notes in evidence, so that question does not properly arise on this voir dire. What the Crown does wish to tender before the jury is the copies of the photographs with Mr. Murphy's handwriting on them, that is, Voir Dire Exhibit Number 1. The question then is whether the notes on those photographs qualify as past recollection recorded.
- [9] Counsel relies on the four criteria set out in Wigmore, as summarized in *R. v. Fliss*, 2002 SCC 16 at para. 63: The basic rule in Wigmore on Evidence (Chadbourn rev. 1970), vol. 3, c. 28, §744 et seq. provided:
1. The past recollection, must have been recorded in some reliable way.
 2. At the time, it must have been sufficiently fresh and vivid to be probably accurate.
 3. The witness must be able now to assert that the record accurately represented his knowledge and recollection at the time. The usual phrase requires the witness to affirm that he "knew it to be true at the time".
 4. The original record itself must be used, if it is procurable.
- [10] I am satisfied that the four requirements are satisfied.
- [11] Mr. Murphy wrote his notes directly onto the photograph that was being shown to Mr. Gandhi. He wrote the name that Mr. Gandhi spoke. He did so at the very moment that the witness was making the identification. The first three criteria are clearly satisfied. As to the fourth, there is no rigid requirement that the original record must always be used. That is so

only if the original is procurable. In this case, the original is not procurable. However, apart from the fact that the copy is in black and white rather than colour, there is no evidence to suggest that the photocopy is not a true copy of the original. It was never suggested to Mr. Murphy in cross-examination that there could be a significant difference between the photocopy that is being tendered in evidence and the original photograph that was shown to Mr. Gandhi.

- [12] Mr. Murphy identified his own handwriting on Voir Dire Exhibit 1, and there is no suggestion that the words he wrote on the original photograph might somehow be different from the words that he identified as his handwriting on Exhibit 1 during his testimony.
- [13] The four Wigmore criteria having been satisfied, there is no basis for excluding Mr. Murphy's evidence, including the evidence of Exhibit 1 on the voir dire. The Honourable Mr. Justice W.F. Ehrcke
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