

CANADA / JUDGMENT

R. v. Darling

2017 BCSC 2111

COURT

Supreme Court of British Columbia

DECIDED

11 September 2017

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2017 BCSC 2111 R. v. Darling IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Darling, 2017 BCSC 2111 Date: 20170911 Docket: 36905-2 Registry: Port Alberni Regina v. Larry Sinclair Darling Before: The Honourable Mr. Justice Thompson Oral Reasons for Reconsideration Ruling on Disclosure of Crown Counsel's Notes Counsel for Crown: G. Baines Counsel for Defence: K. McCullough B. Lynskey Place and Date of Hearing: Nanaimo, B.C. September 6, 2017 Place and Date of Ruling: Nanaimo, B.C. September 6, 2017 Place and Date of Delivery of Oral Reasons Nanaimo, B.C. September 11, 2017

- [1] THE COURT: These are my reasons for dismissing the accused's application that I reconsider my ruling against the Court reviewing Mr. Baines' notes of his conferences with Ms. Robanske, a witness on this voir dire.
- [2] After I ruled against the accused's application that the Court review the notes, Mr. Baines rose to say that there were some email messages between himself and Ms. Robanske about her evidence and these would be disclosed. The Crown disclosed to the accused email communication that occurred on 20 August 2017 and 22 August 2017. The accused invites me to reconsider my ruling in light of this newly disclosed material.
- [3] Mr. Baines had met with Ms. Robanske on 18 August 2017. A draft will-say was prepared and sent to the witness by email on 20 August 2017 for review and comment, and Mr. Baines asked a further question in this same email. The series of email responses from Mr. Robanske are corrections to the draft will-say, and responses to the question asked in Mr. Baines's email and another question he must have asked her at their 18 August 2017 meeting. The emails read, in material part, as follows:
1. Mr. Baines to Ms. Robanske on 20 August 2017 at 6:00 p.m.: Could you have a look at this and let me know if it is accurate, or if there is anything you would add on these topics? Basically I have to disclose to the defence anything materially different than what you already told the police in your statement, and these were topics the police didn't cover with you. One other question I had for you about the meeting with Larry on September 10th, 2015 -- did he tell you anything about where he had been the previous week or what he had been doing?

2. Ms. Robanske replied on 20 August 2017 at 7:04 p.m.: He gave me his FB password to delete unkind comments people left after his arrest on his FB wall. I went thru his messages and saw the pictures and did not want his [sons] somehow seeing them and deleted them. The last letter was not about the big truck it was the pickup truck. I also stored all of the contents out of the apartment except for the items (Small Kitchen Table, Dresser and night stands etc) I sold prior to moving the contents into my residence. The money e-transferred to Louise was the proceeds from what was sold. I don't recall if he mentioned what he was doing the week prior to his arrest. But he may have said he was in Prince George, but I remember him taking several trips to PG so I can't say for sure. When I asked Larry about "if he did it" that was our first conversation.
 3. Ms. Robanske sent a further email on 20 August 2017 at 7:05 p.m.: One more thing[:] it may have been September 9th I met with him at Tim Hortons. If you have phone records that would confirm the date.
 4. Ms. Robanske sent a further email on 20 August 2017 at 7:09 p.m.: You also asked me who Larry loved after himself. I honestly don't believe he is capable of love. I would phrase it as Who can do/provide something he needs/wants. He will then [be] kind and manipulative towards that person to get whatever it is he is after.
 5. Mr. Baines to Ms. Robanske on 22 August 2017 at 9:11 a.m.: One last question about the will-say: what can you tell me about Larry's eating habits? Is he a fussy eater, won't eat certain things? Does stress affect his appetite?
 6. Ms. Robanske replied on 22 August 2017 at 1:42 p.m. He is a very picky eater. He does not know how to cook and [therefore] would go to Subway on a regular basis. I think when he is stressed out his [appetite] decreases. He always complained he could not eat the food in prison, nor drink the water.
- [4] Counsel for the accused submits that the witness' email statements about Prince George, her uncertainty regarding the date of the meeting, and her remarks about the accused being incapable of love, etc., were material that ought to have been disclosed, i.e., in the will-say or otherwise. The accused submits that I should be mindful of earlier instances of non-disclosure in this case. Against that backdrop, he submits that in the light of this latest instance of non-disclosure I should revisit my ruling against examining Mr. Baines's notes of the 18 August 2017 interview, because it has been demonstrated that Mr. Baines's judgment about what was important to disclose, with respect to the circumstances surrounding the interview of Ms. Robanske, has been shown to be flawed. Without suggesting that Mr. Baines is attempting to hide anything, the accused submits that it would be contrary to principle to accept at face value the assertion that there is nothing in Mr. Baines's notes that could be of legitimate advantage to the accused's position beyond what has been disclosed in the will-say statements. Mr. McCullough makes the point that his appreciation of relevance and Crown counsel's impression of relevance might be quite different. In this respect he refers me to the reasons of MacDonald J., as he then was, in *R. v. Regan* (1997), 174 N.S.R. (2d) 72.

In that case the judge made the point, at para. 42, that the Crown was under an important obligation to report all facts at variance from what has already been disclosed and then it was up to the accused to determine if such changes are significant.

- [5] Mr. Baines submits that much of what he was told by Ms. Robanske by email is reflected in the revised will-say and disclosed. With reference to the paragraph criticizing the accused as being incapable of love and being manipulative, he says that this reflects a passage in the statement she gave to the police on 11 September 2015. With reference to Ms. Robanske's uncertainty about whether she met with the accused on 10 September 2015 or a day earlier, Mr. Baines decided when preparing the 22 August 2017 will-say that this would be simply a matter of straightening out a date with reference to her police statement, and was a matter of little moment. With reference to what the accused told Ms. Robanske he was doing in the week leading up to 10 September 2015, it was Mr. Baines's view at the time that this amounted to Ms. Robanske saying that she did not have an answer to Mr. Baines' question about that period of time. On this last point, Mr. Baines now appreciates that what Ms. Robanske told him ought to have been reflected in the revised will-say.
- [6] There is considerable overlap in what Ms. Robanske said about the accused's capacity for love and tendency to manipulate in her August 2017 email, and what she said in her September 2015 statement -- a statement that was made mere months after their common-law relationship broke down. I think that Mr. Baines did not appreciate that the fact that the witness is still saying very uncomplimentary things about the accused's character two years after breaking up with him may be important from the accused's perspective; the accused hopes to lay groundwork for an argument that her evidence reflects her anger and continuing dislike of the accused. Her email words ought to have been included in the revised will-say. It might have been the wise course to also insert reference to the witness' uncertainty about the date of the meeting, although I can understand why what seems to be a very minor discrepancy was brushed aside. And, as noted a moment ago, Mr. Baines has conceded that he made an error in judgment when he did not include in the revised will-say Ms. Robanske's answer about the week before.
- [7] Having ruled against the Crown's claim of work product privilege in relation to that part of the 18 August 2017 meeting that was investigatory, and given that Mr. Baines's notes are relevant, and given that there is some indication (arising out of the examination of the emails and the draft will-say) of less than accurate decision-making respecting disclosure in relation to Crown counsel's interviews of this witness, the issue is whether it remains safe to allow disclosure via will-says (and these email messages) or whether I ought to examine the notes. I will not repeat what I said in my original ruling about the potential difficulties relating to examination of Mr. Baines's notes, but those considerations continue to operate.

- [8] In my original ruling I held that the will-say process adopted by Mr. Justice Braidwood in *R. v. Johal*, [1995] B.C.J. No. 1271, is the best path forward, but we can only continue on that path if I am satisfied that trial fairness is not compromised. The question resolves itself, as many matters do in the end, to a matter of degree. I remain satisfied that the disclosure made to this point meets the Crown's obligation, and that review of the notes is not necessary to avoid impact on the accused's right to make full answer and defence.
- [9] Like all rulings, this one is subject to being revisited if circumstances warrant. Further, I wish to make it clear that my ruling against reviewing Mr. Baines' notes applies to this voir dire only. "Thompson J."

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