
CANADA / JUDGMENT

R. v. Haevischer

2014 BCSC 2640

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Haevischer,

2014 BCSC 2640

Date: 20140604

Docket: X072945-B

Registry: New Westminster

Regina

v.

Cody Rae Haevischer and Matthew James Johnston

This ruling has been edited to comply with applicable publications bans.

Before: The Honourable Madam Justice Wedge

Oral Ruling re Defence Application to limit Crown

cross-examination of potential witness C.K.

Counsel for the Crown:

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B.A. Martland

Place and Date of Hearing:

Vancouver, B.C.

June 2, 2014

Place and Date of Judgment:

Vancouver, B.C.

June 4, 2014

- [1] THE COURT: This is an application by Cody Haevischer, joined in and supported by Matthew Johnston, for an order limiting cross-examination by the Crown of a potential defence witness, C.K.
- [2] The Crown has closed its case against the two accused. Neither has yet elected whether he will lead evidence in his defence.
- [3] One of the Crown's primary witnesses was Michael Le, who gave incriminating evidence against both Mr. Haevischer and Mr. Johnston. Mr. Le was one of the leaders of the Red Scorpions, a gang of which Mr. Haevischer and Mr. Johnston are alleged to be members. Evidence led at trial indicates that C.K. was an associate of Mr. Le and also a member of the Red Scorpions.
- [4] The police interviewed C.K. on a number of occasions, primarily in 2009, but also more recently in January of 2014. C.K. provided information on a variety of topics, but four matters are of relevance to the present application:
 - 1) a meeting at a restaurant, the meeting being germane to the relationship between Mr. Le and two of the victims, Corey Lal and Eddie Narong;
 - 2) a conversation C.K. had with Mr. Le prior to the murders about fob access to the Balmoral Towers where the murders occurred;
 - 3) a conversation C.K. had with Mr. Le after the murders where Mr. Le said, in effect, "I told you it would be taken care of"; and
 - 4) admissions allegedly made to C.K. by Mr. Johnston; according to C.K., he had a white board conversation with Mr. Johnston in which the latter told him who had been killed at the Balmoral and some of the circumstances surrounding the murders.
- [5] Excerpts from C.K.'s statements regarding the first two topics were put to Mr. Le in cross-examination. He denied that the conversations had taken place.

- [6] C.K. has been on the Crown's witness list at different times, beginning in 2011. On May 9, 2014, the Crown informed the accused they would not be calling C.K. as a witness at trial. Since being so informed, the defence has had some preliminary contact with C.K. and has determined that he is willing to testify for the defence in accordance with his statements. His evidence, it is anticipated, will contradict Mr. Le on material issues.
- [7] Mr. Haevischer says that Mr. Le has provided the most damaging evidence against him and that Mr. Le's credibility is therefore a critical issue in the Crown's case against him. Accordingly, he intends to call C.K. as a witness to give evidence on matters that touch on Mr. Le's credibility. However, he does not intend to lead evidence from C.K. regarding the alleged admission by Mr. Johnston and argues that the Crown ought not to be able to lead through cross-examination evidence of that admission or other incriminatory evidence relating to Mr. Johnston where that evidence does not arise in the course of Mr. Haevischer's direct examination of C.K.
- [8] The applicants argue firstly that s. 7 of the Charter provides an accused with the right to make full answer and defence, a component of which is the right of the accused to know the case he must meet before answering the Crown's case.
- [9] Secondly, they argue that the Crown cannot split its case, which would be the effect if it were permitted to lead evidence of the admission after the Crown has now closed its case.
- [10] Thirdly, they say in the circumstances the prejudicial effect of the evidence significantly outweighs its probative value.
- [11] The Crown, for its part, says the issue is whether it has the right to cross-examine a defence witness, who was originally identified as a potential Crown witness, about direct evidence of an accused's involvement in the very crimes that are alleged in the indictment. The gist of the Crown's argument is, firstly, that C.K.'s evidence is well-known to the applicants, as there has been full disclosure of his statements, and accordingly they know the case to be met; secondly, that such cross-examination of a defence witness on a matter that is relevant and otherwise admissible does not amount to case splitting; and thirdly, the evidence is highly probative and has no prejudicial effect whatsoever.
- [12] As to the procedure evoked here by Mr. Haevischer, which is akin to that contemplated in an Underwood application, it is common ground that this application engages a question of admissibility of evidence that is appropriately determined before the evidence is led. The Crown agrees that as a matter of fairness the applicants ought to know before Mr. Haevischer is required to make an election as to whether to call evidence in his defence whether the Crown's cross-examination of C.K. will be limited in scope as sought in his application.
- [13] I will turn first to the legal principles engaged in this application. The case-to-be-met principle ensures that the accused knows when the Crown announces it has closed its case, the body of evidence represents the entirety of the prosecution's case.

[14] In *R. v. Rose*, [1998] 3 S.C.R. 262, the Supreme Court explained that one aspect of the right to make full answer in defence is the right of an accused to know the full case to meet before answering the Crown's case by adducing evidence. At para. 102, citing *R. v. Krause*, [1986] 2 S.C.R. 466, at 473 the Court said:

The right to know the case to meet is long settled, and it is satisfied once the Crown has called all of its evidence, because at that point all of the facts that are relied upon as probative of guilt are available to the accused in order that he or she may make a case in reply

[15] The right has links to the right to full disclosure and to engage in full cross-examination of Crown witnesses. It is concerned with the right to respond to the Crown's evidence. The Court in *Rose* went on to say that inherent in the right to make full answer and defence is "the requirement that the Crown act prior to the defence's response."

[16] The evidentiary rule against case splitting is closely connected to the right of an accused to know the case he or she must meet. The rule is, in essence, a means by which the right is protected. The general rule, as stated in *Krause* at para. 15, is that in the context of a criminal trial, the Crown must produce and enter in its own case all of the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the indictment and any particulars. Justice McIntyre, writing for the Court, explained the rationale of rule as follows:

This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence -- as much as it deemed necessary at the outset -- then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it the full case for the Crown so that it is known from the outset what must be met in response.

[17] The Crown may be permitted to call evidence in rebuttal after completion of the defence case, where the defence has raised a new matter which the Crown has not had the opportunity to deal with and could not reasonably have anticipated. As Justice McIntyre explained at para. 16, rebuttal evidence "will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made."

[18] And, as McIntyre J. explained at para. 17, essentially the same principles apply in cross-examination of witnesses. Where something new emerges in cross-examination by Crown counsel, which is new in the sense that the Crown had no reason to anticipate the matter would arise, and where the matter concerns the merits of the case, then the Crown may be allowed to call rebuttal evidence. However, where the new matter is collateral, that is, not relevant to matters that must be proved for the determination of the case, no rebuttal will be allowed.

- [19] The decision of the Ontario Court of Appeal in *R. v. Mallory*, 2007 ONCA 46, is instructive. The appellants, Mallory and Stewart, were convicted at trial of first degree murder. The trial judge had ruled that the Crown was permitted to call a number of unsavoury witnesses, including jailhouse informants to whom the appellant Stewart allegedly made inculpatory statements. The Crown then called two of the informants as part of its case, but chose not to call many others, including informants about whom it proposed to cross-examine Stewart. The Crown had previously acknowledged to the Court that it viewed the evidence of at least one of those informants, a person known as Metrakos, as unreliable. Before deciding whether Stewart would testify in his own defence, his counsel sought a ruling prohibiting the Crown from cross-examining him on his alleged statements to informants the Crown had not called. Stewart's counsel argued, among other things, that the Crown should not be permitted to cross-examine him on the alleged admissions to informants who had not been called because the Crown could not call them on reply without splitting its case, and the admissions were therefore not admissible.
- [20] However, the trial judge accepted the Crown argument that cross-examination on unproven but admissible statements was permissible, provided the Crown had a reasonable foundation for the questions. He ruled that the Crown was permitted to conduct an unrestricted cross-examination of Stewart on all of the purported admissions. In light of this ruling, the defence elected not to call Stewart to testify.
- [21] On appeal, it was held that the trial judge erred in his ruling. The Court observed that it was no answer to say that the Crown could call the informants in reply. In fact, it was common ground that the Crown was not entitled to, and did not intend to, call these informants in reply due to the collateral nature of the informant's evidence. It acknowledged that if Stewart denied the admissions, it would be bound by his answers. Accordingly, if the Crown had attempted to call the informants in reply to rebut Stewart's denials, the result would have been an impermissible splitting of the Crown's case. For that reason, the admissions which the Crown proposed to put to Stewart were inadmissible.
- [22] Further, said the Court, the trial judge erred in failing to balance the absence of any probative value of the cross-examination against the dangers of cumulative suggestions by the Crown about untested and unreliable information provided by unsavoury witnesses. Because Stewart would simply deny making each statement, the only admissible evidence would be that the admissions were never made. Thus the Crown's proposed cross-examination about the circumstances surrounding the admissions would have no relevance and no probative value. The evidence would be gravely prejudicial to the accused, particularly as the trial was being heard by a jury.
- [23] The Court of Appeal in *Mallory* stated the following overarching principles at paras. 230-233:
- [230] First, voluntary admissions by an accused are generally admissible for their truth as an exception to the hearsay rule.

- [231] Second, [generally no] voir dire is required to establish the voluntariness of [the admissions if they are made to persons other than those in authority, even if the persons are unsavoury witnesses.]
- [232] Third, the Crown is entitled to call the evidence it chooses in its case, provided that it does not call any evidence with an "oblique motive".
- [233] Fourth, the Crown is not prohibited from reserving evidence for cross-examination that was not called in-chief, provided the evidence is not otherwise inadmissible, the Crown has a good faith basis in the foundation for its question, the Crown is not splitting its case, and the prejudicial effect of the cross-examination does not outweigh its probative value.
- [24] It is the fourth of these principles upon which both the Crown and the applicants rely in this application.
- [25] The gist of Mr. Haevischer's position is that the evidence of C.K. concerning the purported Johnston admissions is inadmissible because, first, it is an attempt by the Crown to split its case and, second, the prejudicial effect greatly outweighs the probative value.
- [26] On the issue of case splitting, Mr. Haevischer argues the Crown has known since it first interviewed C.K. in 2009 that he had highly relevant evidence concerning motive, opportunity and admissions made by the accused Mr. Johnston. There was no impediment to the Crown calling C.K., as he had been willing to testify for the prosecution.
- [27] Mr. Haevischer submits the Crown had an obligation to lead this evidence if it wished to rely on it. He says the Crown cannot sit on the evidence and raise it when it suits, unless the Crown wants to risk splitting its case. It makes no difference if the impugned evidence is led in cross-examination rather than rebuttal, thus the law concerning rebuttal evidence and case splitting applies here.
- [28] On the issue of probative value versus prejudicial effect, Mr. Haevischer submits that the probative value of the purported Johnston admission to C.K. cannot lie in its relevance to substantive issues of guilt, otherwise the Crown would have led the evidence as part of its case. Thus its value must lie only in its relevance to issues of credibility. However, in this case, the proposed cross-examination of C.K. cannot have any effect on his credibility, because the Crown will argue that his evidence about the admission is in fact credible and reliable. As such, the evidence sought to be elicited by the Crown has no probative value.
- [29] At the same time, Mr. Haevischer argues the evidence is obviously very prejudicial to Mr. Johnston. With respect to Mr. Haevischer, the Crown's use of the admission and final argument against him is not yet known. At the very least, the Crown may argue that the admission assists the Court in determining what happened in the suite at the Balmoral and those facts may lead to further inferences. Hence, there is prejudice to Mr. Haevischer. He argues that, given the lack of any probative value of the evidence and its prejudice to both accused, a balancing of the factors favours a ruling that the evidence is inadmissible.

- [30] Mr. Johnston adopts the submissions of Mr. Haevischer. He emphasizes the importance of the case-to-meet principle, which ensures the defence knows the body of evidence called by the Crown before it closes its case represents the entirety of the case against him. He says that case cannot change or be buttressed by the late addition through cross-examination of a defence witness of further incriminatory evidence. To do so creates unfairness to him.
- [31] Mr. Johnston argues that if further incriminatory evidence is to be added, the Crown must establish the unforeseeability of that evidence and the Crown cannot establish that the evidence of C.K. was unforeseen. That the Crown attempts to admit his evidence through cross-examination rather than rebuttal evidence is a distinction without a difference as the effect is the same. It is case splitting.
- [32] According to Mr. Johnston, permitting an unrestricted cross-examination of C.K. by the Crown at this very late stage would create an unfairness that could not be overcome by allowing his counsel to re-cross-examine C.K. following the Crown's cross-examination, as has been proposed by the Crown in this case.
- [33] I will turn now to the application of the law to the circumstances of this case. The learned authors Sopinka, Lederman & Bryant, *Law of Evidence in Canada*, 3rd ed. (Markham, ON, LexisNexis Canada, 2009), state that cross-examination as "the greatest legal engine ever invented for the discovery of truth" can first weaken, qualify or destroy the opponent's case; second, support the party's own case through testimony of the opponent's witness; and three, discredit the witness (at §16.112).
- [34] The Crown relies primarily on the second of these principles and says it seeks only what any other advocate has the right to do, which is to support its case through the testimony of a witness called by the opposing party.
- [35] The Crown is not under a duty as a general rule to call a witness it has subpoenaed. As observed by the Court in *R. v. Lyons* (1994), 63 Q.A.C. 15, if the Crown has provided full disclosure of the witness's evidence, its duty ends there; nor is the Crown obliged to call all of the witnesses who have evidence relevant to the issues arising at trial. The Crown must establish as part of its case all of the essential elements of the offence as charged, and it is at liberty to determine which of its available witnesses will best assist the Crown in accomplishing that end.
- [36] Further, the Crown has the right to cross-examine a defence witness on any matter that is relevant and otherwise admissible to the issues arising on the trial. This right includes the right to cross-examine a witness on matters that support the Crown's case.
- [37] I will reiterate the fourth overarching principle stated by the Court in *Mallory*. The Crown is not prohibited from reserving evidence for cross-examination that was not called in chief, provided that it is not otherwise inadmissible, that there is a good faith basis for the question, that the Crown is not splitting its case, and the prejudicial effect of the questioning does not outweigh its probative value.

- [38] Turning first to the issue of whether the Crown's proposed course amounts to case splitting, it is not disputed that C.K.'s evidence is well-known to the applicants. He was identified as a potential Crown witness, and the statements he provided to police as early as 2009 have been disclosed to the defence. In those statements, C.K. discusses the admissions he says he received from Mr. Johnston about the Surrey Six murders. I do not accept Mr. Haevischer's argument that because the Crown is not seeking to elicit the evidence of the admissions in order to challenge C.K.'s credibility, but is instead attempting to lead evidence on the substantive issue of guilt, that the Crown is in effect splitting its case.
- [39] The purpose of cross-examination is not solely to test credibility. As I stated earlier, cross-examination may be used by a party to support its own case through the testimony of the opposing party's witnesses. As against Mr. Johnston at least, the alleged admissions are evidence of his involvement in the murders. If otherwise admissible, this is highly probative evidence relevant to the elements of the offence with which Mr. Johnston is charged.
- [40] The Crown elected not to call C.K., presumably because it concluded that it had led sufficient evidence to establish the essential elements of the offence charged in the indictment. It had entered in its own case all of the relevant evidence on which it intended to rely at the close of its case.
- [41] As explained by the Supreme Court in *Krause*, case splitting occurs where the Crown puts in part of its evidence, then closes its case, and once the defence is complete, adds further evidence to bolster the case originally advanced.
- [42] It is my view that the Crown's proposed cross-examination of C.K. does not amount to case splitting. The Crown would be bound by C.K.'s answers with respect to the alleged admissions by Mr. Johnston. It readily acknowledges that it will not be entitled to elucidate on his answers about those admissions by calling evidence in reply.
- [43] The harm caused by case splitting is that it impairs the constitutional right of the accused to know the case they must meet before making an election. That harm does not arise in this instance. The scope of C.K.'s evidence is well known to the applicants. Both have notice before they elect whether or not to call evidence that the Crown intends to elicit the admissions through cross-examination. Consequently there can be no surprise, unfair or otherwise, nor can there be prejudice to them.
- [44] With respect to the applicant's fair trial rights, and in particular those of Mr. Johnston, they will not be impaired. First, Mr. Johnston will know the case against him before he makes his election whether to call evidence. He will not be called on to make the election until after all of Mr. Haevischer's evidence is heard, including that of C.K., should Mr. Haevischer elect to call evidence.
- [45] Second, Mr. Johnston will be able to cross-examine C.K. fully. In order to ensure a fair trial, I have discretion to permit Mr. Johnston to re-cross-examine C.K. on the evidence elicited by the Crown in its cross-examination.

- [46] Further, the Crown will be obliged to proceed with care in the framing of its questions to C.K. about the admissions. If the Crown elicits evidence of the admissions through leading questions, it may affect the weight the Court can attach to the admissions.
- [47] For these reasons, the Crown's proposed cross-examination, should Mr. Haevischer call C.K. as a witness, does not constitute case splitting or otherwise undermine or impair the trial fairness rights of either applicant.
- [48] Returning to the factors referenced in Mallory, the Crown will not be splitting its case if it leads the proposed evidence from C.K. in cross-examination. It is also apparent the Crown has a good-faith basis for asking C.K. about the alleged admissions for Mr. Johnston.
- [49] The final issue is whether the prejudicial effect of the cross-examination outweighs its probative value. As I noted earlier in this ruling, the admissions the Crown intends to elicit from C.K. are evidence of Mr. Johnston's involvement in the murders. As such, their probative value is potentially high. The only question concerns their prejudicial effect.
- [50] Prejudicial evidence in the legal sense of the term does not mean evidence that is damaging to a party's case. It goes without saying that if the evidence of C.K. on this issue is believed, it is damaging, at least to Mr. Johnston. The question is whether the evidence gives rise to concerns of moral or reasoning prejudice.
- [51] In Mallory, the Crown proposed to cross-examine the accused on admissions introduced not through the evidence of disreputable informants, but only through the Crown, with no indication of the unsavoury character of the individuals who provided the information. Despite the accused's denials, the cumulative effect of repeated suggestions by the Crown that he had admitted his involvement would create the innuendo that he must have at least made some of the admissions. Despite warnings from the trial judge, the risk was that the jurors would be influenced by the innuendo and misuse the evidence. In other words, there was a real risk in Mallory of reasoning prejudice by the jury. There was also moral prejudice arising from the fact that the Crown itself acknowledged the unreliable nature of some of the purported admissions.
- [52] In the present case, the evidence the Crown proposes to elicit from C.K. about the admissions does not give rise to any concern of either moral or reasoning prejudice. It follows that the probative value of C.K.'s evidence, if elicited, would significantly outweigh its prejudicial effect, if any.
- [53] In conclusion, then, in the event that Mr. Haevischer elects to call C.K. as a witness, the Crown will not be restricted in its cross-examination as sought by the applicants, and the application is dismissed.

The Honourable Madam Justice C.A. Wedge

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