

CANADA / JUDGMENT

R. v. Illes

2003 BCSC 753

COURT

Supreme Court of British Columbia

DECIDED

4 February 2003

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2003BCSC0753 Citation: R. v. Illes Date: 20030204 2003 BCSC 753 Docket: 20516 Registry: Vancouver IN THE SUPREME COURT OF BRITISH COLUMBIA Ruling on s. 37 Canada Evidence Act application The Honourable Madam Justice Kirkpatrick February 4, 2003 HER MAJESTY THE QUEEN AGAINST MIHALY ILLES Counsel for Crown D.L. Mulligan C.L. Taylor Counsel for Defendant D. M. McKimm, Q.C. S.E. Wishart Counsel for Attorney General of Canada J.L. Hayes Place and Date of Hearing: Vancouver, B.C. February 4, 2003 BAN ON PUBLICATION 539(1) AND 648(1) CCC

- [1] THE COURT: These are my reasons in respect of the s. 37 Canada Evidence Act application, which was made on January 17, 2003.
- [2] In this first degree murder trial, which concerns the death of Javan Dowling in Vancouver in April 2001, counsel for the accused applied for an order for disclosure of the police records relating to the investigation of the death of Josep Bralic, whose body was found in Fullerton, California, on July 5, 2001. The records for which the defence seeks disclosure include the Fullerton, California, police file, as well as the RCMP assist file.
- [3] The basis upon which the defence seeks disclosure of the police investigation files is the alleged relevance to the motivation of certain Crown witnesses to lie, especially with regard to the assertion of, for instance, Derrick Madinsky, that he did not carry on with the drug trade after Javan Dowling's death. As well, although not specifically articulated as such by defence counsel, the defence hopes to find in these records, evidence that Madinsky or Garry Favell, another Crown witness, were directly responsible for the death of Bralic, and therefore had the propensity, motive and opportunity to kill Dowling.
- [4] Such evidence, if it existed, would be similar fact evidence adduced by the accused to show the guilt of third parties. For that proposition I would expect the defence to rely on R. v. McMillan (1975), 23 C.C.C. (2d) 160, a decision of the Ontario Court of Appeal, which was affirmed at [1977] 2 S.C.R. 824.
- [5] The RCMP appeared on the motion, represented by an agent for the Attorney General of Canada, and objected, pursuant to s. 37 of the Canada Evidence Act, to the disclosure claimed by the defence. The Attorney General orally certified that the specified public

interest supporting non-disclosure was that disclosure would violate informer privilege; would compromise an active investigation; and would violate the interests of cooperative investigation between two police agencies, i.e. the Fullerton, California Police Department and the RCMP. The latter ground was not asserted during the review process.

- [6] Pursuant to *R. v. Pilotte* (2002) 163 CCC (3d) 225 (Ont. C.A.) and *R. v. Meuckon*, (1990) 78 C.R. (3d) 196 (BCCA), this court embarked on a detailed review of all of the records held by the RCMP in respect of the Bralic murder investigation. The Fullerton, California, police file was not produced for inspection. I do not consider that I have the jurisdiction to order the inspection or disclosure of that file. Nevertheless, certain portions of the Fullerton, California, police file are in the RCMP file and have been inspected.
- [7] The hearing proceeded in camera from January 21, 2003, to February 3, 2003. Constable Livingstone of the RCMP, Mr. Hayes, counsel for the Attorney General, the court clerk, and I were the only persons present. The hearing was taped. Thirty three exhibits were filed, including all of the spreadsheets prepared by Mr. Hayes, which described the file number, the contents of the file, the privilege claimed, and the basis upon which the privilege was claimed.
- [8] The inspection of documents consumed 14 days, including weekends. The in camera hearing was held every weekday and one Sunday, from generally nine o'clock in the morning to 6:30 in the evening. The court convened as and when necessary to seek further clarification or explanation of matters contained in the RCMP files, and to rule on the disclosure in respect of each sub-file.
- [9] Constable Livingstone and Mr. Hayes were unfailingly helpful, cooperative and, above all, candid, in their assistance to the court. It is difficult to estimate, but it is likely that more than 15,000 pages of documents, contained in six-and-one-quarter banker's boxes, were reviewed. Disclosure of more than 1,150 pages of documents was ordered between January 23 and February 4, 2003.
- [10] Prior to the commencement of the s. 37 hearing, counsel for the defence asserted that the following information would be of particular relevance to the defence:
1. Statements made by Madinsky;
 2. Statements made by Favell;
 3. Statements made by Rachel Duck, Mr. Bralic's girlfriend;
 4. Statements made by James Carmichael;
 5. All videotapes of statements;
 6. Police investigation notes regarding drug dealing in British Columbia;
 7. Police investigation notes regarding drug dealing in California;

8. Police investigation notes regarding the use of the Portal border crossing;
 9. Police investigation notes regarding the shooting of Bralic;
 10. Police investigation notes regarding the activities of Madinsky, Favell, Carmichael and Bralic, while in California;
 11. Any notes regarding Madinsky and Favell as suspects in the Bralic killing;
 12. All surveillance notes for Madinsky, Favell, and Carmichael; and
 13. All notes relating to meetings with the Vancouver Police Department regarding the Dowling investigation.
- [11] As a result of the s. 37 hearing, the court ordered production in respect of items 1, 2, 4, and 5, and vetted production in respect of items 3, 8, 12, and 13. In respect of category number 5, the videotapes were disclosed, except for that of Rachel Duck, and because her statement was vetted there was not sufficient time to prepare a vetted videotape.
- [12] The basis of the privilege claim by the RCMP may be summarized under the following categories:
1. Disclosure would compromise or hinder the ongoing California police investigation, and other criminal investigations;
 2. Disclosure would reveal potential witness testimony, agents and informers, which would compromise or hinder the California police investigations, and
 3. Disclosure would reveal investigative procedures and plans.
- [13] The task for the court posed by the s. 37 hearing was daunting. I was charged with balancing the importance of the information sought by the defence against the designated public interest, as provided for in *R. v. Gray* (1993) 79 C.C.C. (3d) 332 (B.C.C.A.). I had also to decide whether the information in the RCMP records might possibly affect the outcome of Mr. Illes' trial. Where the information could not affect the outcome of the trial, it has been held that the privilege claim ought, generally, to be upheld, and for that proposition I looked to *R. v. Meuckon*.
- [14] I have now reviewed the entirety of the RCMP file. That review establishes that there is nothing in the record to date which indicates that Madinsky or Favell were directly responsible for the death of Bralic. Furthermore, there is nothing in the file to suggest that Madinsky or Favell were directly responsible for the death of Dowling.
- [15] The disclosure that has been ordered may assist the defence in the attack on the credibility of Crown witnesses. To that extent, disclosure has been ordered because it meets the test of possibly affecting the outcome of the trial.

- [16] As to the balance of the records which have not been disclosed, I can say that a great deal of it is irrelevant to the matters in issue in the case at bar and to the matters raised by the defence in seeking disclosure.
- [17] In all other respects, I am satisfied that the public interest in nondisclosure far outweighs the importance of the information to the defence. The disclosure of the balance of the RCMP files would compromise the ongoing police investigation in California, as well as the ongoing investigation of other crimes. I therefore uphold the privilege asserted by the Attorney General, on behalf of the RCMP, except to the disclosure that I have previously ordered.
- [18] The exhibits filed on the in camera hearing are ordered sealed. They may not be unsealed without further order of the court. I have directed the RCMP not to dispose of the ongoing investigation file until any appeals taken from this decision have concluded. (DISCUSSION BETWEEN THE COURT AND COUNSEL)
- [19] THE COURT: I failed to mention in my reasons, and I can, as with all of these reasons, probably elaborate a little bit.
- [20] Of the about 15,000 pages of documents that were reviewed, I think it is fair to say that there is a huge amount of duplication within that. For instance, the statements that you received appear, I think, on three occasions, in various places in the file. So if one of your concerns that is lingering in the back of your mind, not knowing what is in there, the 15,000 pages does represent a lot of duplication. "P.A. Kirkpatrick, J." The Honourable Madam Justice P.A. Kirkpatrick

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