

CANADA / JUDGMENT

R. v. Mehl

2019 BCCA 438

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 438 R. v. Mehl COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Mehl, 2019 BCCA 438 Date: 20191021 Docket: CA44876 Between: Regina Respondent And Kaela Janine Mehl Appellant SEALED IN PART Before: The Honourable Madam Justice Garson The Honourable Mr. Justice Fitch The Honourable Mr. Justice Abrioux On appeal from: An order of the Supreme Court of British Columbia, dated October 4, 2017 (R. v. Mehl, Victoria Docket 169210-2). Oral Reasons for Judgment Counsel for the Appellant: B.P. Nychuk S.R. Fox Counsel for the Respondent: D.M. Layton, Q.C. L.T. Phipps Place and Date of Hearing: Vancouver, British Columbia October 21, 2019 Place and Date of Judgment: Vancouver, British Columbia October 21, 2019 Summary: The Crown applies for a sealing order regarding the identity of a juror in the court below, and the parties apply to cross-examine witnesses on appeal and to cross-examine a witness by video-link. Held: the applications are granted.

- [1] GARSON J.A.: This is an omnibus ruling on various applications filed by the appellant and the Crown in this appeal.
- [2] An application has been filed by the Crown for a sealing order. The Court has received, read, and considered that material for an order that Juror #10's name not be mentioned at the appeal and, also, that any Court filings indicating Juror #10's identity be sealed. The parties are consenting to the order. In our opinion, it is in the interests of justice that the order be granted and it is so granted.
- [3] I now turn to the applications regarding cross-examination on affidavits.
- [4] The appellant, Kaela Mehl, has appealed her conviction on the charge of first degree murder.
- [5] Her appeal is based on one main ground. As described in her factum, she says that the issue is whether trial counsel's representation fell below the standard of reasonably professional competence and judgment and, as a result, she suffered prejudice and a miscarriage of justice occurred.
- [6] In support of her appeal, Ms. Mehl and the Crown, in response, have filed cross-applications to adduce fresh evidence regarding juror bias and ineffective assistance of counsel.

- [7] A number of affidavits have been filed as proposed fresh evidence. The appellant seeks leave to cross-examine both her trial counsel, Mr. Jeremy Mills and Mr. Kirk Karaszkiwicz. They have both filed affidavits in response to Ms. Mehl's allegations of ineffective assistance of counsel and/or the issue of juror bias. If the appellant's applications are granted, the Crown seeks leave to also cross-examine Mr. Mills and Mr. Karaszkiwicz. The Crown also seeks leave to cross-examine Ms. Mehl on her affidavits.
- [8] The appellant and the Crown have provided the Court with written briefs in support of these applications. We have had the opportunity to read and consider those briefs. All counsel consent to these applications.
- [9] In addition, for medical reasons, Mr. Karaszkiwicz is unavailable to testify in Vancouver. He is able to testify by video link from the Victoria courthouse, which is close to his home. All counsel consent to his testifying by video.
- [10] The following is a ruling on the cross-applications to cross-examine witnesses before the Court in this appeal, as well as the application that Mr. Karaszkiwicz be permitted to do so by video link.
- [11] With my colleagues agreeing, we are satisfied that the orders sought permitting the cross-examinations, as well as the order permitting the evidence by video, should be granted for the reasons that follow.
- [12] First with respect to the applications to cross-examine the witnesses, Mr. Mills, Mr. Karaszkiwicz, and Ms. Mehl, our authority for doing so is found in s. 683(1)(b) of the Criminal Code, R.S.C. 1985, c. C-46. That section provides that such an order may be made where the court considers that it is in the interests of justice to do so. It is an extraordinary remedy. There must be a sufficient basis or foundation to support such an order. A key consideration is whether there is a reasonable possibility that the proposed cross-examination will produce meaningful evidence to assist the court in fulfilling its role in determining the issues raised by the appeal: *R. v. Au-Yeung*, 2010 BCCA 367; *R. v. Atzenberger*, 2018 BCCA 224.
- [13] Where, as here, there are contradictions in the affidavit evidence and those conflicts are central to the issues on the appeal and cannot satisfactorily be resolved on the face of the affidavits, the test will be met.
- [14] We have considered the submissions made in support of the applications to cross-examine the two trial counsel and are satisfied that the orders sought should be made in this instance. The scope of the cross-examination should reasonably be limited to those issues raised in the factums.
- [15] I now turn to the application to conduct the cross-examination of Mr. Karaszkiwicz by video link. Our authority to make such an order is found in s. 714.1 of the Criminal Code, if it is appropriate in all the circumstances. *R. v. S.D.L.*, 2017 NSCA 58, sets out a number of factors that the court says should be considered. While we do not consider that all those

factors need be present to ground such an order, in this case we are satisfied that, here, the personal circumstances of Mr. Karaszkiewicz factor in favour of making the order. Neither party has suggested that the appeal cannot be conducted fairly using the video link that has been arranged. Counsel have made the appropriate arrangements to enable Mr. Karaszkiewicz to conveniently be taken to any documents that may be put to him. On balance, it will be convenient for Mr. Karaszkiewicz to testify in this manner.

- [16] With respect to the applications to adduce fresh evidence on the appeal, including the evidence elicited on cross-examination, as is our usual practice, we will receive the evidence, subject to any objections that we understand will be made shortly regarding Ms. McCoy, and then rule on its admissibility in the course of our judgment on appeal.
- [17] Counsel may have particular submissions about the evidence related to the witness, Ms. McCoy. Those submissions may be made in the course of the appeal. "The Honourable Madam Justice Garson" "The Honourable Mr. Justice Fitch" "The Honourable Mr. Justice Abrioux"

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