

CANADA / JUDGMENT

R. v. Mehl

2020 BCCA 229

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 229 R. v. Mehl COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Mehl, 2020 BCCA 229 Date: 20200813 Docket: CA44876 Between: Regina Respondent And Kaela Janine Mehl Appellant FILE SEALED IN PART Before: The Honourable Mr. Justice Fitch The Honourable Mr. Justice Butler The Honourable Mr. Justice Abrioux On appeal from: An order of the Supreme Court of British Columbia, dated October 4, 2017 (conviction) (R. v. Mehl, Victoria Docket 169210-2). Counsel for the Appellant: B.P. Nychuk S.R. Fox Counsel for the Respondent: D.M. Layton, Q.C. L.T. Phipps Written Submissions Received from the Appellant: July 9, 2020 Written Submissions Received from the Respondent: June 29, 2020 July 13, 2020 Place and Date of Judgment: Vancouver, British Columbia August 13, 2020 Written Reasons of the Court Summary: Application by the Crown for an order pursuant to s. 682(1) of the Criminal Code requiring the trial judge to provide a report addressing the observations, if any, she made of a juror whom the appellant alleges made gestures to members of the gallery during the course of the trial that display a reasonable apprehension of bias. Held: Application dismissed. This is not one of the rare cases in which making such an order is warranted. In the circumstances of this case, the report is unnecessary and would not meaningfully advance resolution of the central factual issue on appeal. In addition, there is a substantial risk that obtaining such a report might be perceived as unfairly influencing findings of fact the division will be obliged to make on appeal. Reasons for Judgment of the Court: I. Overview

- [1] On October 4, 2017, Kaela Janine Mehl was found guilty by a jury of the first degree murder of her infant child. Her appeal from conviction has been set for hearing before this division in December 2020.
- [2] The appellant alleges that during the course of the trial, one of the jurors repeatedly made physical gestures towards the paternal family of the deceased infant as the jury was entering and exiting the courtroom. The appellant will argue on appeal that the gestures should be interpreted as expressions of sympathy or support that display a reasonable apprehension of bias on the part of the juror. In addition, the appellant will argue that the failure of her trial counsel to bring to the attention of the trial judge the occasion on which he saw the gesture being made constitutes ineffective assistance of counsel. On both grounds, the appellant will argue that these events give rise to a miscarriage of justice warranting the intervention of this Court pursuant to s. 686(1)(a)(iii) of the Criminal Code, R.S.C. 1985, c.

C-46 [Code] and an order for a new trial.

- [3] The alleged behaviour by the juror, which was never brought to the trial judge's attention and is not otherwise reflected on the record, has been the subject of a lengthy and detailed post-trial investigation. The parties will seek on the hearing of the appeal to adduce a considerable body of fresh evidence on this issue. That evidence consists of observations made by the appellant, trial counsel, sheriffs and spectators seated in the gallery of the courtroom. In all, the parties will seek to adduce the evidence of 22 people who were in a position to make observations respecting the conduct of the juror.
- [4] In addition, the parties will seek to adduce as fresh evidence an affidavit sworn by the juror that appends a statement the juror gave to the police in which the juror denied making any gestures towards the gallery.
- [5] Broadly speaking, the fresh evidence the parties will seek to adduce can be grouped into three categories. In the first category, the affiants describe relatively frequent gesturing by the juror, which they interpreted as expressions of sympathy or support directed to the father of the deceased infant and his family. In the second category, a group of affiants more limited in number, depose that they saw the juror make a gesture on one occasion but do not definitively ascribe any particular meaning to the gesture. In the third category, the affiants report seeing no gesturing by the juror.
- [6] Against this background, the Crown applies under s. 682(1) of the Code for an order that the trial judge furnish the division with a report that responds to the following questions:
 - 1. At the time of the Mehl trial, what was your practice, if any, regarding observing the jurors as they entered or exited the courtroom during the course of a trial?
 - 2. During the Mehl trial, did you observe any of the jurors make a gesture in the direction of the public gallery as the jury entered or exited the courtroom?
 - 3. If your answer to question (2.) is "yes", please describe:
 - i. the nature of the gesture; ii. when you first observed it; and iii. how often you observed it (i.e. on how many days, and how often on each day).
- [7] In its written reply submissions, the Crown suggests that concerns raised by the appellant, who opposes the application, could be addressed by requiring the trial judge to respond to a further question or questions regarding her vantage point and ability to make observations of the jurors as they entered and exited the courtroom.
- [8] The parties consented to the resolution of this application in writing.
- [9] For the reasons that follow, we dismiss the application.

- [10] These reasons were provided to counsel on August 13, 2020, in unredacted form. Except as to the disposition of the application, counsel undertook not to disseminate or otherwise make publicly available the content of the judgment until such time as the Court hears the submissions of counsel and rules on whether the judgment should be redacted or its public release delayed in order to preserve the integrity of the evidentiary portion of the appeal hearing. II. Legislative and Jurisprudential Context
- [11] Section 682(1) provides as follows: Report by judge 682 (1) Where, under this Part, an appeal is taken or an application for leave to appeal is made, the judge or provincial court judge who presided at the trial shall, at the request of the court of appeal or a judge thereof, in accordance with rules of court, furnish it or him with a report on the case or on any matter relating to the case that is specified in the request.
- [12] The leading case on the principles to be applied in considering whether to request a report from a trial judge is *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155. Writing for the majority, Justice Cory noted that the provision is something of a historical anachronism born of a time when there was seldom a transcript made of trial proceedings. The majority in *E. (A.W.)* was clear that such a request should now only rarely be made. As Cory J. explained (at 191-192): As a general rule the trial judge's report introduces an element of unfairness into the appeal procedure. The trial judge is being requested to give his or her subjective view of what transpired. With the very best of intentions the trial judge may subconsciously be influenced to write a report which justifies decisions made and actions taken during the course of the trial. It will be very difficult if not impossible for counsel opposed to the view of events taken by the trial judge to argue against the judge's version. To request the report, as a general rule, is to encourage a situation fraught with the possibilities of unfairness. It is only in those rare situations where something occurred which is not reflected in the record and upon which opposing counsel cannot agree that a report from a trial judge might be requested. For example, a desire for comments with regard to the demeanour of a witness should not justify a request for a report. The assessment of the demeanour of a witness should fall within the exclusive domain of the jurors as the triers of the facts. Indeed jurors are routinely instructed at the opening of a criminal trial that they should closely observe the demeanour of the witnesses during the course of the trial. To ask for a trial judge's comment to the Court of Appeal on this issue would I think be superfluous and improper. It follows that I do not think that there should be a standing request from Courts of Appeal to trial judges to routinely make a report. As the Chief Justice has pointed out, if the Court of Appeal issues a general invitation to trial judges to submit reports, that would be tantamount to restoring the predecessor of s. 682(1). Rather, as I have said, the request should be made only in those rare circumstances where something has occurred which is not reflected on the record upon which opposing counsel cannot agree. In those rare cases, trial counsel ought probably to be afforded an opportunity to appear before the trial judge in order to make submissions with regard to the requested report. Further, when the report is made, copies should be provided to counsel appearing on the appeal so that they may make representations with respect to it. [Emphasis added.]

- [13] One of the principal questions guiding the resolution of an application of this kind is whether requesting a report from the trial judge might improperly influence rather than assist the appeal process: see *E. (A.W.)*, per Cory J. at 191-192; per Lamer C.J., dissenting in the result, at 175.
- [14] The approach required by *E. (A.W.)* has been applied by this and other appellate courts in a variety of different contexts: see, for example *R. v. C.W.G.* (1993), 36 B.C.A.C. 234 (Chambers); *R. v. MacMillan*, 2002 BCCA 306 (Chambers); *R. v. Lund*, 2006 BCCA 296 (Chambers); *R. v. Hossainnia*, 2011 BCCA 117 (Chambers); and *R. v. Dhillon*, 2014 BCCA 182 (Chambers).
- [15] As the inquiry is intensely case-specific, these authorities, while of assistance in the identification of broad governing principles, do not address the propriety of requesting a report from the trial judge in the unique circumstances of this case. I do note, however, the observation of Chief Justice Lamer in *E. (A.W.)* at 176-177, that the trial judge's report continues to play a useful role in the appellate process particularly in respect of issues that are not reflected on the record, including the behaviour of jurors. I do not understand this observation to be inconsistent with the majority judgment.
- [16] The question to be resolved on this application is whether, in the particular circumstances of this case, requesting a trial judge's report will assist the appeal process and do so in a manner that will be fair and will be seen to be so. III. The Positions of the Parties
- (a) The Crown
- [17] Consistent with the test expressed in *E. (A.W.)*, the Crown emphasizes that the issue the trial judge would be asked to address is not reflected on the record and is a central factual issue upon which the parties cannot agree. The Crown notes that the order it seeks would not require the judge to comment on matters properly within the domain of the jury, nor would it tempt the judge to justify any decision she made at trial. The Crown acknowledges that it is a relevant factor in the resolution of this application that the trial judge is not the only source of the sought-after information. The Crown does, however, resist the notion that a request for a report should only be made where the trial judge's input will be determinative of the matter in dispute. Further, the Crown submits that receiving from the trial judge a report as to her observations "would assist in determining which version of events is most reliable."
- (b) The Appellant
- [18] In opposing the application, the appellant submits that obtaining a report is not necessary in this case and will not assist in the resolution of the central factual issue to be resolved on appeal. In support of this position, she emphasizes that, in light of the weight of the fresh evidence sought to be tendered, the main focus of the appeal will not be on whether the juror made physical gestures during the course of the trial, but on the number of occasions upon which the gestures were made and what the juror intended to convey by making them. The appellant notes the Crown's agreement that the central factual issue to be resolved on

appeal will likely be "how often [the gestures were made] and [with] what meaning". In this context, the appellant submits that having the trial judge address whether she saw a gesture or gestures being made by the juror will not meaningfully advance the inquiry. In addition, the appellant submits that requesting a report in the form proposed by the Crown will inevitably draw the trial judge into issues that should properly be reserved for the appellate process. For example, the appellant submits that the proposed questions, as framed, ask the judge to describe the nature of any gesture she observed. The appellant argues that describing a gesture may well entail providing an opinion about the message the juror intended to convey by that gesture. The appellant submits that the trial judge is in no better position to assist this Court on this point than the fresh evidence affiants. For all of these reasons, the appellant says that the application should be dismissed. IV. Analysis

- [19] We are in general agreement with the position of the appellant. Of particular significance in the resolution of this application are the following considerations.
- [20] First, there is an abundance of proposed fresh evidence before us concerning the alleged conduct of the juror. While we agree with the Crown that orders made pursuant to s. 682(1) are not limited to situations in which the trial judge is the only potential source of the sought-after information, the need for a trial judge's report is attenuated in the circumstances before us.
- [21] Second, if the trial judge reports that she did not observe any juror making what might be construed as sympathetic gestures to the paternal family of the deceased infant during the course of the trial, nothing will have been gained by making the order sought. The parties agree the appeal will likely proceed on the factual premise that, on one or more occasions, the juror gestured to spectators sitting in the gallery in proximity to the father of the deceased infant and his family. The controversy on appeal will centre on the frequency with which those gestures were made and what they were intended to signal.
- [22] Third, if the judge did observe the juror gesture to members of the gallery, the observation does not advance the inquiry unless it is accompanied by the judge's assessment of the meaning the juror sought to convey by making the gesture. In this respect, we agree with the appellant that an inquiry (or further inquiry) of this sort would inevitably draw the trial judge into a factual controversy on appeal and invite the expression by her of an opinion that may well be at odds with the opinion of others. We also agree with the appellant's position that the trial judge's assessment of what the juror may have intended to convey by making the gesture stands on no greater footing than the assessment of anyone else who observed the gesture. And yet there is a real concern that, depending on the conclusions reached, this Court might be seen as privileging the interpretation of the trial judge over the interpretation advanced by other witnesses. The potential for perceived unfairness is significant and is an additional factor we have considered in determining to dismiss the application.

[23] As matters stand, and for the reasons expressed, we do not see this case as being among the rare circumstances in which an order of this kind should be made. The application is, accordingly, dismissed. "The Honourable Mr. Justice Fitch" "The Honourable Mr. Justice Butler" "The Honourable Mr. Justice Abrioux"

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