

CANADA / JUDGMENT

R. v. Mehl

2020 BCCA 344

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 344 R. v. Mehl COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Mehl, 2020 BCCA 344 Date: 20201201 Docket: CA44876 Between: Regina Respondent And Kaela Janine Mehl Appellant Restriction on publication: Pursuant to the Court's inherent jurisdiction, a publication ban has been imposed restricting the publication, broadcasting or transmission in any way of any information that could identify the juror whose conduct forms part of the subject matter of the appeal. 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: August 24, 2020 Written Submissions Received from the Respondent: October 9, 2020 November 23, 2020 Place and Date of Judgment: Vancouver, British Columbia December 1, 2020 Written Reasons of the Court Summary: Both parties apply for leave to cross-examine certain witnesses at the hearing of the appeal. The Crown also applies for a sealing order and a publication ban protecting the identity of a juror whose conduct is at issue on appeal. Held: Applications granted. The Dagenais test (Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835) is met. There is a reasonable possibility that the proposed cross-examinations will give rise to evidence that will meaningfully assist the Court in resolving the issues to be advanced on appeal. Reasons for Judgment of the Court:

- [1] By applications filed November 23, 2020, the Crown applies for orders: (1) sealing a small subset of materials filed in this Court for use on Kaela Janine Mehl's appeal from her conviction, following a trial by judge and jury, of first degree murder; and (2) banning publication of the identity of a juror whose alleged conduct forms one of the grounds of appeal, along with any information that could disclose the juror's identity.
- [2] Both parties have tendered fresh evidence, in affidavit form, for use on the appeal. The proposed fresh evidence pertains to the alleged conduct of the juror and to Ms. Mehl's further ground of appeal that her trial counsel failed to provide her with effective assistance in defending the charge. Following this Court's usual practice, counsel can anticipate that we will receive the fresh evidence at the outset of the appeal hearing. Against this background, counsel for the Crown and Ms. Mehl have applied for leave to cross-examine certain

witnesses before the division of this Court assigned to hear this appeal. The hearing is scheduled to commence on December 7, 2020.

- [3] None of the applications are opposed. The parties are content that the Court resolve these matters on the basis of the written materials filed, and we are satisfied that it is appropriate to do so in advance of the hearing.
- [4] We address first the Crown's applications for a sealing order and publication ban.
- [5] Applications for a non-statutory publication ban or confidentiality order, such as a sealing order, are guided by the framework developed in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76; and *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41. The framework requires the application of a two-step test:
 - 1. Is the order necessary to prevent a serious risk to an important interest? This first question involves three elements: (a) whether the risk is real and substantial, well-grounded in the evidence, and poses a serious threat to the interest in question; (b) whether the interest can be expressed in terms of a public interest in confidentiality, as opposed to an interest that is merely specific to the party requesting the order; and (c) whether reasonable alternatives are available to the order sought and, if not, how the court may restrict the order as much as reasonably possible.
 - 2. Do the salutary effects of the confidentiality order outweigh its deleterious effects, including effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings? If restrictions on the open court principle are justified, the framework requires courts to craft orders that are minimally restrictive.
- [6] A sealing order was previously made by this Court on October 21, 2019, to protect the identity of the juror. As matters have developed, it is necessary to revisit that order now to ensure that the sealing order extends to all of the fresh evidence filed in this Court that identifies the juror, either directly or indirectly. In addition, we are of the view that it is necessary to tailor the order previously made to better reflect both the nature of the order actually sought by the Crown in October 2019, and this Court's commitment to the open court principle.
- [7] By way of background, a juror's name and contact information are generally kept confidential and not released to the public during a trial or after its completion. This practice protects the juror's privacy and promotes the important public interest of encouraging citizens to participate as jurors in the administration of criminal justice. This public interest is reflected in the presumptive rule of juror anonymity that governs the process of jury selection: s. 631(3) of the Criminal Code, R.S.C. 1985, c. C-46 [Code].

- [8] We are of the view that the sealing order and publication ban are necessary, not only to protect the juror's privacy interests, but to advance the important public interest identified. Given the tailored nature of the orders we propose making, we are satisfied that the salutary effects of the orders sought outweigh any minimal deleterious impact on the open court principle. In our view, there is no reasonably alternative measure that is available in the circumstances.
- [9] In the result, we make the following sealing order:
1. This Court's sealing order dated October 21, 2019, is vacated.
 2. The following affidavits in the court file for this appeal are to be sealed and remain sealed, except that copies may be released to a member of the public, as permitted pursuant to this Court's Record and Courtroom Access Policy, provided that the juror's name, contact information and any other information likely to reveal the juror's identity is redacted from the copies:
 - a. The affidavit of the juror, affirmed September 5, 2019;
 - b. The affidavit of Paul Philip, affirmed September 6, 2019; and
 - c. The affidavit of Dawn Weaver, sworn September 13, 2019.
 3. During the hearing of this appeal, the parties shall not mention the juror's name, contact information or other information likely to reveal the juror's identity.
- [10] An order banning publication of any information that could identify the juror will issue on the following terms: No information that could identify the juror whose conduct forms part of the subject matter of the appeal, including but not limited to the juror's gender, physical description, manner of walking, juror number or seat in the jury box, shall be published in any document or broadcast or transmitted in any way.
- [11] We dismiss as abandoned the Crown's related application filed November 2, 2020, which was superseded by the applications filed on November 23, 2020.
- [12] We turn next to the applications of the parties for leave to cross-examine certain witnesses at the hearing of the appeal. Our jurisdiction to permit the proposed cross-examinations is found in s. 683(1)(b) of the Code. That section provides that such an order may be made in relation to a witness who would have been a compellable witness at trial where the court considers that it is in the interests of justice to do so. Cross-examination of a witness pursuant to s. 683(1)(b) is an extraordinary remedy. The party who seeks leave to cross-examine a witness pursuant to s. 683(1)(b) must establish a foundation upon which it can be concluded that it is in the interests of justice to grant the order sought. A key consideration is whether there is a reasonable possibility that the proposed cross-examination will produce evidence that will meaningfully assist the court in determining the issues raised by the appeal: *R. v. Atzenberger*, 2018 BCCA 224 at para. 16; *R. v. Patrick*, 2020 BCCA 259 at paras. 75-79; *R. v. Jerace*, 2020 BCCA 267 at paras. 6, 12. In a case

such as this, where there are contradictions in the affidavit evidence central to the two key issues raised on appeal that cannot satisfactorily be resolved on the face of the affidavits, the test is met.

- [13] In the result, and with the exception of the juror who is not a compellable witness (see R. v. Budai, 1999 BCCA 501), we grant the parties leave to cross-examine the witnesses identified in their respective notices of application. The scope of the cross-examination should reasonably be limited to the grounds of appeal and issues raised in the factums. "The Honourable Mr. Justice Fitch" "The Honourable Mr. Justice Butler" "The Honourable Mr. Justice Abrioux"

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