

CANADA / JUDGMENT

R. v. Oliynyk, LePage and Ferris

2005 BCSC 1484

COURT

Supreme Court of British Columbia

DECIDED

17 October 2005

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Oliynyk, LePage and Ferris,

2005 BCSC 1484

Date: 20051017

Docket: 65537

Registry: New Westminster

Between:

Regina

And

Lloyd Allan Ferris, Joseph Elwood Roger LePage,

and David James Oliynyk

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- Ban on Publication has been lifted November 17, 2005.

Before: The Honourable Madame Justice MacKenzie

Ruling on Transcripts

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Counsel for the Defendant, Ferris

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Date of Ruling:

October 17, 2005

New Westminster, B.C.

Introduction:

- [1] These are the reasons of my ruling of October 17, 2005 that the Crown need not remove the names of the alleged speakers in the transcripts of the intercepted telephone calls in this case. The Crown will tender into evidence approximately 65 telephone calls, intercepted pursuant to Part VI of the Criminal Code. I have ruled these intercepted private communications admissible as evidence with the exception of telephone calls 37 and 38.
- [2] Defence counsel object to the identification of the three accused as speakers in the transcripts and the identification of Mr. Grunwald as a speaker in calls 8, 9 and 10. They seek to have the identification of each the accused and Mr. Grunwald deleted from the transcripts. They suggest the accused be identified as, "speaker one," "two," or "three".
- [3] The case law clearly establishes that transcripts of intercepted private communications do not constitute evidence, but are only intended to assist to the trier of fact. The recordings themselves are the evidence and an appropriate instruction or warning as to the limited use of the transcripts must be given to a jury.

Position of the Defence:

- [4] Defence counsel request that the Crown be directed, when filing the transcripts of the intercepted telephone calls, to ensure there is no writing in the transcripts to indicate that any of the accused is one of the speakers. Alternatively, they request that the jury be reminded that the Crown is required to prove by evidence, independent of the transcripts, the identification of the voices in the recordings as those of the accused.

- [5] Mr. Benning submits, in particular, that since the sufficiency of voice identification is one of the underpinnings of Mr. LePage's defence, that transcripts identifying him as a speaker create a needless possibility of prejudice. As such, Mr. Benning says the transcripts ought to be edited so to avoid this prejudice to Mr. LePage.
- [6] Alternatively, recognizing that the recordings will be before the jury and that the jury will undoubtedly require assistance by way of transcript, counsel, (through Mr. Benning), argue that the assistance can be given in a way that causes much less prejudice to the accused, such as through a jury instruction similar to the following:

The Crown alleges e.g. that Mr. LePage is a member of the conspiracy and they urge you to find that the speaker indicated as Mr. LePage in the transcripts is the Mr. LePage in the courtroom. But it is for you to decide, based on all the evidence you have heard, whether the Crown has satisfied you that Mr. LePage is the speaker as indicated in the transcripts.

- [7] Defence counsel have directed me to case law, which they admit does not go as far as they urge me to go, but they argue, can be interpreted to support their requests.
- [8] They rely on *R. v. McKay* (1992), 136 A.R. 27 (Q.B.), where the Crown agreed with defence counsel that the names of the accused would be edited from the transcripts of intercepted private communications to read "unknown male" or "unknown female." Therefore, the court did not have to rule that the transcripts be edited. The court did not refer to any case law as it was not required.
- [9] In their alternative submission, defence counsel rely on *R. v. Bartkowski*, 2005 B.C.S.C. 507, in which the accused objected to the identification of himself in transcripts of telephone conversations. Macaulay J. held that the identification was acceptable as there was independent evidence identifying the voice of the accused. Defence counsel submit this decision supports the proposition that the Crown must introduce evidence of voice identification before the transcripts go before the jury.
- [10] Counsel also argue that the law has evolved considerably on the weighing of the prejudicial effect of evidence against its probative value and that the courts need to be more sensitive to this balancing analysis.

Position of the Crown:

- [11] The Crown asks me to dismiss this application to edit the transcripts as it is unsupported by authority. It is for the trier of fact to consider and weigh the evidence, and decide whether the case has been proven. The issue of the use of transcripts is well-settled at law; transcripts are only meant to assist the trier of fact in understanding audio recordings.

- [12] The Crown also submits that the authorities relied upon by defence counsel do not assist the court as they do not directly address whether identification of an accused ought to be removed from transcripts. Specifically, the Crown submits that Bartkowski supports the proposition that the trier of fact must ultimately decide if the evidence of voice identification is sufficient.

Discussion:

- [13] In *R. v. Rowbotham* (1988), 41 C.C.C. (3d) 1, 25 O.A.C. 321, the Ontario Court of Appeal confirmed the discretion of the trial judge to determine whether transcripts of intercepted private communications should be left with the jury during their deliberations (Rowbotham, at p.50). The court also noted that if the communications are lengthy or numerous, then a transcript should be left with the jury (Rowbotham, at p.51). In this case, they are both numerous and lengthy as they comprise approximately 67 telephone calls.
- [14] The trial judge has the discretion to decide whether the transcripts ought to be provided to the jury in a manner that avoids prejudice to the accused either by editing those transcripts or by instructing the jury on the weight to be attributed to voice identification.
- [15] In exercising this discretion, I recognize the well-established principle outlined in Rowbotham, that it is the recordings themselves which constitute the evidence to be considered by the jury. Conversely, the transcripts of the recordings do not constitute evidence. Instead, they operate to assist the jury in understanding the audio recording and in their fact-finding function more generally. The necessity of providing reasonable assistance to juries was highlighted in *R. v. Pleich* (1980), 55 C.C.C. (2d) 13 (Ont. C.A.) when Morden J. stated at p. 32:

It is a fundamental feature of a jury trial, of which juries are constantly reminded, that it is the exclusive responsibility of the jury to find the facts in dispute on the evidence adduced before them. Accordingly, all reasonable assistance should be given to juries to enable them to perform this responsibility fairly and effectively.

- [16] The use of transcripts as a mode of assistance to the jury, was specifically addressed in *R. v. Wilson*, [1973] 3 W.W.R. 1, when Seaton J. said at p. 3, the "Jury must have some assistance as to who is doing the speaking and the transcripts are the best assistance available." Specifically, the identification of speakers in a transcript assists the jury in exercising their fact-finding responsibility. In *Wilson*, Seaton J. commented on the necessity of identifying speakers in the following passage:

I know of no other way than having the assistance of persons who know the voices to identify them. It is to be noted that some 30 man-hours were used in preparing the words and identifying who was using them. I think, if it can be called "convenience", that we should not ask the jury to re-do it when they are incapable of re-doing it because they do not know the voices.

- [17] Seaton J. drew a useful analogy to a photograph tendered at trial, (Wilson at p. 3). If a photograph is tendered, but cannot be identified by any witness, it is of little assistance to the jury. Similarly, if a transcript of a recording does not provide the names of the speakers, the recording is of little assistance to the jury.
- [18] The jury will hear the evidence and submissions about what is and is not stated in the intercepted communications: (R. v. Mooring, 2000 B.C.S.C. 762 at ¶14). The reliability of the identification is a matter of weight to be determined by the trier of fact, (R. v. Chan, 2001 B.C.S.C. 1180 at ¶28), and the identification of the accused in the transcript is merely an opinion which the jury is entitled to accept or reject, in whole or in part (Rowbotham, at p. 50). In R. v. Biasi (1981), 62 C.C.C. (2d) 304 at 308, Paris J. warned the jury that the identification of the accused in the transcripts were, "only allegations by the Crown and that it will be up to them to satisfy themselves as to the identity of the voices on the tapes." In addition, Macaulay J. in Bartkowski supports the proposition that the trier of fact must consider evidence independent of the identification in a transcript when determining its weight.
- [19] Instructions to the jury must emphasize that it is the recording that constitutes the evidence, (Rowbotham, at pp. 47-50), and that the transcripts are only intended to assist in their fact-finding function. Any prejudice to the accused as a result of the voice identification in transcripts is mitigated by the assistance provided to the jury and the limiting instructions given as to the use of the transcripts.

Disposition:

- [20] I agree with Crown counsel that the issues raised here are well-settled by the case law: trial judges can exercise their discretion to admit transcripts, which are not themselves evidence but assist the jury, particularly with respect to voice identification. Moreover, none of the cases provide authority for the editing out of any names of the alleged speakers. As stated by Paris J. in Biasi at p. 309, "I can see no reason in law that obliges me to have the identifying passages deleted." In reaching this conclusion, I have balanced the prejudicial effect on the accused and the probative value in assisting the jury.
- [21] The Crown must prove all the elements of the offence. In particular, the evidence of voice identification can be challenged in cross-examination and is no more prejudicial to the accused than is a particular witness describing evidence pertaining to the accused. Crown counsel has told me that they intend to introduce a significant amount of evidence on voice identification independent of the transcripts themselves, and they outlined some of it.
- [22] Accordingly, I must dismiss the first part of the defence application to edit the transcripts as any prejudice to the accused can be mitigated by an instruction to the jury on the appropriate use of the transcripts.
- [23] The jury will be instructed along the following lines:

During the trial, you heard a tape recording.

When the tape was played, you also had a transcript of the tape. The transcript is just an aid to help you follow what was said on the tape, and by whom, as it was being played.

Only the tape is evidence. It will be available to you in the jury room where you may listen to it if you need to. It is up to you to decide whether or how often you want to listen to it, or any part of it again. You may listen to it as many times as you wish to help you determine who is speaking and what s/he is saying.

The transcript was also filed as an exhibit. It will be available to you in the jury room to help you to determine what is actually on the tape. But remember, if you find any differences between the tape and the transcript, either about what was said or by whom, you must rely on what you hear on the tape, rather than what is in the transcript.

The voice identification in the transcripts is only someone's opinion of the identity of the speaker. You may accept or reject this opinion, in whole or in part, and may give them whatever weight you think they are entitled to.

The issue of what is said and whom the speaker is, is entirely up to you, as the trier of fact. You must rely on what you hear on the recordings and any other evidence given about the speakers about what was said, rather than on what is in the transcripts.

[24] On defence counsels' second concern regarding the identification of Mr. Grunwald in the transcript for calls 8, 9 and 10, the Crown has affirmed that those calls are important for their content rather than the identification of Mr. Grunwald as a speaker. Therefore, the Crown will not undertake to call a witness to give evidence of that identification.

[25] Given the position of Crown counsel on this issue and the law as discussed on voice identification in transcripts, I do not see the need to make an order now in favour of editing or deleting the identification of Mr. Grunwald in calls 8, 9 and 10. I may revisit this particular ruling later or give instructions to the jury if there is no voice identification evidence regarding Grunwald introduced by Crown.

"A.W. MacKenzie, J."

The Honourable Madam Justice A.W. MacKenzie

November 17, 2005 - Ban on Publication or broadcast by the media including newspapers, radio and internet, of any evidence heard, submissions made or rulings given in the absence of the jury until the jury has rendered its verdict and the trial is over has been lifted on November 17, 2005.

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