

CANADA / JUDGMENT

R. v. Tallio

2019 BCCA 330

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 330 R. v. Tallio COURT OF APPEAL FOR BRITISH COLUMBIA Citation: R. v. Tallio, 2019 BCCA 330 Date: 20190906 Docket: CA44096 Between: Regina Respondent And Phillip James Tallio Appellant Restriction on publication: Portions of this file are sealed or subject to publication bans in orders dated October 24, 2017, November 7, 2017, November 8, 2017, July 23, 2019, and August 8, 2019. Further orders or directions may be issued pursuant to the November 8, 2017 order. FILE SEALED IN PART Before: The Honourable Madam Justice Bennett The Honourable Mr. Justice Harris The Honourable Mr. Justice Hunter On appeal from: An order of the Supreme Court of British Columbia, dated November 1, 1983 (R. v. Tallio, Prince Rupert Docket 74/83). Oral Reasons for Judgment on the Application for Further DNA Testing, Preservation of the Material and Return of the Material Counsel for the Appellant: T.M. Arbogast R.M. Barsky Counsel for the Respondent: M.T. Ainslie, Q.C. J.A.M. Dickie Counsel for the Intervenor, Marion Bolton: S.J. Rauch Place and Date of Hearing: Vancouver, British Columbia September 3, 2019 Place and Date of Judgment: Vancouver, British Columbia September 6, 2019 Summary: In 1983, Mr. Tallio pleaded guilty to second degree murder. On June 30, 2017, an extension of time to file a notice of appeal was granted, in part, to enable DNA testing to be performed on tissue samples taken from the victim. This application relates to further DNA testing. The Crown applies for materials presently in the possession of the RCMP to be released to the British Columbia Institute of Technology Forensic Lab for scientific testing. Mr. Tallio applies to vary an order granted on March 12, 2018 in relation to the return of other material to Canada. Ms. Bolton, the intervenor, seeks orders returning all of the material to her forthwith. Held: Applications granted, in part. The interests of justice require that this case be decided on the best information available. Additional testing by the Crown may shed light on the important issues surrounding the DNA results obtained to date. The March 12, 2018 order is varied to allow the materials in the possession of the National Forensic Institute to remain there given the risk of damage from further transportation. Ms. Bolton's application is adjourned generally.

- [1] BENNETT J.A.: On April 23, 1983, Delavina Mack was raped and murdered in Bella Coola, British Columbia. She was 22 months old when her life ended. Phillip Tallio pleaded guilty to second degree murder on November 1, 1983, and was sentenced to life imprisonment, with a ten-year minimum for parole eligibility. Mr. Tallio was 17 years old at the time of the offence. Mr. Tallio maintains his innocence, and is still in prison some 37 years later.

- [2] On June 30, 2017, an extension of time to file a notice of appeal was granted, (indexed at 2017 BCCA 259) in part, to enable DNA testing to be performed on tissue samples of Delavina, which were found stored at B.C. Children's Hospital and had been taken during the autopsy in 1983.
- [3] DNA testing had been performed by a laboratory called Orchid Cellmark prior to the extension of time being granted, however, further testing was requested. On March 12, 2018, this Court made an order permitting some of the material to be transferred for testing to the Netherlands Forensic Institute ("NFI"). The history of the testing to that point is set out in the reasons, indexed at 2018 BCCA 83, and I need not repeat it here.
- [4] The parties and intervenor bring three applications in relation to further DNA testing:
- 1) the Crown brings an application to conduct further tests;
 - 2) Mr. Tallio brings an application to vary the order made March 12, 2018 in relation to returning the material to Canada; and
 - 3) Ms. Bolton seeks orders returning all of the material to her forthwith.
- [5] For the reasons that follow, I would grant the Crown's application for further testing. I would grant the order to permit the material to remain in the Netherlands. As such, I would refuse Ms. Bolton's application to have the material returned to her at this time. In doing so, I am aware of the pain that these proceedings have caused her, and it is not without regret that I would dismiss her application. In these circumstances, however, it seems appropriate to adjourn her application generally. The Crown's application for further testing
- [6] The Crown seeks to have the following material, presently in the possession of the RCMP, released to the British Columbia Institute of Technology ("BCIT") Forensic Lab for scientific testing. For convenience, they are referred to as Test A and Test B: Test A -- Three vaginal tissue samples of Delavina Mack that were obtained from formalin fixed and paraffin embedded blocks created during her autopsy, and removed from the paraffin blocks by Orchid Cellmark ("FFPE tissue") labelled FR11-0113.03.01; FR11-0113.04.01; and FR11-0113.05.01 by Orchid Cellmark; and Test B -- 38 female DNA extracts obtained by Orchid Cellmark from surface swabbing and xylene washes of the Delavina Mack FFPE tissue blocks; and if considered necessary by the BCIT Forensic Lab, all reagent blanks associated to the testing of the 38 female DNA extracts obtained by Orchid Cellmark.
- [7] Mr. Tallio does not oppose further testing, provided it does not delay the appeal. The testing can be completed in a matter of weeks, and will not delay the schedule set for the hearing of the appeal. Ms. Bolton opposes further testing.
- [8] The tissue proposed to be tested in Test A had been washed with a xylene solution as part of the testing process. The washing was tested, and a partial DNA male profile was identified, from which Mr. Tallio was excluded as a donor.

- [9] The Crown recently learned that while the washing was tested, the tissue itself was never tested, and it seeks an order for that testing to be completed. It says that further testing is necessary because a partial male DNA profile was found in the washing of one of these tissues, and the Crown seeks to discover if there is a profile on the tissue itself.
- [10] The Crown seeks Test B to see if there is female contaminant DNA on the tissue samples. These samples have only been tested for male DNA. The Crown seeks to have the material tested for female DNA to ascertain if the material has been further contaminated. Mr. Tallio's view is that anything that can be done, should be done in terms of testing the material.
- [11] Ms. Bolton has deposed to the significant harm these proceedings have done to her and her family. She does not wish to interfere with the process of the appeal, but does not believe that further testing on her daughter's remains is necessary.
- [12] I am mindful of the stress these proceedings are having on Ms. Bolton and other members of her family. There is no doubt that her daughter's remains must be treated with dignity, and will eventually be returned to her family.
- [13] However, the interests of justice require that this case be decided on the best information available. The additional testing may shed light on the important issues surrounding the DNA results obtained to date. I would allow the Crown's application. Mr. Tallio's application to vary the March 12, 2018 order
- [14] The March 12, 2018 order permitted material to be transported to the NFI for further testing. The order also states:
3. The RCMP will, as soon as reasonably possible, escort the DNA Extract, the uterine sample and the reference DNA samples (collectively, the "exhibits") to the NFI. At the completion of testing, the NFI will contact the RCMP, and the RCMP will escort what remains of the exhibits back to Canada. The disposition of the exhibits will be resolved at the conclusion of the appellant's appeal. [Emphasis added.]
- [15] The NFI was unable to achieve results from their testing because the samples were too degraded to do further testing using the RM-YSTR approach. The possibility of so-called "next-gen" testing was raised, and now may be closer to a reality. As a result, Mr. Tallio asks the Court to find that the testing has not been completed, or to vary the order to allow the material to remain with the NFI. He also seeks that the "conclusion of the appellant's appeal" includes appeals to the Supreme Court of Canada.
- [16] In addition, the evidence shows that the material can be damaged by transporting it. Thus, Mr. Tallio says it makes more sense to permit the material to remain with the NFI rather than returning it to Canada, only to have it remitted to the Netherlands at a later date, if additional testing is ordered.

- [17] The Crown says that there is no reason not to return the material, as there is little information on the "next-gen" testing. Ms. Bolton reiterates her concerns noted above, and says that there is no basis established for the material to remain with the NFI.
- [18] It has always been contemplated that further testing might be sought as the technology improves. However, I would not interpret the words in the order, "at the completion of testing" to mean any possible testing, ever. The order was made on the basis of the available testing. That has been done. However, given that further transportation could damage the material, in my view, it is preferable to leave the material with the NFI for the time being. I would amend the order as follows: I would delete the underlined sentence "At the completion of testing, the NFI will contact the RCMP, and the RCMP will escort what remains of the exhibits back to Canada". I would add the following: The disposition and return of the exhibits will be resolved at the conclusion of the appellant's appeal to this Court by the division seized with the appeal, unless otherwise ordered by this Court. Ms. Bolton's application to return the material
- [19] I have already noted Ms. Bolton's deep concern that her daughter's remains be returned to her as soon as possible. I believe that all involved in this litigation recognize the profound effect the proceedings have had on Ms. Bolton, and recognize as well that the remains of Delavina be treated with dignity and respect. However, as noted above, I am of the view that the interests of justice require the further testing occur, and that the material be preserved until the appeal in this Court is concluded, or otherwise ordered by this Court.
- [20] It seems that the most appropriate order would be to adjourn Ms. Bolton's application generally, rather than to dismiss it. Summary
- [21] I would grant the applications by the Crown and Mr. Tallio and I would adjourn Ms. Bolton's application generally.
- [22] The order the Crown seeks will be as their draft order, which appears in the Appendix to the submission on this application.
- [23] HARRIS J.A.: I agree.
- [24] HUNTER J.A.: I agree. "The Honourable Madam Justice Bennett"

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