CA016527
Vancouver Registry

Court of Appeal for British Columbia

ORAL REASONS FOR JUDGMENT:

Before:

The Honourable Mr. Justice Taylor — March 5, 1993
The Honourable Mr. Justice Wood
The Honourable Mr. Justice Hollinrake — Vancouver, B.C.

BETWEEN:

R E G I N A

APPELLANT

AND:

HUBERT PATRICK O'CONNOR

RESPONDENT

M.D. Macaulay, Q.C. — appearing for the (Crown) Appellant

C. Considine and
D. McDonagh — appearing for the Respondent

1 **TAYLOR, J.A.:** This is an application by the Crown for leave to adduce new evidence on the hearing of an appeal against the entry of a judicial stay of proceedings during the course of the trial of the respondent on charges of rape and indecent assault.

2 The material concerned consists of the affidavits of members of the legal staff of the Attorney General, two of whom were Crown Counsel at the trial, together with documents referred to in those affidavits which are contained in 10 binders and one stapled but unbound bundle of oversized folios with attached typewritten transcripts. These documents are referred to in the affidavits as having come mostly, if not wholly, from the files of Crown Counsel conducting the trial.

3 The judicial stay was entered by the trial judge on the ground that there had been abuse of process by the Crown in failing to make complete disclosure to counsel for the defence of information relevant to the evidence to be given by Crown witnesses, despite several orders of the Court to that effect.

4 The purpose of the material, as described by Crown Counsel before us, is to demonstrate that adequate disclosure was in fact made by the Crown. The material consists of statements made by, and records of interviews held by Crown Counsel and police with, the complainants against whom the offences are alleged to have been committed and potential witnesses to events which may or may not be relevant to issues in the case.

5 There can be no question that the appeal involves novel questions of law. They are concerned with the extent of the duty of disclosure placed on the Crown as a result of recent decisions

of the Supreme Court of Canada and other courts, and may also possibly involve the privacy interests of complainants in cases of this sort. There can be no doubt that disclosure of the material tendered could be prejudicial to the right of the respondent to a fair trial, in the event a new trial were ordered as a result of this appeal. Disclosure of the material would, moreover, be invasive of the privacy of the complainants. In saying this I emphasize that if there were a new trial, there can be no certainty, as to much of this material, that it would then be disclosed. Some of it may be quite irrelevant to the issues which would be before the Court.

6 Mr. Considine says there is no need for all this material to be filed. He says that much of what is said by Crown Counsel in their affidavits has no bearing on the issues raised by the appeal. He says that he and Mr. Macaulay can perhaps agree on what needs to go in and he takes the position that the appeal falls properly to be determined in any event by what took place before the trial judge. As I understand his submission it is that this Court ought not to look beyond the record at trial and ought not to consider whether, had other information been known to him, the judge might have reached some other conclusion.

7 It seems to us that the problem arises from the novelty of the matter. The factual question of the adequacy of Crown disclosure cannot, of course, always be decided on the basis of the

record at trial, unless the trial judge has conducted some sort of *voir dire* to explore the question in full, and this has not, of course, so far been the custom. When the issue is raised on appeal, it is understandable that the Crown would wish to create a record, by way of an application to adduce new evidence, and perhaps the respondent will wish to add to this. From the material so produced it is to be hoped that in the end each side will select and bind separately for the Court those documents to which they will, in fact, find it necessary to refer at the hearing of the appeal, in the event that the Court is disposed, in the end, to adjudicate on the sufficiency of the disclosure made.

8 As already indicated to counsel, we do not think it appropriate to rule at this time on the admission of the proposed new evidence for the purposes of the appeal. It is not the custom of this Court to make that decision until the issues raised in the appeal have been fully explored. We are, however, prepared to direct that the Crown may refer to the material tendered at the hearing of the appeal, and to leave the decision whether or not the material will be accepted as new evidence to be made by the panel which hears the appeal. If the normal practice of the Court is followed, that decision may well be deferred until the appeal has been fully argued before the panel.

9 As to the manner in which the material is to be dealt with, we make the following directions.

1. The material is to be bound in white covers, marked "Supplementary Material Tendered by the Crown". Since it is probable that the appeal will be heard by a five-judge panel, counsel should enquire of the Registry whether it is necessary to produce further volumes. If counsel eventually agree on a volume of extracts to which they will in fact refer, there may then be no need to make further copies of the whole of the material. In any event, counsel must clearly segregate material containing information which is admitted to have been disclosed from material containing information which is conceded not to have been disclosed and material in respect of which there is dispute as to whether the information contained was disclosed or not.

2. In their factums, counsel may refer to this supplementary material, as proposed new evidence, but should designate such references, by marginal lineation or otherwise, so as clearly to distinguish material not yet in evidence from evidence given, and statements made, during the proceedings in the trial court and at the preliminary hearing.

3. With the consent of counsel, we order that the material tendered as new evidence, and all documents referring to such material, shall be withheld by the Registry from access by persons other than Crown Counsel and the respondent and his counsel, who shall have access to the material for all proper purposes related to the conduct of the appeal proceedings. No other person shall have access to the material except with leave of a judge of this Court and on such terms, if any, as the judge may impose.

10 With respect to the future conduct of the appeal proceedings, we make the following directions:

(a) Counsel for the respondent may file an application to adduce new evidence within

> the next three weeks, that is to say on or before March 26, 1993; that application will be heard in Vancouver at 9:15 a.m. on the first date convenient to the Court and counsel.
>
> (b) Counsel may within one week thereafter, that is to say on or before April 2, 1993, file an application for leave to cross-examine the maker of any affidavit tendered as new evidence, and that application will be heard on the same basis as already mentioned.
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> (c) The factum for the Crown will be filed within four weeks thereafter, that is to say on or before April 30, 1993.
>
> (d) The factum for the respondent will be filed within the following four weeks, that is to say on or before May 28, 1993.

Provided this timetable is adhered to, the hearing of the appeal can take place September 15 and 16, 1993. Should the Registry be advised prior to the end of next month that a third day will be required, September 17, 1993, may also be made available.

11 Should the Court find it desirable to provide directions with respect to the scope of the issues which counsel are asked to address on the appeal, that will be done by way of memorandum to counsel before the end of this month.

12 The directions which we have now made may be varied, and the further applications we have contemplated may be heard, either by a single judge in chambers or by a panel of the Court. That

will be a matter to be decided when the nature of the application in question is known, and counsel will, of course, be advised which procedure has been settled on.

WOOD, J.A.: I agree.

HOLLINRAKE, J.A.: I agree.

TAYLOR, J.A.: There will be directions as I have indicated.

"The Honourable Mr. Justice Taylor"