Court of Queen's Bench of Alberta

Citation: R v [redacted], 2020 ABQB 707

Date:
Docket: 181110446Q1
Registry: Red Deer

Between:

Her Majesty the Queen

Crown

- and -

[redacted]

Accused

Oral Reasons on Adjournment Application
of the
Honourable Mr. Justice N.E. Devlin

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[1] The accused is charged with having committed sexual assault on June 9, 2018. Today is his trial date. Just over 28 months have elapsed since the date of the offence. Subsequent to his arraignment, the Crown applied for an adjournment on the basis it had learned of the existence of further evidence just this morning. The accused vigorously opposed an adjournment on the basis that this is a case of gross police negligence in failing to obtain this evidence earlier and that the adjournment should consequently not be granted.

Facts

[2] The basic outline of the case against the accused, together with a sketch of his evidence in response, are contained in my ruling in respect to the section 276 application in this case,

reported at 2020 ABQB 611. The adjournment request proceeded as a *voir dire* with evidence being called, but it was common ground that the information already before the Court on the pre-trial matter should inform this decision.

[3] The adjournment is requested because, as the Crown told the Court, he learned from the complainant this morning that the accused had sent her a series of text messages in the immediate aftermath of the alleged assault. The Crown advised that this is the first time he learned that actual text messaging had taken place in the context in this case, as opposed to exchanges by a Snapchat, which notoriously do not leave any record. The Crown also told the Court that, some months ago, he had queried the police about the existence of potential messaging in this case based on his review of the file.

[4] I invited both parties to call evidence on this application if they wished. The Crown called the complainant. She testified that the accused sent her a lengthy series of messages in the period immediately following the alleged assault, some of them while she was actually with the police officer who responded to the call for assistance in this matter. In her words, the texts "came flying in." She knew them to be from the complainant because they came up under his contact information.

[5] She described the contents of the messages in general terms. She could no longer remember the exact words given the passage of time. She said that, in these messages, the accused was at first trying to protect himself saying he was invited in. As the texts continued, in the absence of any response from her, the accused subsequently apologized for his behaviour. Her evidence was that there may have been five to six texts in total, some of which contained large paragraphs. She never replied to any of them.

[6] The complainant told the Court that she no longer has the phone on which she received these messages because she upgraded to a new phone in the intervening two years. She has, however, continued to maintain the same phone number and service account with Telus. Her evidence is that many of these messages came in while she was face to face with the police officer taking her complaint. She was clear that she told him about receiving these messages as it was happening. He did not ask to look at her phone, nor that of the home's occupant, who was also receiving messages.

[7] Her evidence in this respect was not challenged. Indeed, it was somewhat corroborated by the contents of RT's recorded interview with the police just over two weeks later. That interview was not formally entered into evidence, but counsel mutually agreed that part of its contents should be conveyed to the Court and form part of the record on this application.

[8] It is agreed that, in this interview, RT expressly told the police that messages about the events of the night in question had come to her and her husband from the accused in the aftermath of the alleged assault. Again, it is agreed that the police did nothing to follow up on this information. At no point did police request to see the messaging on either the complainant's phone or those of RT and her husband. No warrant or production order for the messages was ever sought.

[9] I pause to observe that, by June 2018, it was a well-established law in Canada that police may require judicial authorization to search for and gather messaging, irrespective of the consent of the message holder: see *R. v. Marakah*, 2017 SCC 59. They would, however, have been entirely entitled to view the messages if shown to them by the complainant or the other

witnesses, in order to determine whether they needed to take steps to obtain a warrant or a production order to gather this evidence.

[10] The complainant also testified about having reminded the police of the messaging. It is unclear when that could have taken place, given her evidence as to the history of contact she had with police about this matter. Therefore, I proceed on the assumption that the complainant told the investigating officer about the messaging on the night of the events, and RT reminded them two weeks later.

[11] The Crown also told the Court that he had raised an issue of messaging with the police some three to four months ago, apparently, in context of having reviewed RT's statement in preparation for trial. Again, his query was met with inaction.

[12] Finally, the complainant testified that she raised the issue of messaging again, just over a month ago, when the police served her the subpoena for today's trial. It is common ground on this application that the police have never done anything whatsoever to view, secure, or seize this potential evidence.

[13] In terms of the contents of the messages, the description I have of them is that they began as justifications and transformed over the course of the communications to something constituting an apology for what took place. The evidence does not establish whether this apology acknowledged wrongdoing or was an apology in the form of regret for having upset or miscommunicated with the complainant. We do not know.

[14] This charge dates from June of 2018. The applicable 30-month period for presumptive excessive delay to trial under Section 11(b) of the Charter, as described in the Supreme Court's leading cases of *R. v. Jordan*, 2016 SCC 27, and *R. v. Cody*, 2017 SCC 31, will expire in early 2020. The Crown has indicated it will prioritize this matter over all others and would take any available dates offered for a new trial. Mr. Fagan advised the Court that he has a few windows of availability in November, December, and February. Both parties are, otherwise, prepared to proceed today.

The Adjournment Application

[15] The Crown is asking for an adjournment to go and get the messages. Mr. Gordon advised the Court that this process could take 60 to 90 days based on his experience with Telus' response to production orders. He also advised the Court that it was likely that Telus would still have these text messages stored despite the passage of significant time. While I do not have specific evidence on this point, these submissions were quite fairly not disputed and accord with both this Court's experience and with the evidence on these matters adduced in other well-known judicial proceedings. Therefore, I proceed on what I take to be an undisputed factual foundation that:

(a) these messages are likely to still exist; and

(b) could be produced to the Court in a matter of a few months.

[16] Defence opposes an adjournment. It says that the Crown has failed to meet the classic test articulated by the *Supreme Court in Darville v. The Queen*, 1956 SCJ No 82. Mr. Fagan maintained that an adjournment to retrieve this evidence now would be extremely unfair to the accused given the astonishing level of police negligence that is at the root of the problem.

The Governing Law

[17] In *Darville*, the Supreme Court laid out a three-part test describing the conditions that normally must be satisfied before a party will be entitled to an adjournment on the basis of an absent witness. Applied by analogy to the situation of missing evidence, those three conditions are:

> (a) that the absent evidence is material;
>
> (b) that the party applying for the adjournment has not been guilty of laches or neglect in its endeavour to procure the evidence; and
>
> (c) that there is a reasonable expectation that the evidence can be procured by the new trial date.

[18] The *Darville* test has continued to be applied by courts in Alberta including our Court of Appeal on numerous recent instances: see *R. v. Healy*, 2020 ABCA 197 at paragraph 86. I am satisfied it remains good law and governs my discretionary decision today. I would add that, in the context of this case, being a Crown adjournment related to new evidence, additional considerations beyond *Darville* can be and will be taken into account.

The Test Applied

[19] The first question to consider is whether the missing evidence is material. In this case, I find that the messages are material. They comprised statements of the accused about the alleged offence, made in the immediate aftermath to it, to the complainant and other witnesses. This meets the basic threshold for materiality.

[20] In this case, the complainant's description of the contents of the messages heightens the materiality. She is able to tell the Court that he was talking about events of that night and apologizing for what happened. This would almost certainly be relevant evidence on the issue in this trial, namely whether the sexual encounter was consensual or the product of an honest but mistaken belief in communicated consent. That said, the précis of the evidence that was provided to me by the complainant did not describe it as a confession, an admission of criminal wrongdoing, an admission to specific acts or circumstances, or anything nearly that definitive.

[21] The evidence in the complainant's statement on the night of the alleged offence, entered into evidence on the section 276 *voir dire*, contains statements attributed to the accused in the aftermath of the alleged assault in conversation that passed between him and the complainant in the kitchen moments after the disputed encounter took place. These provide me with some flavour of what may be in these messages. If that is indeed the case, the level of probative value would fall short of a clear confession. I do not find that as necessarily the case, but rather note that this is the circumstantial evidentiary landscape upon which I am being asked to adjourn the trial.

[22] In summary, I find the absent evidence is material but not definitive. The level of materiality is, however, sufficient to meet the purposes of the *Darville* analysis.

[23] The second consideration is the reason for the absence of the evidence today. In this case, it is abundantly clear that the evidence is not available because of the neglect of the police charged with investigating this alleged offence. It is mind-boggling that the police did nothing in this case to examine, secure, or seize these messages. On the record before me, they clearly knew

about them, and the relevance of them, for the entirety of this investigation and, indeed, from a matter of minutes after the alleged assault.

[24] The unchallenged evidence before me is that this evidence took shape in realtime, virtually before the eyes of the police as they took the complainant's statement. I would characterize this is an absence of evidence arising from gross police negligence. That finding encompasses the fact that RT for certain told the police that messages had been sent by the accused, about the alleged offence, in the relevant time frame.

[25] The full picture of police inaction and ineptitude is completed by the fact that the Crown, in keeping with diligent preparation for trial, followed up on the mention of the texts that he found in the file some period ago while preparing. Again, silence and inaction followed.

[26] There may be many reasons and justifications for the police's actions and inactions. They are not here to defend and explain themselves in this proceeding. I wish to be clear that my criticism of police conduct in this case is based solely on the evidence before me, and I appreciate that a fuller examination of the circumstances — perhaps in another forum — may reveal different facts. However, on what is before me today, the problem giving rise to this adjournment request is one of police neglect.

[27] I wish to add that the Crown in this case, Mr. Gordon, has handled the unfortunate hand he has been dealt in keeping with the best traditions of the office he holds. That said, for these purposes, the actions of the Crown and the police as a collective prosecutorial machinery of the state are not separable. The Crown, by which I mean the law enforcement arm of the state, is applying for a day-of-trial adjournment on account of its own agents' negligence. This application manifestly fails the second branch of the *Darville* analysis.

[28] The third and final consideration is whether the evidence can be procured for a subsequent trial date. This criteria appears to be satisfied in that we have no reason to believe that the evidence could not be found and produced. A nuance to this consideration, however, is that the length of time that process normally takes would run this trial perilously close to, if not past, the line of which delay becomes presumptively unreasonable.

[29] The clock does not stop with receipt of this evidence from the service provider. The messaging must then be disclosed to defence counsel. He in turn must analyze it, give advice to his client, and take instructions on how to proceed further. Readiness to continue with trial would not be an immediate condition upon receipt of this evidence from Telus.

[30] Were this adjournment to be granted, it is likely to precipitate an application for unreasonable delay irrespective of which side of the 30-month line a future trial date falls on. I would also note that exceptional measures by this Court would be required to provide an in-time trial date. While I am certain the Court would be willing to take extraordinary steps to return this matter to trial quickly, that would come at the cost of availability to the myriad of other matters which had suffered lengthy, blameless delays as a result of the ongoing COVID pandemic. I take these factors into account in my considerations.

[31] This is a most unfortunate circumstance. The Court's purpose and prime directive is always to be a truth seeker. Proceeding in the absence of material and potentially available evidence is not a good state of affairs. I also note that this is taking place in the context of a prosecution for sexual assault. While this crime should not gain substantially differential treatment than other serious allegations of interpersonal violence, I do note that Parliament has

enacted many special and specific provisions surrounding evidence in sexual assault prosecutions to ensure the complainants in this highly gendered crime receive the full benefit and protection of the law.

[32] That said, I would find it unfair to the accused to delay the trial. He has waited close to two and a half years for his day in court. He has instructed and retained senior counsel to represent him, and he is ready to go. By adjourning this trial now, the Court might well be guaranteeing an infringement of his right to trial within a reasonable time under Section 11(b). It is also unfair for the accused to come ready for trial after the passing of so much time only to learn that he faces new evidence.

[33] I appreciate that the evidence in question is said to be his own words which, if proven, he presumably would have known about all along. This attenuates the unfairness but does not fully answer it.

[34] As a final consideration, I note that this is not a case where denial of the adjournment would preempt the Crown calling its case or undo the prosecution. Different considerations would apply in that circumstance. Here, if the adjournment is denied and, hypothetically any reference to the missing evidence is excluded, the Crown would be left to call exactly the case it thought it had up until a few hours ago. This is the same case the accused has been waiting to answer for over two years and which he has come ready to answer today.

[35] The Court is put in the invidious position of having to choose between what I conclude would be a significant unfairness to the accused, of proceeding without relevant evidence that the complainant brought to the attention of the police from day one. This is entirely unsatisfactory. However, it is the reality the Court is presented with.

[36] Considering that the unavailability of the evidence was caused by the unexplained negligence of state agents, that the missing evidence is both likely available and relevant but not dispositive of any issues at trial, that the Crown will still be entitled to call the entirety of the case it anticipated throughout, it would be unfair for the case against the accused to change at this juncture, and that the granting of an adjournment may itself precipitate an infringement of the accused's Charter Rights, the adjournment request is denied.

[37] The trial will proceed as scheduled, and I will entertain any defence motions in respect of how the missing evidence should be addressed in oral testimony. I would like to thank both counsel for your professional handling of this unfortunate matter.

Heard on the 19th day of October, 2020.
Dated at the City of Red Deer, Alberta this 19th day of October, 2020.

N.E. Devlin
J.C.Q.B.A.

Appearances:

G. Gordon
for the Crown

P. Fagan
for the Accused