R. v. Brooks

Ontario Judgments

Ontario Superior Court of Justice

P.J. Cavanagh J.

Heard: March 5, 2020.

Judgment: March 13, 2020.

Court File No.: CR-19-5-0000324-0000

[2020] O.J. No. 1129 | 2020 ONSC 1585

Between Her Majesty the Queen, Respondent, and Barrington Brooks, Applicant

(44 paras.)

Case Summary

Criminal law — Evidence — Documentary evidence — Disclosure of records of complainant or witness to accused — Application by accused for production of records in possession of Canada Border Services Agency that related to complainant's immigration status and deportation proceedings and for production of documents in possession of Crown relating to complainant and witness, LB, allowed in part — Accused charged with attempted murder, criminal harassment, and breach of probation — LB, now 20, had sexual relationship with accused when she was 12 — Documents pertaining to accused's immigration status irrelevant to present charges — Crown ordered to produce missing person occurrence reports in 2012 pertaining to LB which referred to accused and his association with LB.

Application by the accused for production of records in the possession of Canada Border Services Agency that related to the complainant and for production of documents in the possession or under the control of the Crown relating to the complainant and a witness, LB, which the accused claimed fell within the ambit of disclosure under Stinchcombe. The accused was charged with attempted murder, criminal harassment, and breaches of probation orders. The Crown alleged the accused entered a crowded hair salon and proceeded to stab the complainant several times with a large knife. The accused relied on the fact that the complainant was arrested because of his immigration status and faced deportment following these proceedings to support the submission that there was more than a reasonable possibility that the Border Services records might indicate prior discreditable conduct or a reputation for untruthfulness which led to his arrest and deportation proceedings and, as such, they were logically probative of his credibility at trial. The complainant identified the accused as his attacker. LB, now 20, also identified the accused as being the assailant. When LB was 12, she became involved in a sexual relationship with the accused, who was then 45.

HELD: Application allowed in part.

The accused was not entitled to production of records in the possession of Border Services that pertained to the complainant. The documents pertaining to the accused's immigration status related to matters which were collateral and not relevant to the present charges. Although the accused's credibility would be an issue at trial, the collateral fact rule precluded the use of information on collateral matters to cross-examine him. The accused had not pointed to something in the record on this application that suggested that the Border Services records have potential impeachment value. None of the undisclosed records in the Crown's possession that pertained to the complainant or LB related to the incident which led to the charge of attempted murder. The Crown was ordered to produce three missing person occurrence reports in 2012 pertaining to LB in which there were references that appeared to be to the accused and his association with LB.

Counsel

Michael Coristine and *Christian Moreno*, for the Crown.

Keiisha-Anne Pillai, for the Applicant.

Cornelia Mazgarean, for Morvin George.

REASONS FOR JUDGMENT

P.J. CAVANAGH J.

Introduction

1 The applicant is charged with attempted murder, criminal harassment, and two counts of failure to comply with probation orders with respect to possession of weapons offences. His trial with respect to these charges is scheduled to begin on May 25, 2020.

2 The applicant brings this application for (i) production of records in the possession of a third party, the Canada Border Services Agency ("CBSA"), that relate to the complainant, Morvin George; and (ii) production of documents in the possession or under the control of the Crown relating to Mr. George and a witness, L.B., which the applicant asserts fall within the ambit of disclosure under *R. v. Stinchcombe*, *[1991] 3 S.C.R. 326*.

3 For the following reasons, the applicant's application for production of records in the possession of CBSA that relate to the complainant is dismissed and the applicant's application for production of documents in the possession of the Crown which the applicant asserts fall within the ambit of disclosure under *Stinchcombe* is allowed in part.

Factual Background

4 The Crown alleges that on January 20, 2018 the accused entered a crowded hair salon and

proceeded to stab Mr. George several times with a large knife. The attack was captured on CCTV video. The man fled on foot before the police arrived.

5 At the hospital, Mr. George provided a statement to police in which he identified the applicant as his attacker. Two weeks later, Mr. George provided a videotaped statement to police in which he affirmed the identity of the applicant as his attacker and provided some background information on his association with the applicant.

6 Mr. George has no status in Canada. Mr. George was arrested in 2018 pursuant to an immigration warrant and he is due to be deported at the conclusion of these proceedings.

7 L.B. is also expected to be a witness at the applicant's criminal trial. When L.B. was 12 years old, she became involved in a sexual relationship with the applicant, who was then 45 years old. The applicant subsequently pleaded guilty in 2014 to procuring illicit sexual intercourse and assault against L.B. That guilty plea forms part of the Crown's intended application to admit discreditable conduct at the applicant's trial.

8 L.B. is now 20 years old. In or around November 2018, she provided a videotaped statement to Toronto police in which she identified the applicant as being Mr. George's assailant, as seen on the CCTV video of the attack. According to Crown counsel, L.B.'s primary role at the applicant's trial will be to identify the assailant captured on the video. Her evidence will also deal with the applicant's prior discreditable conduct that formed the basis for his guilty plea in December 2014.

9 The applicant included in its application record a missing youth occurrence report from 2012 for L.B. which the Crown produced. This report discloses that in 2012 the applicant was charged with sexual offences against two underage girls, including L.B. During the time frame of the investigation of these offences, L.B. was reported missing on a number of occasions between July and September 2012, when she was twelve years old. The occurrence report discloses that Mr. George knew L.B., who had attended several times at a barber shop at which Mr. George worked as a barber, and L.B. provided a statement to the police in which she reported that she had been staying with Mr. George and had slept with and engaged in "petting" with him.

10 L.B. also reported to police that the applicant had forced her to have intercourse with him. This led to the 2012 charges against the applicant. In addition to his guilty pleas on sexual offences involving L.B., the applicant also pled guilty to procuring sexual intercourse against a second underage girl, Shamar Pottinger. The applicant also pled guilty to one count of assault against Ms. Pottinger.

11 The charge against the applicant of criminal harassment is based on an allegation that between January 7 and February 28, 2017, the applicant attended Ms. Pottinger's residence on a number of occasions banging on the door and looking for L.B. and Ms. Pottinger.

Analysis

12 I will address the two parts of the applicant's application separately.

Is the applicant entitled to production of records in the possession of the CBSA that pertain to Mr. George?

13 In *R. v. O'Connor*, *[1995] 4 S.C.R. 411*, the Supreme Court of Canada addressed the principles which govern disclosure and production of private records not in the possession of the Crown and elaborated on an approach to production of third party record. This approach was also addressed by the Supreme Court of Canada in *R. v. McNeil*, *2009 SCC 3*.

14 The approach involves the following steps:

a. The accused first obtains a *subpoena duces tecum* and serves it on the third party record holder. The *subpoena* compels the person to whom it is directed to attend court with the targeted records or materials.

b. The accused also brings an application, supported by appropriate affidavit evidence, showing that the records sought are likely to be relevant in his or her trial. Notice of the application is given to the prosecuting Crown, the person who is the subject of the records, and any other person who may have a privacy interest in the records targeted for production.

c. If the recordholder or some other interested person advances a well-founded claim that the targeted documents are privileged, in all but the rarest cases where the accused's innocence is at stake, the existence of privilege will effectively bar the accused's application for production of the targeted documents, regardless of their relevance. Issues of privilege are best resolved at the outset of the *O'Connor* process.

d. Where privilege is not in question, the judge determines whether production should be compelled in accordance with the two-stage test established in *O'Connor*. At the first stage, if satisfied that the record is likely relevant to the proceeding against the accused, the judge may order production of the record for the court's inspection.

e. At the next stage, with the records in hand, the judge determines whether, and to what extent, production should be ordered to the accused.

15 The first stage of the *O'Connor* approach requires the accused to demonstrate that the information contained in the records is likely to be relevant either to an issue in the proceedings or to the competence to testify of the person who is the subject of the records. If the information does not meet this threshold of relevance, then the analysis ends, and no order will issue.

16 In *McNeil*, the Supreme Court of Canada explained at para. 33 the meaning of the term "likely relevant" under the common law *O'Connor* regime for production of third-party records:

> "Likely relevant" under the common law *O'Connor* regime means that there is "a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify" (*O'Connor*, at para. 22 (emphasis deleted)). An "issue at trial" here includes not only material issues concerning the unfolding of the events which form the subject matter of the proceedings, but also "evidence relating to the

> credibility of witnesses and to the reliability of other evidence in the case" (*O'Connor*, at para. 22). At this stage of the proceedings, the court cannot insist on a demonstration of the precise manner in which the targeted documents could be used at trial. The imposition of such a stringent threshold burden would put the accused, who has not seen the documents, in an impossible Catch-22 position.

17 This threshold burden of "likely relevance" reflects the fact that the context in which third party records are sought is different from the context of first party disclosure. The applicant must justify to the court the use of state power to compel the production of third party records. It is important for the effective administration of justice that criminal trials remain focused on the issues to be tried and that scarce judicial resources not be squandered on "fishing expeditions" for irrelevant evidence. The "likely relevance" threshold reflects this gatekeeper function: *McNeil*, at para. 28.

18 In *O'Connor* and *McNeil*, the courts explained that while the "likely relevance" threshold is a significant burden, it should not be interpreted as an onerous burden upon the accused. The threshold is significant because the court must play a meaningful role in screening applications to prevent the defendants from engaging in speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming requests for production. On the other hand, the relevance threshold cannot be an onerous task to meet because accused persons cannot be required, as a condition to accessing information that may assist in making a full answer and defence, to demonstrate the specific use to which they might put information which they have not even seen. See *McNeil*, at para. 29; *O'Connor*, at paras. 24-25.

19 On an application such as this, the applicant must do more than simply allege that the records sought are relevant to credibility, or that there is a possibility that the records may disclose an evidentiary basis to challenge the credibility of the person who is the subject of the records based upon, for example, prior discreditable conduct. The applicant must not simply invoke "credibility" at large but must provide some basis to show that there is likely to be information in the records sought which would relate to the complainant's credibility on a particular, material, issue at trial: See *O'Connor*, at para. 142.

20 In *R. v. Batte*, *(2000), 49 O.R. (3d) 321*, Doherty J.A., writing for the panel, addressed the question of what is needed by an accused to establish likely relevance according to the approach in *O'Connor*. He held at para. 53 that the accused cannot rely on speculative assertions or stereotypical assumptions to discharge his or her burden. Doherty J.A. explained at para. 75 that "the accused must be able to point to something in the record adduced on the motion that suggests that the records contain information which is not already available to the defence or has potential impeachment value".

21 I accept the submission made on behalf of Mr. George that just because a person in Canada does not have immigration status and is subject to deportation proceedings does not lead to an inference that this person is less worthy of belief than other persons. The applicant does not submit otherwise. The applicant relies on the fact that Mr. George was arrested because of his immigration status and faces deportment following these proceedings to support the submission that there is more than a reasonable possibility that the CBSA records these records may

indicate prior discreditable conduct or a reputation for untruthfulness which led to his arrest and deportation proceedings and, as such, they are logically probative of his credibility at trial.

22 The CBSA documents pertaining to Mr. George's immigration status relate to matters which are collateral and not relevant to matters which must be proved for adjudication of the charges against the applicant. Although Mr. George's credibility will be an issue at trial, the collateral fact rule precludes the use of information on collateral matters to cross-examine him: *R. v. Wooley*, *2006 CarswellOnt 7780*, at para. 11.

23 The applicant has not shown that there is a reasonable possibility that the CBSA records are logically probative to an issue at trial. The applicant has not pointed to something in the record on this application that suggests that the CBSA records have potential impeachment value.

24 For these reasons, I conclude that the applicant has not discharged his onus at the first stage of the *O'Connor* analysis.

Is the applicant entitled to production of certain requested records in the possession of the Crown which relate to Mr. George and to L.B.?

25 The applicant also brings this application for an order requiring the Crown to produce certain records which are in its possession or under its control on the ground that they fall within the ambit of the Crown's disclosure obligations according to *Stinchcombe*.

26 Earlier in these proceedings, the applicant requested reports from the Crown that pertain both to Mr. George and to L.B.

27 The Crown responded that it has possession of one occurrence report for Mr. George from 2015. The nature of the incident described is that Mr. George was a witness at a private birthday where a fight broke out between uninvited guests and other males. No other related parties were present.

28 The Crown initially advised that one Toronto Police Services ("TPS") missing person report pertaining to L.B. was not in its possession and a third-party records application would be needed for production of this report. At the hearing of this application, I was advised that this TPS record is in the possession of the Crown and, as such, it would be subject to the *Stinchcombe* application.

29 The Crown also responded that it has in its possession or under its control a number of reports pertaining to L.B.:

a. Occurrence reports in 2016, 2014, and 2011 regarding reports by L.B. of sexual assaults.

b. Occurrence report in 2014 regarding a mental health evaluation when L.B. was taken to hospital for a mental health evaluation.

c. Eleven missing person and missing person found reports in 2012-2014.

d. Occurrence report in 2011 involving a neighbour dispute.

30 The Crown has not produced these reports because it takes the position that they are clearly irrelevant.

31 In *R. v. Egger*, *[1993] S.C.J. No. 66*, the Supreme Court of Canada addressed the principles in *Stinchcombe* regarding the Crown's duty to disclose information to the accused. Sopinka J. confirmed that the Crown has a duty to disclose to the accused all information reasonably capable of affecting the accused's ability to make full answer and defence. The Crown's disclosure obligation is subject to a discretion, the burden of justifying the exercise of which lies on the Crown, to withhold information which is clearly irrelevant or the non-disclosure of which is required by the rules of privilege, or to delay the disclosure of information out of the necessity to protect witnesses or complete an investigation. Information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege. See *Egger*, at paras. 19-20, citing *Stinchcombe*, at p. 340.

32 One measure of the relevance of information in the Crown's hands is its usefulness to the defence. If it is of some use, it is relevant and should be disclosed. A judge reviewing the Crown's disclosure decisions must determine that production of information sought can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence, or otherwise making a decision which may affect the conduct of the defence such as, for example, whether to call evidence. See *Egger*, at paras. 19-20.

33 Counsel for the applicant submits that the requested reports could contain information which assists the investigation of the defence theory and preparation for the cross-examination of Mr. George. Counsel submits that there is reason to believe that Mr. George may have had control over L.B. and may have been prostituting her. Counsel for the applicant contends that the requested records could identify persons who had a history with L.B. and this information could potentially support an "alternate suspect" theory. Counsel submits that the requested reports may contain information which would assist with cross-examination of Mr. George based upon prior discreditable conduct.

34 The Crown's disclosure obligations are not absolute, and the Crown is not required to disclose information which is clearly irrelevant. The Crown produced an occurrence report pertaining to L.B. which does have a nexus with persons the Crown intends to call as witnesses. This report is included in the applicant's application materials. Crown counsel advises that the requested reports pertaining to L.B. are unrelated to the offences with which the applicant is charged, and they are unrelated to the applicant or to any witness the Crown intends to call. Crown counsel advises that the requested occurrence reports pertaining to L.B. have nothing to do with Mr. George. Crown counsel submits that the requested occurrence reports which have not been produced have no connection to the charges against the applicant whatsoever.

35 In *Stinchcombe*, Sopinka J. held at para. 23 that when disputes over disclosure arise, the reviewing judge may review the Crown's exercise of discretion as to relevance to ensure that the right to make full answer and defence is not violated. This review may require not only

submissions but the inspection of statements and other documents and, in some cases, *viva voce* evidence.

36 On this application, the Crown provided to the court the undisclosed records in the Crown's possession that pertain to Mr. George or L.B. These records consist of one report which pertains to Mr. George and 18 reports which pertain to L.B. I have reviewed these reports for the purpose of deciding whether the Crown has met its burden of justifying the exercise of its discretion to withhold production of these records on the ground that they are clearly irrelevant. None of the records relate to the actual events which allegedly occurred on January 20, 2018 which led to the charge of attempted murder against the applicant. I identify these records below by their TPS occurrence numbers.

37 There are three records that relate to L.B.'s reports of alleged sexual assaults in 2011 and 2014 and the investigation of these reports. [14-3404697, 11-4234680, 11-2391837] There is an additional record of a report by L.B.'s mother to the police in 2016 that L.B. may have been sexually assaulted. [16-977847] These reports are unrelated to the applicant or to Mr. George. They are not reasonably capable of affecting the applicant's ability to make full answer and defence to the charges against him. I am satisfied that the Crown has met its burden of justifying the exercise of its discretion to withhold production of these four records on the ground that they are clearly irrelevant.

38 There is one record in which L.B. was identified as a witness in a missing person report in respect of another person. There is no reference in this report to the applicant or Mr. George. This record is not reasonably capable of affecting the applicant's ability to make full answer and defence to the charges against him. With respect to this report, I am satisfied that the Crown has met its burden of justifying the exercise of its discretion to withhold production of this record on the ground that it is clearly irrelevant. [12-4331406]

39 There are a number of records from 2012-2014 of missing person reports or missing person found reports that pertain to L.B. Eight of these reports do not refer to the applicant or Mr. George. These reports are not reasonably capable of affecting the applicant's ability to make full answer and defence to the charges against him. With respect to these eight reports, I am satisfied that the Crown has met its burden of justifying the exercise of its discretion to withhold production of these eight records on the ground that they are clearly irrelevant. [14-3404697, 14-3192525, 13-4762200, 13-1003178, 12-4502666, 12-4354317, 12-4313218, and 12-2531303]

40 There are three missing person occurrence reports in 2012 pertaining to L.B. in which there are references that appear to be to the applicant and his association with L.B. [12-4684436, 12-4520727, 12-4451898] These reports refer to L.B.'s attendances at a barber shop at Weston Rd. and St. Clair and her involvement with persons there. One of these records refers to the applicant by name, and contains information describing the applicant's sexual involvement with L.B. With respect to these three reports, I am not satisfied that the Crown has met its burden of justifying the exercise of its discretion to withhold production of these records on the ground that they are clearly irrelevant. These records are to be produced, with proper redactions by the Crown, as was done with the occurrence report that was already produced and is included in the applicant's application record.

41 There is one record from 2014 pertaining to L.B. [14-3424383] which reports on her having been taken to a hospital for a mental health evaluation. The applicant submits that this record may be relevant to L.B.'s testimonial competence. A witness is presumed to be competent to testify unless shown otherwise: *O'Connor*, at para. 149. I am not satisfied that there is a proper foundation to challenge the competency of L.B. to testify and, in the absence of a proper foundation, I am not satisfied that this record reasonably affects the applicant's ability to make full answer and defence. I am satisfied that the Crown has met its burden of justifying the exercise of its discretion to withhold production of this record on the ground that it is clearly irrelevant.

42 There is one record from 2011 pertaining to L.B. in which she made a report to the police of threatening and harassing conduct toward her by a person in her apartment building. [11-4184059] This report is not reasonably capable of affecting the applicant's ability to make full answer and defence to the charges against him. With respect to this report, I am satisfied that the Crown has met its burden of justifying the exercise of its discretion to withhold production of this record on the ground that it is clearly irrelevant.

43 The record that pertains to Mr. George is from 2015. Mr. George was identified in an occurrence report as a witness who attended a birthday party at which a fight broke out that was investigated by the police. The record does not report any statement from Mr. George. This report is not reasonably capable of affecting the applicant's ability to make full answer and defence to the charges against him. With respect to this report, I am satisfied that the Crown has met its burden of justifying the exercise of its discretion to withhold production of this record on the ground that it is clearly irrelevant. [15-58249]

Disposition

44 For these reasons:

a. The application for production of records in the possession of the CBSA pertaining to Mr. George is dismissed.

b. The Crown is directed to produce to the applicant, with proper redactions, occurrence reports in its possession identified as Reports Nos. 12-4684436, 12-4520727, and 12-4451898. The application for records in the possession or under the control of the Crown is otherwise dismissed.

P.J. CAVANAGH J.
