R. v. Shaw

Ontario Judgments

Ontario Superior Court of Justice

R.A. Clark J.

Heard: April 4, 5, 8 and 9, 2019.

Judgment: June 4, 2019.

Court File No.: CR-18-50000107

[2019] O.J. No. 3164 | 2019 ONSC 3283

Between Her Majesty the Queen, Respondent, and Shakiyl Shaw, Lenneil Shaw, and Mohamed Ali-Nur, Applicants

(97 paras.)

Counsel

David Tice and *Michael Coristine*, for the Crown.

Dirk Derstine, for the Defendant Shakiyl Shaw.

Boris Bytensky, for the Defendant Lenneil Shaw.

Margaret Bojanowska, for the Defendant Mohamed Ali-Nur.

Application #3 re: Alleged Abuse of Process

Application #4 re: Proposed Alternate Suspect Evidence

Application #5 re: Admission of Hearsay Evidence

Reasons for Decision

R.A. CLARK J.

Introduction

1 On October 16, 2016, Jarryl Hagley was shot to death in a Pizza Pizza restaurant on Weston Rd. near Lawrence Avenue, in Toronto.

2 On January 5, 2017, Shakiyl Shaw was arrested in relation to the Hagley homicide; Lenneil Shaw and Mohamed Ali-Nur were arrested the next day. All were charged with first degree

murder. The matter was set down for a preliminary inquiry in April of 2018, but, on February 14, 2018, the Crown preferred an indictment, pursuant to s. 577 of the *Criminal Code of Canada*, *R.S.C. 1985, c. C-46*. The three men are now before the court to answer to that indictment. At the outset of this trial, I heard a number of pre-trial applications.

3 In Application #3, brought on behalf of Mohamed Ali-Nur, alleging that the preferment of the indictment may constitute an abuse of process, Ms. Bojanowska sought an order requiring the Crown to present to the court the materials presented to the Attorney General to obtain his consent to prefer this indictment. Although not formally joining in the written application, counsel for the other accused made oral submissions in support of the application.

4 In Application #4, brought on behalf of Lenneil Shaw and Mohamed Ali-Nur, Mr. Bytensky and Ms. Bojanowska sought permission to adduce evidence of an alternate suspect.

5 In Application #5, brought on behalf of Lenneil Shaw and Mohamed Ali-Nur, Mr. Bytensky and Ms. Bojanowska sought permission to adduce hearsay evidence.

6 Although counsel for Shakiyl Shaw did not participate in these applications, neither did he oppose them.

7 The Crown opposed all three applications.

8 On April 18, 2019, in a brief oral statement, I refused Applications #3 and #5. On April 23, I provisionally refused Application #4. In relation to all three applications, I indicated that I would give written reasons for my decisions as soon as time might permit. Since, as will be evident from the following discussion, the applications are interrelated, it is convenient to give my reasons for decision for all three together; what follows, then, are those reasons.

Chronology of Events

9 As part of the investigation, police seized certain closed circuit television ("CCTV") recordings from the area. Although the CCTV did not show the shooting, it did show three hooded figures approaching the restaurant moments before the shooting and fleeing the scene immediately thereafter. The face of one of them, Winston Poyser, was clearly visible at one point. On December 28, 2016, Poyser was arrested and charged with first degree murder. Having since resolved that charge, Poyser is now the central Crown witness in this case.

10 Five days after the shooting, in the hopes of identifying the perpetrators, the investigators released some CCTV images to the public. Later that day, the police received an anonymous tip that:

(i) the shooter and the victims were friends, or used to be at one time;

(ii) they all used to hang around Weston Village together;

(iii) all suspects were known to the police;

(iv) the victim was not the intended target; and

(v) the suspects used to hang around at the barbershop on Pantelis Kalamaris Lane and at the Weston GO tunnels at night.

11 On November 12, 2016, a lawyer, Mr. Brian Ross, contacted Det. Worden of the Toronto Police Service ("TPS") Homicide Squad, indicating that he had a client (whom he did not identify at that time) who was involved in the homicide; that client was Poyser. Worden and Ross met two days later, on November 14, 2016, at which time Ross indicated that his client would be willing to cooperate with the police and testify in the prosecution of the others involved if he were to be afforded consideration in terms of any charges he would face and possibly witness protection.

12 Independent of Poyser's involvement in the investigation, the investigators identified the car that had been used to transport the shooters to and from the scene as belonging to Poyser's mother and, on December 20, 2016, police executed a search warrant at Poyser's residence. Poyser was not home at the time, but turned himself in to police on December 28, 2016.

13 Poyser gave several statements to police in which he confirmed what they already knew, namely, that the car used belonged to his mother, and went on to identify Shakiyl Shaw as the driver and the shooters as Lenneil Shaw and Mohamed Ali-Nur. As for his own role, Poyser said he did not know that the men intended to shoot anyone. On June 27, 2018, Poyser resolved his murder charge by pleading guilty, with the Crown's consent, to the offence of being an accessory after the fact to murder.

14 In September 2017, members of the TPS Guns and Gangs Unit ("G&G") launched a large-scale investigation, entitled "Project Patton" ("Patton"), which targeted a street gang called the "Five Point Generals" ("5PG"), and a subset of that gang known as the "Goonies to Monstas" ("G2M"), said to be actively engaged in criminal activity in the Weston Rd./Lawrence Ave. area.

15 On February 13, 2018, a member of G&G submitted an application for authorization for the Patton investigators to, *inter alia*, intercept private communications in connection with the investigation. In para. 1 of Appendix "D" to the supporting information to obtain ("ITO"), the affiant stated that the police had documented 16 "events, homicides and shootings" in which, so the affiant contended, the 5PG and "subset group, members and associates" were either the perpetrators or the victims. The affiant asserted that the incidents reflected ongoing rivalry among several gangs over what is referred to in street gang argot as "turf." Several paragraphs later, those events are set out in a table, in which the Hagley homicide is mentioned.

16 Sometime early this year, Mr. Derstine and Mr. Bytensky, each independently of the other, were made aware of the Crown disclosure in several prosecutions arising out of Patton by other counsel in their respective offices who were acting for persons arrested in the Patton investigation. Because they contend that Hagley was a G2M member, it became apparent to Mr. Derstine and Mr. Bytensky that the Patton disclosure, which I am told involves many thousands of pages, might be relevant to the defence of their clients on this charge. For her part, Ms. Bojanowska did not become aware of the Patton disclosure until some short time later.

17 On February 19, 2019, all counsel sought the Patton disclosure from the Crown in this case.

Arguing that Patton was irrelevant to this case, the Crown resisted these requests, insisting that, if the defence wanted disclosure, it was incumbent upon them to bring a third-party records application. Ultimately, however, though still maintaining that the proper approach was for the defence to bring a third-party records application, on March 7, 2019, in order not to delay the scheduled start of this trial on April 1, 2019, the Crown disclosed the material sought.

Abuse of Process Application

18 Counsel for all three accused acknowledge that a full abuse of process hearing must await the end of the trial, so that the court can be in a position to assess all the evidence to determine whether the proceedings are, indeed, abusive. As indicated above, however, they presently seek an order that the Crown produce to the court the materials sent to the Attorney General in support of the request for a direct indictment, because, on the record before the court, it appears that the indictment may have been preferred for an improper or oblique purpose.

19 There is no constitutional right to a preliminary inquiry: *R. v. Arviv* (1985), 19 C.C.C. (3d) 395 (Ont. C.A.); leave to appeal to S.C.C. refused (1985), [1985] S.C.C.A. No. 74 61 N.R. 237. In *Arviv*, at p. 404, Martin J.A. held that "[t]he so-called right to a preliminary hearing is not elevated to a constitutional right under the Charter. The 'right' to a preliminary hearing under the Code may be displaced by the Attorney-General preferring an indictment under s. 507(3) [now s. 577(a)] which, as we have previously stated, does not per se contravene s. 7 of the Charter."

20 Three years after *Arviv*, in *R. v. Beare* (1988), 45 C.C.C. (3d) 57 (S.C.C.), at p. 76, Laforest J. stated:

> The existence of the discretion conferred by the statutory provisions does not, in my view, offend principles of fundamental justice. Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid.
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> ...
>
> This court has already recognized that the existence of prosecutorial discretion does not offend the principles of fundamental justice: see *R. v. Lyons*, supra, at p. 348; see also *R. v. Jones*, [1986] 2 S.C.R. 284, at pp. 303-04.

21 Prosecutorial discretion "is an expansive term that covers all 'decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it'": *R. v. Anderson* (2014), 311 C.C.C. (3d) 1 (S.C.C.), at para. 44, citing *Krieger v. Law Society of Alberta*, 2002 SCC 65, at para. 67. In relation to the facts before me, s. 577 of the *Criminal Code* confers upon the Attorney General the right to prefer an indictment even where no preliminary inquiry has been held; that decision is an exercise of prosecutorial discretion: *Anderson*, at para. 44.

22 In *Sriskandarajah v. United States of America*, 2012 SCC 70, the appellants argued that the duty of procedural fairness imposed upon the Minister of Justice went beyond simply providing reasons to explain the factors underlying his decision; rather, it also required that the Minister obtain and disclose the assessment of the Public Prosecution Service of Canada ("PPSC") concerning whether to prosecute them in Canada. Further, the appellants argued that they

should have been given time to respond to the PPSC's assessment, following which the Minister should have addressed their concerns in his final decision to extradite. They submitted that the disclosure they sought was important because the decision not to lay charges in Canada was a key factor in the final decision to extradite. In response to these arguments, the court held, at para. 27:

> First and foremost, prosecutorial authorities are not bound to provide reasons for their decisions, absent evidence of bad faith or improper motives: *Kwok*, at paras. 104-108. Not only does prosecutorial discretion accord with the principles of fundamental justice - it constitutes an indispensable device for the effective enforcement of the criminal law: *Cotroni*, at pp. 1497-98. The appellants do not allege bad faith. Their request to see the prosecution assessment is a thinly disguised attempt to impugn the state's legitimate exercise of prosecutorial authority.

Although *Sriskandarajah* was an extradition case, inasmuch as what the appellants sought in that case was an order requiring the Crown to explain the exercise of its prosecutorial discretion, the principles are no less apposite here.

23 Similarly, in *Anderson*, at para. 55, on behalf of the full court, Moldaver J., relying on *Sriskandarajah*, held that "prosecutorial authorities are not bound to provide reasons for their decisions, absent evidence of bad faith or improper motives."

24 In *R. v. Durette* *(1992), 72 C.C.C. (3d) 421* (Ont. C.A.), rev'd on other grounds, *[1994] 1 S.C.R. 469*, speaking for the majority, at p. 436, Finlayson J.A. held:

> Traditionally, the courts have not been concerned with why the Crown elects to proceed by indictment, and indeed, this court has held that it has no jurisdiction or power to interfere with the exercise by the Attorney General of Canada of his discretion in preferring a direct indictment, even during the course of a preliminary hearing (*R. v. Saikaly* *(1979), 48 C.C.C. (2d) 192*, 27 Chitty's L.J. 174; *R. v. Arviv* *(1985), 51 O.R. (2d) 551*, *19 C.C.C. (3d) 395*, per Martin J.A. at p. 560 O.R., p. 404 C.C.C.; and *R. v. Ertel* *(1987), 35 C.C.C. (3d) 398*, *58 C.R. (3d) 252* [leave to appeal to S.C.C. refused (1987), *[1987] S.C.C.A. No. 354* *36 C.C.C. (3d) vi*, *61 C.R. (3d) xxix*], per Lacourcière J.A. at p. 415 C.C.C., p. 268 C.R.

25 At p. 441 of *Durette*, Finlayson J.A. cited with approval the following passage from *R. v. Balderstone* *(1983), 8 C.C.C. (3d) 532* (Man. C.A.), leave to appeal to S.C.C. refused (1983), *[1983] S.C.C.A. No. 44*, *52 N.R. 72*, in which Monnin C.J.M., speaking for the court, held:

> If a judge should attempt to review the actions or conduct of the Attorney-General -- barring flagrant impropriety -- he could be falling into a field which is not his and interfering with the administrative and accusatorial function of the Attorney General or his officers. That a judge must not do.

26 More recently, in *R. v. Hersi*, *2014 ONSC 1211*, at para. 38, Baltman J. held that "there is no statutory 'right' to a preliminary hearing that could call into question the extensive appellate authority upholding the constitutionality of section 577. The preferment of a direct indictment prior to trial is a matter of prosecutorial discretion, and there is no evidence of misconduct here that would justify an inquiry into the AG's reasons for so doing."

27 In summary, then, "exercises of prosecutorial discretion are *only* reviewable for abuse of process": *Anderson*, at para. 36 [emphasis in the original]. At para. 52 of *Anderson*, the court went on to hold that, "given the unique nature of prosecutorial discretion--specifically, the fact that the Crown will typically (if not always) be the only party who will know why a particular decision was made--this court in *Nixon*[1] recognized that where prosecutorial discretion is challenged, the Crown may be required to provide reasons justifying its decision where the claimant establishes a proper evidentiary foundation": para. 60. See also *R. v. Brown*, *[1997] O.J. No. 6163* (G.D.).

28 Thus, while, in certain circumstances, the court has the authority to look behind decisions which, in the normal course, are entirely within the discretion of the Crown, "[j]udicial non-interference with prosecutorial discretion has been referred to as a 'matter of principle based on the doctrine of separation of powers as well as a matter of policy founded on the efficiency of the system of criminal justice' which also recognizes that prosecutorial discretion is 'especially ill-suited to judicial review'": *Anderson*, at para. 46, citing *R. v. Power*, *[1994] 1 S.C.R. 601*, at p. 623. Accordingly, "the many decisions that Crown prosecutors are called upon to make in the exercise of their prosecutorial discretion must not be subjected to routine second-guessing by the courts": *Anderson*, at para. 46.

29 In *R. v. Jewitt* *(1985), 21 C.C.C. (3d) 7* (S.C.C.), at p. 14, Dickson C.J. held that the common law doctrine of abuse of process applies to criminal proceedings in Canada, but "only in the clearest of cases" and only where the Crown's conduct was such as to "violate those fundamental principles of justice which underlie the community's sense of fair play and decency."

30 In *Anderson*, at paras. 49-50, Moldaver J. held:

> The jurisprudence pertaining to the review of prosecutorial discretion has employed a range of terminology to describe the type of prosecutorial conduct that constitutes abuse of process. In *Kreiger*, this Court used the term "flagrant impropriety" (para. 49). In *Nixon*, the Court held that the abuse of process doctrine is available where there is evidence that the Crown's decision "undermines the integrity of the judicial process" or "results in trial unfairness" (para. 64). The Court also referred to "improper motive[s]" and "bad faith" in its discussion (para. 68).
>
> Regardless of the precise language used, the key point is this: abuse of process refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system.

31 The onus to establish an abuse of process on a balance of probabilities rests on an accused: *R. v. Jolivet*, *2000 SCC 29*, at para. 19, citing *R. v. O'Connor*, *[1995] 4 S.C.R. 411*, at para. 69. See also *R. v. Walton et al*, *2019 ONSC 928*.

32 Absent "a tenable allegation of mala fides on the part of the Crown ... [which] must be supportable by the record before the court, or if the record is lacking or insufficient, by an offer of

proof ... the court is entitled to assume what is inherent in the process, that the Crown exercised its discretion properly, and not for improper or arbitrary motives": *Durette*, at p. 438.

33 In *Power*, at p. 616, L'Heureux-Dubé J. held that a party alleging an abuse of process must demonstrate "conspicuous evidence of improper motives or of bad faith or of an act so wrong that it violates the conscience of the community, such that it would genuinely be unfair and indecent to proceed" and went on to observe that "cases of this nature will be extremely rare."

34 Turning to this case, do the circumstances warrant the court requiring the Crown to explain its action? In support of the relief sought, the main assertions upon which Ms. Bojanowska relies are:

(i) that, as stated above, Hagley was a member of G2M;

(ii) that Poyser is, or at least was at the material time, a member of or, in the least, associated with 5PG and/or G2M;

(iii) that Poyser had contact close in time to the homicide with at least one member of G2M, namely, Jason Sewell (also known as "Monsta");

(iv) that other sources, both civilian and police, have indicated that Sewell could be one of three persons whose images were captured on CCTV coming to the Pizza Pizza immediately prior to the shooting and, in turn, fleeing immediately after;

(v) that two Crown witnesses in this trial, who were with the deceased at the time of the shooting, namely, Terrell Garner and Tariq Charles, are mentioned as persons of interest in the Patton ITO;

(vi) that an anonymous tip to the Crimestoppers program indicated that the police had arrested the wrong man for the shooting death of Hagley;

(vii) that in a private communication intercepted during the Patton authorization, a known G2M member and another person discuss what they contend is the fact that the media "got it wrong" when they named the present accused as the persons responsible for the crime;

(viii) that a woman named Rubina Alvi, who claimed to be Hagley's girlfriend and carrying his child at the time of his death, told the police that they had arrested the wrong men;

(ix) that Alvi claimed she was later threatened by the men she claims are responsible for the homicide because she had spoken to the police;

(x) that, upon the execution of a search warrant, a 9 mm. pistol, proven forensically to be the weapon that discharged one of the shots fired during the homicide, was recovered from a residence in which one Carleton Francis was present;

(xi) that Carleton Francis is said to be associated with the 5PG;

(xii) that Orette Francis, also known as "G Man", is a leading member of the PG5;

(xiii) that, given that Orette Francis and Carleton Francis have the same surname, it is reasonable to suppose that they are related;

(xiv) that a search of Poyser's cellular telephone revealed that Poyser communicated with Orette Francis in the hours leading up to the homicide concerning the fact that he was evidently running low on gasoline; and

(xv) that, after the homicide, Poyser destroyed potential evidence, to wit: he erased his dash camera and left the vehicle windows rolled down to permit the weather to destroy trace evidence that may have been present.

On the basis of these assertions, Ms. Bojanowska submitted that "the [Patton] disclosure explains the Hagley murder". The explanation, according to both Ms. Bojanowska and Mr. Bytensky, is that the Hagley homicide was "an inside job", meaning that Hagley was likely killed by members of his own gang as a consequence of some internecine dispute. For reasons that I will develop when I come to discuss the alternate suspect application, I disagree.

35 To begin, assuming, *arguendo*, that Hagley was killed by members of 5PG or G2M, it is unclear exactly who the target of the "inside job" was. In her factum, Ms. Bojanowska relies on the anonymous tip. As noted above, one of the points the tipster related was that Hagley was not the intended target. For his part, in his factum seeking admission of hearsay evidence, Mr. Bytensky also relies on this tip, including the tipster's assertion that Hagley was not the target, but then goes on to assert, at para. 44, that the targets were "Hagley, Charles and Garner." Later still, however, at para. 61 of his factum, while still discussing what he contends is the threshold reliability of the anonymous tip, Mr. Bytensky asserted that Charles was the target. In oral argument on both applications, however, Hagley was said to be the target; neither Charles nor Garner was mentioned as a target by either Ms. Bojanowska or Mr. Bytensky. I will return to the subject of whom, if anyone, the shooters were targeting when I come to discuss the alternate suspect application.

36 It is not disputed that defence counsel were afforded no notice that an indictment would be preferred. As a consequence, defence counsel complain that they were not able to make representations to the Attorney General, as defence counsel often are in such situations, concerning why the Attorney General ought not to exercise his discretion to prefer an indictment. In light of what they contend is the importance of the Patton disclosure in relation to this case, defence counsel contend that the opportunity to make representations was critically important in terms of fairness to the accused in discovering the case against them.

37 Defence counsel suggest that it is not unreasonable on the face of these assertions to conclude that the Crown may have preferred the indictment for an oblique purpose. One suggestion was that the Crown may have wished to shield Poyser from being fully discovered at the preliminary inquiry. Another was that it may have been part of some arrangement with Poyser, although counsel did not suggest what the nature of that arrangement might have been.

38 One of the facts Ms. Bojanowska relied on as a circumstance supporting her suggestion of an oblique purpose is that the Patton ITO was sworn on February 13, 2017, and the indictment was dated the following day. As I mentioned to Ms. Bojanowska in oral argument, in my experience, seeking the Attorney General's consent to prefer an indictment is a lengthy, time

consuming process. That said, I see nothing to suggest that the timing of these two events is anything more than mere coincidence.

39 One of the principal complaints on this application from all counsel is that the Crown's case will stand or fall on the testimony of Poyser and, as a consequence of the Attorney General having preferred the indictment, they have lost the opportunity to cross-examine Poyser. In that regard, however, I am mindful of Martin J.A.'s remarks in *Arviv*, at p. 405-06:

> Unless it can be said that the failure to afford the accused an opportunity to cross-examine a key witness prior to the witness giving his evidence at the trial, in and of itself, constitutes a violation of s. 7 of the Charter notwithstanding full disclosure of the Crown's case and of the witness's evidence has been provided, there was no contravention of s. 7 in this case. We are not prepared to hold and, in our view, are not entitled to hold, that the failure to provide the opportunity to cross-examine, even a key witness, prior to the giving of evidence by that witness at the trial, per se, contravenes the Charter, where full disclosure of the Crown's case and of the witness's evidence has been made.

40 In *R. v. Girimonte* *(1997), 121 C.C.C. (3d) 33* (Ont. C.A.), at para. 37, Doherty J.A. held:

> Discovery involves a testing by the defence of the strengths and weaknesses of the Crown's case through the questioning of witnesses. Discovery is a forensic tactic and a means whereby counsel prepares for trial. Unlike disclosure, discovery is not a constitutionally protected right. The Crown has no obligation to afford the defence an opportunity to discover the Crown's case.

See also *R. v. Guimond* *(2003), 177 C.C.C. (3d) 315* (Que. C.A.), leave to appeal to S.C.C. refused, *[2007] S.C.C.A. no. 557*, at paras. 13-15, and *R. v. Bjelland*, *2009 SCC 38*.

41 Since, as opposed to disclosure, which is a constitutional right, the defence has no equivalent s. 7 right to discover the Crown's case, I see nothing to support the proposition that the Crown preferred this indictment to shield Poyser from discovery and certainly nothing that would amount to "flagrant impropriety" (*Anderson*, at para. 49), so as to amount to an abuse of process.

42 For the Crown, Mr. Tice indicated that, despite the initial entreaties of his counsel, Poyser received no consideration from the authorities in return for his cooperation. As Mr. Derstine points out, however, one could argue that being permitted to plead guilty to being an accessory after the fact to murder, rather than having to face trial on a charge of first degree murder, could fairly be considered to be significant consideration. But, even if one considers that this amounts to consideration, such arrangements are a commonplace in criminal prosecutions and, that said, this would not violate "those fundamental principles of justice which underlie the community's sense of fair play and decency" (*Jewitt*, at p. 13), so as to constitute an abuse of process.

43 Albeit full disclosure has been made both of this case, and latterly, at the insistence of defence counsel, of the Patton materials, defence counsel argue that the lateness of that disclosure has resulted in unfairness to their clients. In weighing that concern, it is fair to say, on the one hand, that the Patton disclosure was voluminous and did not occur until approximately

three weeks before trial. On the other hand, the timing of this disclosure must be examined in light of the following facts:

(i) disclosure was not sought until early February;[2]

(ii) the Crown at that time concluded that the material was not relevant to the prosecution at hand and, thus, that it was not required to disclose it;

(iii) the Crown promptly advised the defence of its position, to wit: that, if they wished to pursue disclosure, they ought to bring a third-party records application; and

(iv) the amount of Patton material upon which defence counsel relies for this application is miniscule in comparison to the entire Patton disclosure.

44 Defence counsel contend that the relevance of the Patton material was obvious, such that the Crown in this case ought to have been aware of its relevance and, since it was in the hands of the TPS, ought to have disclosed it pursuant to *Stinchcombe* long before it did. This presupposes that all Crown prosecutors constitute a monolithic whole, as it were, such that the knowledge of one is the knowledge of all, a proposition rejected in *R. v. McNeil*, *2009 SCC 3*, at para. 22.

45 Likewise, I reject the further proposition advanced by the applicants that the Homicide Squad officers ought to have been aware of the fruits of an entirely separate investigation commenced by G&G officers approximately one year after the Hagley murder and roughly nine months after the arrests of the applicants, and its alleged relevance to the Hagley case, simply because they and the Patton investigators belong to the same police service: *R. v. Quesnelle*, *2014 SCC 46*, at paras. 11 and 12. Counsel conceded in oral argument that the TPS has thousands of members. In the same way as it is untenable to visit all Crown prosecutors with the knowledge of one, so, too, it is unreasonable to visit the knowledge of one set of investigators with the knowledge of other investigators charged with investigating a separate matter at a later point in time.

46 Defence counsel argue that the disclosure came so late in the day as to prejudice their clients' right to make full answer and defence. As an example, Ms. Bojanowska asserted that Poyser would have been in fear of retribution from the 5PG if he were to name the people he was actually with at the time of the homicide and, thus, falsely accused the applicants, such that it is critical for the defence to able to show Poyser's connection to the 5PG, but they have been deprived of that opportunity by the Crown's preferment of the indictment. Be that as it may, while unfortunate from the defence perspective, the case law makes abundantly clear that, provided it is made in good faith, the Crown's decision to prefer an indictment is not *per se* unfair and does not, without more, call into question the Crown's motive in preferring this indictment.

47 The Patton materials comprise tens of thousands of pages and, in relation to the whole of that disclosure, the portion relied upon by the applicants in this application is truly minute. Having now examined this tiny portion in the context of the present applications, apart from the fact that (i) the 5PG and the G2M inhabit the same geographical area in which the murder took place; (ii) that Hagley's murder is mentioned in Appendix "D" to the Patton ITO; (iii) that some of what appear to be nicknames in Poyser's phone are similar to nicknames by which some of the

5PG members are known; (iv) that Poyser may know certain 5PG or G2M members; and (v) that Poyser may have been attempting to contact one of them shortly before the homicide; on the face of it, the two investigations otherwise appear to me to be unrelated.

48 In terms of the Hagley murder being mentioned in the Patton ITO, Ms. Bojanowska submitted in oral argument that the homicide investigators would have known of the connection between the Patton investigation and the Hagley murder. But, as I read Appendix "D", the only connection apparent to me is that, when Patton began, almost a full year after the homicide, the Hagley murder appeared, at least to the Patton investigators, to be one event in what the affiant meant when he stated, at para. 1, "[i]n many instances, retaliation can be seen as a cascading effect." I see no suggestion that 5PG was in any way responsible for Hagley's death. As distinct from suggesting "an inside job" as defence counsel posit, it seems to me that this is just one more example of the continuing cycle of inter-gang violence, and the predictable retaliatory responses thereto, that plagues this city. That said, in my view, mention of the Hagley murder in the Patton ITO says nothing one way or the other about the Crown's motivation in preferring this indictment.

49 Thus, I agree with the Crown that this material was not such that the Crown ought to have provided it pursuant to *Stinchcombe*. Rather, more properly, in my view, it ought to have been the subject of a third-party records application and, however late the disclosure relative to the trial date, for the following reasons I attribute no fault to the Crown:

(i) defence counsel did not apply for disclosure until shortly before trial;

(ii) it was reasonable for the Crown to insist upon a third-party records application;

(iii) notwithstanding (ii) *supra*, the Crown acquiesced in the defence request in order not to delay this trial;

(iv) irrespective of under which regime it came to be disclosed, the Crown had a duty to review all of the Patton material before releasing it, in order not to disclose anything that could potentially compromise one or more prosecutions arising from a totally separate investigation; and

(v) inasmuch as the Patton material comprises, as earlier stated, thousands of pages, that duty was time-consuming.

50 So, while the lack of an opportunity to discover Poyser at a preliminary inquiry may be unfortunate from the defence perspective, the case law makes abundantly clear that, provided it is made in good faith, the Crown's decision to prefer an indictment is not *per se* unfair and does not, without more, call into question the Crown's motive in preferring this indictment.

51 Defence counsel acknowledged in oral argument that the Crown would have been entitled to prefer an indictment had it been concerned about s. 11(b) of the *Charter*, but rejected the proposition that the Crown may have preferred the indictment in this case out of concern for the *Jordan*[3] deadline. The arrests having occurred in January of 2017, the *Jordan* deadline is in early July of this year. Mr. Derstine pointed out that it was anticipated that the preliminary inquiry would take approximately four to six weeks and was scheduled to begin in April of 2018, which would have seen it conclude in May 2018. That being the case, counsel assert, there was no

risk of a stay pursuant to *Jordan*. Thus, they argue, *Jordan* concerns do not reasonably explain the Crown's actions, leaving the specter of some oblique motive.

52 For its part, the Crown argues that *Jordan* was looming and preferring the indictment can be sensibly explained that way. Having said that, Mr. Tice did not go so far as to actually assert that *Jordan* was the reason the Crown preferred the indictment. In response, Mr. Bytensky pointed out that, had that been the reason, it would have been a simple matter for Mr. Tice to simply have said so. Insofar as he chose not to do so, Mr. Bytensky contends that confirms the assertion that there appears to be an oblique motive. I respectfully disagree. While I accept that, were *Jordan* the reason, the easiest course would be to simply say so, I can also understand why, as a matter of principle, a prosecutor would resist explaining that which he might easily explain, for the simple reason that the Attorney General is not obliged to explain the exercise of his discretion unless the circumstances support a reasonable conclusion that it was exercised for an improper purpose.

53 Before a prosecutor will be obliged to explain actions which lie within the normal scope of prosecutorial discretion, there is an onus on the party asserting prosecutorial misconduct to adduce evidence of such misconduct or, in the least, to make an offer of proof. "Requiring the claimant to establish a proper evidentiary foundation before embarking on an inquiry into the reasons behind the exercise of prosecutorial discretion respects the presumption that prosecutorial discretion is exercised in good faith": *Anderson*, at para. 55; see also *Durette*, at pp. 438-439. Contrary to Mr. Bytensky's suggestion that this is a case of *res ipsa locquitur*, I am not persuaded that the assertions relied upon by the applicants support an oblique motive or prosecutorial misconduct. Rather, they amount to nothing more than speculation, which, it is trite to observe, will not suffice.

54 In summary on this issue, I see nothing on this record that suggests "flagrant impropriety", nothing that would "violate those fundamental principles of justice which underlie the community's sense of fair play and decency," nothing that "undermines the integrity of the judicial process" or "results in trial unfairness", and nothing that reflects, in any degree whatsoever, "improper motive[s]" or "bad faith" on the part of the prosecution. That being said, I presume, as I am entitled to do, that, in preferring the indictment in this case, the Attorney General exercised his discretion in good faith. Thus, I decline to order production of the materials sought.

Application re: Proposed Hearsay Evidence

55 On behalf of Lenneil Shaw and Mohamed Ali-Nur, Mr. Bytensky and Ms. Bojanowska filed an application to elicit hearsay evidence from a variety of sources. But, on April 9, 2019, at the outset of oral argument, Mr. Bytensky, who made the submissions for both applicants, conceded that he could not establish, at that point in time, either (i) threshold reliability of the bulk of the proposed evidence or (ii) the likelihood that a miscarriage of justice could result unless the rules of evidence were relaxed: *R. v. Finta* *(1994), 88 C.C.C. (3d) 417* (S.C.C.). Accordingly, on behalf of both applicants, Mr. Bytensky abandoned the application save for one narrow aspect.

56 The remaining aspect was Rubina Alvi's contention, in her April 2017 statement to the lead

investigator, Det. Shankaran, that she was threatened with death by members of the 5PG because she had spoken to the police. The need to introduce hearsay arose from the fact that Alvi's whereabouts were then unknown. However, on April 15, Mr. Bytensky advised that Alvi had been arrested on an unrelated matter; accordingly, this aspect became moot. Therefore, on April 18, I dismissed the application.

Application re: Alternate Suspect Evidence

57 On behalf of Lenneil Shaw and Mohamed Ali-Nur, Mr. Bytensky and Ms. Bojanowska filed an application to elicit evidence of an alternate suspect. As with the hearsay application, Mr. Bytensky presented the argument on behalf of both applicants. The proposed evidence falls into two categories: direct and circumstantial evidence. I will deal with the latter first.

Proposed Circumstantial Evidence

58 In *R. v. McMillan* (1975), 7 O.R. (2d) 750 (C.A.), aff'd [1977] 2 S.C.R. 824, the *locus classicus* concerning the admissibility of evidence of an alternate suspect, at p. 757, Martin. J.A. stated on behalf of the court "[i]t [is] self-evident that if A is charged with the murder of X then A is entitled, by way of defence, to adduce evidence to prove that B, not A murdered X." He went on to say, however, that the evidence must be both relevant and probative.

59 It is important to bear in mind the caution set out in *R. v. Grant*, 2015 SCC 9, at paras. 3-4:

> Obviously, the identification of an accused as the perpetrator of the crime charged is essential to establishing criminal liability. The burden to prove beyond a reasonable doubt that the person before the court is the guilty party rests squarely on the Crown. In accordance with the presumption of innocence, the accused is never required to prove her innocence, an accused person's *Charter* protected right to make full answer and defence entitles her to challenge the Crown's case and lead evidence to raise a reasonable doubt about whether the accused committed the crime.
>
> However, the accused's rights are not the only interest at stake. The integrity of the administration of justice requires that the proceedings stay focused on the indicted crime and not devolve into trials within a trial about matters that may not be sufficiently connected to the case. Such tangents risk causing delays, confusion and distractions that undermine the trial's truth-seeking function. This risk is especially heightened where the defence seeks to introduce other alleged suspects or crimes into the trial.

60 As stated by the Supreme Court in *R. v. Grandinetti*, 2005 SCC 5, at paras. 47-48:

> The requirement that there be a sufficient connection between the third party and the crime is essential. Without this link, the third party evidence is neither relevant nor probative. The evidence may be inferential, but the inferences must be reasonable, based on the evidence, and not amount to speculation.
>
> The defence must show that there is some basis upon which a reasonable, properly instructed jury could acquit based on the defence: *R. v. Fontaine*, [2004] 1 S.C.R. 702, 2004 SCC 27, at para. 70. If there is an insufficient connection, the defence of third party involvement will lack the requisite air of reality: *R. v. Cinous*, [2002] 2 S.C.R. 3, 2002 SCC 29.

61 At para. 49, Abella J. went on to adopt the following legal test, as formulated by the trial judge in that case:

> The cases establish that an accused may adduce evidence tending to show that a third person committed the offence. The disposition of a third person to commit the offence is probative and admissible provided that there is other evidence tending to connect the third person with the commission of the offence.

62 The circumstantial evidence upon which the defence relied consists, in the main, of the assertions set out in points (i) through (xv) inclusive in para. 34, *supra*. Consideration of some of those points depended on the admissibility of the proposed hearsay and, thus, they are no longer of any evidentiary moment. For those remaining assertions not dependent on hearsay, I will consider a number of them below.

(i) *Identification of Jason Sewell*

63 Of the other sources that would supposedly indicate that Jason Sewell might be one of three persons whose images were captured on video coming to the Pizza Pizza immediately prior to the shooting and, in turn, fleeing the restaurant immediately after, the only civilian is Sue Lynn Bennett. However, Bennett cannot presently be found, and I was not asked to admit her statement to the police in this regard as an exception to the rule against hearsay. As for police sources, early on in the investigation, in response to the aforementioned release by the homicide investigators of CCTV images, two officers contacted the investigators to indicate that Sewell might be the person whose face can be seen. In rebuttal on this application, Mr. Tice indicated that he is reliably informed that neither of the officers still maintains the opinion that the image is that of Sewell. Mr. Bytensky took no issue with Mr. Tice's assertion in this regard. Accordingly, these purported identifications no longer have any evidentiary value.

(ii) *Poyser's Membership or Association with 5PG*

64 The defence asserts that Poyser was at the material time a member of G2M. Mr. Bytensky argues that Poyser's association with G2M makes the Crown's theory (that the shooting was by way of retribution on the part of the applicants -- two of whom live in a housing complex known as Scarlettwood Ct. -- for a shooting that occurred in the Scarletwood area on the evening of October 15, 2016) unlikely for the reason that Scarletwood people would not likely use a driver associated to the G2M to do a shooting on G2M turf.

65 While it will be open to the defence to suggest to Poyser that he was a member of 5PG or G2M, the difficulty with this analysis is that, apart from certain nicknames in Poyser's electronic phonebook that are similar to names attributed to members of the 5PG in the Patton ITO, there is no evidence that Poyser was a member of, or even associated with, either the 5PG or G2M. Mr. Tice asserts that Poyser will deny that he was a member of either gang. But, even if Poyser were associated to one or more members of the gang, it would not necessarily exclude the possibility of his having been involved with the accused in perpetrating the shooting on October 16, 2016.

(iii) *Poyser's Attempted Telephone Contact with "G Man" and "Smokey"*

66 As for the assertion that, in the hours leading up to the homicide, Poyser attempted to phone someone listed in his phone as "G Man" and another person listed as "Smokey", the applicants assert that G Man is the nickname of Orette Francis, said to be a leading 5PG member and Smokey is the nickname of one Donald Marsdon, said to be a member of a gang known as the "Shower Posse", a gang said to be affiliated with 5PG and G2M. As I have already indicated, the similarity of some names in Poyser's phone book to nicknames of certain gang members does not establish that they are, in fact, the same people. But, even if they are, the fact that Poyser may know some members of the 5PG, G2M, or the Shower Posse, does not, without more, support the defence theory that Hagley was murdered at the instance of anyone associated with any of these gangs.

(iv) *Garner's and Charles' Membership in G2M*

67 Mr. Bytensky placed great emphasis on the fact that Garner and Charles, who were with the deceased at the time of the shooting and anticipated to be Crown witnesses, were listed as persons of interest in the Patton ITO. They may be members of G2M, but, as Mr. Tice pointed out in rebuttal, there is no evidence that they were considered to be of particular importance in terms of Patton and no evidence that they were arrested as a result of that investigation. Accordingly, the mere fact that, approximately 18 months after the Hagley murder, they were mentioned in an ITO respecting another, unrelated investigation does not increase the likelihood that Hagley was murdered by reason of some internal conflict within the 5PG or G2M.

68 On the contrary, in my view, the fact that Garner and Charles are apparently members of G2M and their presence at the scene of the murder renders it less likely, not more, that this was an internally arranged assassination. I say that for the following reasons. There is no dispute that both shooters discharged their weapons in the direction of all three men and one of those weapons was a shotgun, a much less than discriminating weapon when discharged in the direction of multiple people. Neither Garner nor Charles was injured, but it would appear that there was no attempt on the part of the shooters to spare them from harm; rather, it would appear that they escaped injury because they fled more quickly than Hagley. If, then, as the defence postulates, the shooters were members of the 5PG or G2M, and the object of the attack was to kill Hagley, one would have to question why they would shoot Hagley when he was in close company with Garner and Charles because of the obvious risk that they, too, would be injured or killed.[4] There is not a scintilla of evidence that anyone in the 5PG had any grievance against either Garner or Charles and defence counsel has not suggested that there is. But to say that is just to underscore the fact that there is no evidence to suggest that anyone within the 5PG or G2M had any grievance against Hagley. The defence predicates its entire theory (that Hagley's murder resulted from an internal 5PG or G2M plot) on the fact that Hagley was shot to death, but, in light of the fact that the shooters appear to have shot at all three men, there is really no reason to suppose that Hagley was the intended target and the others were not. Without that presupposition, the applicants' theory fails.

(v) *Carlton Francis is said to be Associated with the 5PG*

69 Mr. Bytensky made much of the fact that a 9 mm. pistol, proven forensically to be the pistol used during the homicide, was recovered upon the execution of a search warrant from a

residence at a time when Carleton Francis was present. This took place, however, approximately two months after the homicide and, although Francis was arrested, the charges against him were later withdrawn by the Crown. Since it would appear that he was a visitor to the premises, in light of the withdrawal, his presence at the place and time where and when the police seized the 9 mm. pistol does not support the proposition that he had any connection to the pistol.

70 As noted above, Mr. Bytensky contends that, if not a member of the 5PG, Carleton Francis is, in the least, associated with the gang. He bases his assertion on (i) that, as indicated above, Francis has the same last name as Orette Francis; (ii) a Patton intercept, in which one Rakeem Henry spoke to a woman named Thorpe, with whom Francis lived at the time; and (iii) as noted above, the fact that a 9 mm. pistol was recovered at a place where Carleton Francis was present. In my view, the purported link of Carleton Francis to the 5PG by this means is weak at best. Further, as discussed in oral argument, Mr. Bytensky acknowledged that the connection he asserts relies for its existence on events that occurred approximately 18 months after the homicide and further acknowledged that he cannot show anything linking him to the 5PG or G2M at any earlier time. Eighteen months is a not an insignificant period of time in this context, it seems to me. But even assuming, *arguendo*, that Francis was a member of, or associated with, 5PG at the time of the homicide, that does nothing to increase the likelihood of a 5PG or G2M plot to kill Hagley.

(vi) *Alleged Threats Received by Rubina Alvi*

71 As noted above, when she spoke to the police in April 2017, Rubina Alvi claimed that she had been threatened with death for having spoken to the police by two persons she identified as "Monsta" and "Shadow". At a later point in her statement, she said she was also threatened by someone named "Max." The defence asserts that these individuals are all members of 5PG or G2M. It is not disputed that "Monsta" is Jason Sewell's nickname and not disputed that Sewell is a member of the G2M; the other two men are also known to be associated with the gang.

72 Alvi asserted in April 2017 that she had earlier mentioned these threats to a detective whom she could not identify.[5] It appears to me, however, that she first mentioned the threats to Shankaran in her April 12, 2017 statement, i.e.: approximately six months after she alleges she received them. What was actually said to her, according to her account, is difficult to know for certain by virtue of the fact that part of what she said about these threats was transcribed simply as "inaudible".

73 Since it has been my experience that, not infrequently, what some transcriptionists cannot discern, and thus transcribe as "inaudible", can actually be discerned with a careful listening to the recording, I raised this point in the course of Mr. Bytensky's oral argument and gave him overnight to listen to the recording to see if he could discern exactly what Alvi said. When court resumed the next day, counsel seemed to agree that the word that had been transcribed as "inaudible" was in fact the word "mans". This is of some significance, to my mind, because, contrary to Mr. Bytensky's suggestion that the members of the 5PG or G2M were threatening Alvi for having explicitly mentioned one or more of them to the police, it would appear, to me at least, that the threat was more general than that. It was on that rendition, at least as I perceive it,

simply a way of reproaching her for having spoken to the police at all, thus undercutting the force of this evidence in terms of supporting the alternate suspect theory.

74 CCTV captured images of three men walking to and running away the scene of the shooting. There is no dispute between Crown and defence that Poyser was one of them. The other two men were, according to Poyser, Lenneil Shaw and Mohamed Ali-Nur. Poyser will also say that Shakiyl Shaw drove Poyser's vehicle to the scene of the shooting, waited in the car while the men went to shoot the deceased, and then drove the car away from the scene when they returned. The defence will be that Poyser is lying about the identity of his three companions that morning. Against that backdrop, the purported relevance of the alleged threats is that they support the proposition that Monsta was involved in the homicide; the logic being that if he were not involved he would have had no reason to threaten her.

75 In considering the extent to which the alleged threats support the defence theory, I remind myself that the threshold to establish relevance is low; i.e.: all one need demonstrate for a fact "A" to be relevant to proof of a fact "B", is that proof of A renders the existence of B more likely than it would be without such proof: *R. v. Watson* *(1996), 108 C.C.C. (3d) 310* (On. C.A.), at 323-24. That said, while it is theoretically possible that the impetus underlying the threats could be what the defence contends, there is, in my view, another more plausible alternate explanation.

76 While there is, for the present, no direct proof before me of the existence of the 5PG, it is not disputed that the Lawrence Ave./Weston Rd. area is inhabited and, in some very tangible way, controlled by the 5PG. Equally, it is not contested that there exists in this area, as in many gang infested areas, what is most often referred to as a "code of silence," such that it can be dangerous for people in the area to speak to the police. However, the evidence that Alvi was threatened is not proffered to support this general proposition, but, rather, as noted above, for the proposition that Monsta *et al* were angry with Alvi for having implicated them in the homicide. But, as I said to Mr. Bytensky during the course of his submissions, while the men might well have known that she had spoken to the police, they would have had no way of knowing that she had named any of them as the perpetrators. Rather, if she was threatened, it strikes me that they would have threatened her for having breached the code of silence, as opposed to having named them specifically.

77 The existence of the code of silence, even with the assertion that Alvi was threatened in relation to this case, does not support, in my view, a logical inference that Poyser lied to the police about the identity of his companions on the morning of October 16, 2016; rather, this conclusion amounts to nothing more than speculation.

Summary re: Circumstantial Evidence

78 Mr. Bytensky complained in oral argument that, by resisting this application, the Crown is trying to give the jury "only half of the picture." I disagree. What Mr. Bytensky contends is the other half of the picture amounts, with respect, to nothing more than fanciful imaginings. Even with the inclusion of the hearsay evidence contemplated for admission in Mr. Bytensky's written application, I would not have been satisfied that the case for admission of the alternate suspect evidence had been made out. In the absence of the hearsay evidence, I was, *a fortiori*, not

persuaded, on the basis of the circumstantial evidence, that there was any air of reality to the proposition that Monsta or his 5PG or G2M confederates were responsible for Hagley's murder.

Proposed Direct Evidence of an Alternate Suspect

79 I turn now to what is purported to be direct evidence of an alternate suspect, namely, Alvi's account of what she saw on October 16, 2016. The defence now contends that she will say that she was at the scene of the homicide and recognized Monsta as one of the assailants.

80 As mentioned above, on October 16, 2016, Alvi was interviewed by Shankaran, at which time she told him that she had been an eyewitness to the homicide.

81 On April 12, 2017, having concluded through other investigative efforts that Alvi had been less than truthful when they had spoken in October, Shankaran questioned her further. Initially, Alvi maintained that she had witnessed the homicide. She indicated in some considerable detail that she had gone to the Pizza Pizza in company with Hagley, that she was inside the restaurant, and she had actually witnessed the shooting. However, CCTV in the possession of the police revealed that she was not with Hagley when he walked to the restaurant and witness statements indicated that she was not inside the restaurant at the time of the shooting.

82 In her October 2016 statement, Alvi also gave a detailed account of an argument that had transpired shortly before the homicide between two men outside the restaurant, concerning "dope." This, too, the CCTV showed to be false.

83 When Shankaran interviewed her in April 2017, she initially maintained that her October 2016 statement was true. However, when Shankaran confronted her with the fact that her earlier version of events was not corroborated either by CCTV the police had seized or by the statements of other witnesses, she eventually acknowledged that she had not seen the shooting and had not seen the two men that she had earlier asserted were present. She continued to assert, however, that a friend, Sue Lynn Bennett, had seen the shooting and had told her about it shortly thereafter when, according to Alvi, they met in a nearby bar. For her part, when spoken to by the police, Bennett denied both being present at the shooting and attending the bar Alvi mentioned. Alvi contends that Bennett was present, but will not admit she was there for fear of retribution.

84 On April 5, 8, and 9, 2019, I heard argument as to why I should allow evidence of an alternate suspect. As noted above, at that time Alvi's whereabouts were unknown and it was argued that her account of the events should be admitted as an exception to the rule against hearsay.

85 On April 15, 2019, when I indicated that I was prepared to rule on the three outstanding applications, Mr. Bytensky rose to advise that Alvi had been arrested and to ask the court to defer its ruling until defence counsel could have an opportunity to interview her, since what she might say could have an impact on this application. I agreed.

86 On April 17, Mr. Bytensky advised that counsel had spoken to Alvi the day before and she

had given an account that was, to some extent at least, in accord with her October 2016 statement.

87 As noted above, in her October 2016 account, Alvi said that she had actually witnessed the shooting. According to a very brief oral précis Mr. Bytensky provided the court on April 17, apparently Alvi had told counsel the previous day that, as opposed to having actually seen the shooting, as she said in October 2016, or having been told about it later, as she said in April 2017, she was now prepared to say that she was outside the restaurant at the time of the shooting. When she heard gunfire, she then turned to see "people," including Monsta, in Mr. Bytensky's words, "leaving, running or walking ..." out of the Pizza Pizza via the front door. Given that a ruling in favour of the proposed alternate suspect evidence would fundamentally alter both the nature and the length of this trial, and possibly cause great prejudice, I was troubled by both the brevity and vagueness of Mr. Bytensky's précis.

88 For that reason, on April 18, I told Mr. Bytensky that I wanted to know with greater precision what it was anticipated that Alvi would say, if called. In that behalf, I indicated that I expected counsel to file a supplementary application record, which was to include an affidavit setting out with particularity what Alvi said when interviewed by counsel two days prior. Mr. Bytensky agreed that he would prepare such a record. Later that day, however, Mr. Bytensky indicated that he had discussed the matter with the other defence counsel and, since those in attendance at the interview were all counsel of record in this trial, there was a consensus that the court's direction would put whoever the affiant might be in a potential conflict of interest.[6]

89 Faced with Mr. Bytensky's position, I indicated that I would not require counsel to file an affidavit. I indicated, however, that, given the very significant inconsistencies in Alvi's various accounts and given the profound impact that the admission of alternate suspect evidence was likely to have on this trial, I would still require what I characterized as a "will say statement" from the defence in order to be able to rule on this issue in an informed way.

90 This discussion took place late in the afternoon, at a time when we were about to adjourn for the Easter long weekend. Since I considered that it was vitally important that all counsel have, sooner rather than later, a clear understanding of just what evidence would be permitted and what evidence would not, and in order not to have to delay my ruling in that behalf any further than it already had been, I invited Mr. Bytensky to email the will say statement to me[7] as soon as it was prepared. Mr. Bytensky agreed. However, on Saturday, April 20, I received an email from Mr. Bytensky[8] in which he advised that, after consulting with defence counsel, he felt he must respectfully decline to provide such a statement. In the end, applicants' counsel provided no statement as to what Alvi would say if called.

91 On April 18, 2019, in response to comment by Mr. Bytensky, I made plain to all counsel that, provided they had a good faith basis to do so (*R. v. Lyttle*, *2004 SCC 5*), it was open to defence counsel to suggest to any of the anticipated Crown witnesses, Poyser, Garner or Charles, that he was a member of the 5PG or G2M, as the case may be, or any other gang for that matter. Since the antecedents of each of these witnesses can be seen as reflecting on his respective character and, by extension, on his credibility, I held that cross-examination on these issues

would not amount to adducing evidence of an alternate suspect; rather, such cross-examination would be entirely permissible even without this application.

92 In contrast, I held that defence counsel would not be permitted to cross-examine any witness on Hagley's association to the 5PG or G2M. Since, obviously, the rationale pursuant to which I permitted counsel to cross-examine Crown witnesses on their antecedents had no application to Hagley, to permit counsel to cross-examine as to his character risked prejudicing a fair trial by tainting his character and, further, to permit counsel to do so would amount, albeit in a somewhat indirect fashion, to permission for them to introduce evidence of an alternate suspect.

93 It is beyond dispute that a trial court has the discretion to exclude otherwise relevant evidence on the basis that its probative value is outweighed by its potential prejudice. See *R. v. Grant*, *2009 SCC 32*, at para. 30, where, speaking for the court, Karakatsanis J. stated:

> A finding of logical relevance does not end the admissibility inquiry. Even the *Grandinetti* sufficient connection test speaks only to the probative value side of the *Seaboyer* equation. Once the relevance threshold is met, the trial judge must still be satisfied that the probative value of the evidence tendered by the defence is not substantially outweighed by its prejudicial effects.

It is equally well settled that, before excluding defence evidence in the exercise of this discretion, the court must conclude that the prejudicial effect of the proffered evidence substantially outweighs any probative value it might have: *R. v. Seaboyer*, *[1991] 2 S.C.R. 577*. That said, being firmly of the opinion that the probative value, if any, of the proffered evidence of an alternate suspect was not just substantially, but vastly, outweighed by the potential prejudice, on April 22, 2019, I provisionally refused the application to introduce evidence of an alternate suspect.

94 The provisional aspect of the ruling had to do with Rubina Alvi. In my opinion, she was the only witness who, as of the time the application was determined, could possibly provide a foundation upon which the defence could then ask the court to admit evidence of alternate suspects. However, given Alvi's unsavoury antecedents, her multiplicity of accounts of this event, I had very real concerns (i) whether she would even be called as a witness by any of the accused; (ii) whether, if called, she would actually appear to testify; and, most importantly,[9] (iii) whether, if she testified, she would actually say anything that would provide a proper evidentiary foundation for other evidence of an alternate suspect. Accordingly, I held that, if she testified and purported to have actually seen someone other than the accused shoot Hagley or, in the least, gave an account from which it could reasonably be deduced that someone other than the accused shot Hagley, then I would, at that time, allow the defence to call further and other evidence supporting the proposition that someone else committed the murder.

95 I initially indicated that I would not *voir dire* Alvi's proposed evidence because I was not confident that, were I to do so, her account would not change, yet again, between the *voir dire* and the time she when she might be called upon to give evidence, even if the *voir dire* were to be held immediately before her she gave evidence before the jury. At a later point, Mr. Bytensky indicated that since the Crown's preferment of the indictment had deprived the defence of an opportunity they would otherwise have had of discovering Alvi at a preliminary inquiry, my

refusal to conduct a *voir dire* would prejudice the defence by forcing them to call her without knowing with any precision what she was likely to say. Persuaded by this argument, I modified my earlier ruling to indicate that, at such time[10] as the defence made known that they wished to call Alvi, I would conduct a *voir dire* in order that counsel would be in a position to make an informed decision whether to call her or not.

96 As for Crown witnesses who had testified as part of the Crown's case (whom, as a result of my provisional ruling, the defence were not permitted to cross-examine on this issue), I ruled that, at the conclusion of their evidence for the Crown, I would bind them over to re-appear for further cross-examination should defence counsel so desire.

97 In terms of any prejudice occasioned by having to recall one or more Crown witnesses, thereby elongating the trial somewhat, I told counsel that I would alleviate the potential for such prejudice by telling the jury that the witness(es) had to be recalled, not because of anything counsel had done or failed to do, but, rather, as a consequence of a legal ruling that I had made and, further, that they were to attach no importance to the evidence that the witness(es) gave later as opposed to the evidence the witness(es) had given when first called and that they should approach the assessment of the evidence of any witness who was recalled as though s/he had given all his/her evidence at one time.

R.A. CLARK J.

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1 *R. v. Nixon*, *2011 SCC 34*.

2 Crown counsel pointed out in oral argument that the disclosure in the Patton cases was made to counsel in Mr. Derstine's and Mr. Bytensky's offices in "mid-2018."

3 *R. v. Jordan*, *2016 SCC 27*.

4 See para. 34, *supra*, where I have discussed the apparent uncertainty in the defence applications as to who the target(s) of the alleged 5PG plot actually was/were.

5 As I will discuss in some greater detail below, police first spoke to Alvi on October 16, 2016, within hours of the homicide. When Shankaran asked in April 2017 why she had not earlier said anything about these threats, Alvi claimed that she had mentioned it to a detective, but the detective told her that he could not act on her information until someone was actually dead. When Shankaran asked who the detective was, Alvi claimed that she did not know his name. When asked to describe him, she gave a description so vague that, assuming such a person actually existed, Shankaran could not possibly have identified him. Given the unlikelihood that any police officer would say what Alvi attributes to the officer she mentioned and her highly questionable credibility in other regards, I conclude that she was lying to Shankaran in this regard.

6 In response, I indicated that, given Alvi's extremely dubious credibility, I would have thought that counsel would have recognized, ahead of interviewing her, what I consider to be the very obvious prospect that, if and when she testifies, she might depart from something she said in her most recent interview, thereby requiring counsel to prove that statement. On the basis of that obvious prospect, I went on to observe that I would have thought that counsel would have had present for the interview a secretary or articling student; i.e.: someone whose position as counsel in this trial would not be compromised if required to prove Alvi's prior statement.

7 In order to avoid any suggestion of *ex parte* communication between counsel and the Court, I stipulated that any email to be sent to me must be copied to all counsel.

8 Your Honour:

Having consulted with all counsel after the close of Court on Thursday, I am writing to advise that, regretfully, we are not in a position to provide a detailed account of our meeting with Ms. Alvi on April 17, 2019.

Our position, ultimately, is that information that has been gathered by counsel as part of trial preparation is not subject to a defence disclosure obligation. In this particular case, providing detailed particulars of our interview will only further arm the prosecution in any cross-examination of Ms. Alvi they may conduct if she is called as a witness, and will undermine our clients' ability to convince the jury to rely on her evidence, and thereby to make full answer and defence.

As officers of the Court, and as I stated on the record this past week, all counsel continue to reasonably expect Ms. Alvi to testify, generally, that

* She was present on John Street in the early morning hours of October 16, 2016 and was a direct eyewitness (as opposed to a hearsay witness) of some of the events that evening.

* She had been driven to John street and dropped off there.

* She personally observed and recognized (as opposed to being told by others) that "Monsta" (aka Jason Sewell) was one of the individuals involved in the incident; and

* After the night in question, she was personally threatened by a number of people connected to the 5PG/G2M, including Sewell, "Max", and "Show Off" (also known to her as "Shadow") as a result of her having spoken to the police and having provided information identifying Mr. Hagley's assailants. She was also shown pictures of various individuals connected to Project Patton (the pictures were taken from the Project Patton disclosure) and recognized most of the pictures shown to her, including the pictures of the some or all of the persons who threatened her.

With respect, our position is that the record -- consisting of the previously filed transcripts together with these current representations as to our expectations of her viva voce testimony - is sufficient to allow the Court to assess the principal points of her evidence and to determine whether or not this evidence is capable of serving as the primary foundation for the Alternate Suspect Application.

If the Court is ultimately of the view that this is insufficient to pass the necessary legal threshold for admission of this evidence, we will respect and abide by the Court's ruling in this regard.

Sincerely,

Boris Bytensky

9 Given the refusal of defence counsel, as earlier mentioned, to provide the court with a written account of what she would be likely to say,

10 I.e.: following the close of the Crown's case, but before the defence had been called upon to decide whether to call evidence or not.

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