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Citation: *R. v. Khemraj*, 2010 ONCJ 36

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

TARIQUE KHEMRAJ

Before Justice Kathleen J. Caldwell
Heard on November 30, 2009
Reasons for Judgment released on January 19, 2010

Ms. Jennifer Stanton .... **for the Crown**
Mr. David S. Rose .... **for the accused Mr. Tarique Khemraj**

Caldwell J.:

[1] Mr. Khemraj is charged with impaired driving and "drive over 80". Partway through the evidence of the arresting officer, the defence brought a Stinchcombe application for disclosure of materials relating to the standardized roadside or field sobriety tests. As I understand it, the administration of these tests is becoming increasingly common and they are of a much more technical nature than the roadside tests administered in the past by the police.

[2] Both Crown and defence counsel agreed that they were unaware prior to the officer's testimony that he had administered these particular tests. There is a fleeting reference to roadside testing in the officer's notes but neither counsel interpreted this reference to refer to the so-called standardized roadside tests.

[3] Mr. Rose, counsel for Mr. Khemraj, requests disclosure of "the details of the Roadside Sobriety Test protocol and manual, training procedure and manual, including criteria for (un)successful performance of the test used in this case, and details of the arresting officer's training on the field sobriety tests, his qualifications in its application, and any other non-chemical or physical sobriety test". He argues that disclosure of this material is necessary in order to make full answer and defence pursuant to section 7 of the Charter.

[4] The Crown objects, arguing that there is no evidentiary basis for the material, that if such material exists it is not relevant to the issues in this case, and that alternatively it cannot be disclosed as it is protected by copyright.

Disclosure Principles

[5] The seminal case on disclosure is R. v. Stinchcombe (1991), 68 C.C.C. (3d) 1 (S.C.C.). The Crown must disclose all relevant information whether or not the Crown intends to introduce it as evidence. It is only if the information is "clearly irrelevant", privileged or beyond the Crown's control that it may be withheld.

[6] Once the defence launches an application to review the Crown's decision not to disclose, the onus is on the Crown to "justify its refusal to disclose" (para. 21 Stinchcombe). A successful justification would be on the basis that it is beyond the Crown's control, clearly irrelevant or privileged (see R. v. Chaplin (1994), 96 C.C.C. (3d) 193 (S.C.C.) at para. 25).

[7] The governing principle is that the material should be disclosed if "there is a reasonable possibility that the withholding of the information will impair the right of the accused to make full answer and defence" (para. 22 Stinchcombe).

[8] It is clear from the Supreme Court's rulings that the threshold is quite low in favour of disclosure. Further, the Crown must err on the side of disclosure (see para. 20 Stinchcombe)

[9] The Supreme Court of Canada recently reiterated and stressed the importance of a liberal interpretation of relevance in R. v. McNeil, 2009 SCC 3: "likely relevance for disclosure purposes has a wide and generous connotation and includes information in respect of which there is a reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence" (para. 44).

[10] The Crown objects to the requested disclosure on three bases: (1) lack of a basis for assuming that the requested material exists; (2) the material, if it exists, is protected by copyright; and (3) lack of relevance. The Crown quite correctly concedes that lack of relevance is her strongest argument. I will therefore deal quite quickly with the first two objections.

[11] As I understand it, the primary material which the defence wishes is any training manual utilized by the officer. Given that the officer said that he received training in the tests he administered, and given the apparent technical nature of the tests, it seemed reasonable to assume that written materials such as a manual existed. At my urging, toward the end of the arguments, the Crown asked the officer if there was such a manual and the officer said "yes". In my view, this answer dispenses with the Crown's first argument.

[12] I also find that any claim of copyright does not defeat the defence request for the manual. I agree with the reasoning of Justice Fairgrieve in R. v. McCracken, [1995] O.J. No. 4947 (Ont. Ct. Just.) and apply it to this case. In that decision, manuals relating to the Intoxilyzer 5000C were requested and the Crown claimed privilege on the basis of copyright.

Justice Fairgrieve ordered the disclosure, stating

The claimed copyright, in my view, ought not to be permitted to interfere with the discharge of the Crown's disclosure obligations. Surely, when this Intoxilyzer was granted approved instrument status, it must have been known to the manufacturer and to the distributor that there would be some interest on the part of the defence bar in the way the machine was operated and the way that qualified technicians operated it in particular cases (para. 9).

[13] For the same reasons outlined by Justice Fairgrieve, I find that any copyright issues cannot defeat the defence request for disclosure of the manual.

[14] I turn finally to the issue of relevance. The defence disclosure request is worded quite broadly: "the details of the Roadside Sobriety Test protocol and manual, training procedure and manual, including criteria for (un)successful performance of the test used in this case, and details of the arresting officer's training on the field sobriety tests, his qualifications in its application, and any other non-chemical or physical sobriety test".

[15] I find that copies of any manuals, including any protocols, utilized in any training that the officer received pertaining to the tests he utilized in this case constitute relevant disclosure. Further, I find that the defence should be informed if the officer passed or failed any training he received in relation to the tests used in this case, if indeed he was tested.

[16] The officer has testified that he concluded that he had a reasonable suspicion that Mr. Khemraj had alcohol in his body and thus made the roadside screening device demand and had Mr. Khemraj perform the test. The defence contests both the subjective and objective bases for these grounds. The officer has testified that there were other factors beyond the field sobriety test results which led to the formation of his grounds.

[17] The defence is entitled to challenge the officer on the bases for his conclusions, and is entitled to challenge the reasonableness of these conclusions. I agree with Mr. Rose that it would be difficult for him to challenge these conclusions without knowing the details, as contained in the manuals and protocols, of the training that the officer has received in relation to the tests he administered. I have already noted above that the threshold for relevance in relation to disclosure is very low.

[18] I therefore order the disclosure of the material I have outlined in paragraph 15 as I find that it is not "clearly irrelevant" to the issues in this case.

Released: January 19, 2010

Signed: "Justice K. Caldwell"