Court File Nos. CA42488 and 42490
Vancouver Registry

BRITISH COLUMBIA COURT OF APPEAL

(ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA FROM THE JUDGMENT OF THE HONOURABLE MADAM JUSTICE WEDGE PRONOUNCED THE 2ND DAY OF OCTOBER, 2014 AT VANCOUVER, B.C.)

BETWEEN:

REGINA

RESPONDENT

AND:

MATTHEW JAMES JOHNSTON AND CODY RAE HAEVISCHER

APPELLANTS

APPELLANTS' JOINT REPLY FACTUM #1: SECTION 650 AND *VETROVEC*

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PART I – OVERVIEW

1. In this factum, the appellants jointly respond to several points raised in *Respondent's Factum #1*, regarding s. 650(1) of the *Criminal Code*, the curative proviso, and the trial judge's application of the principles in *R. v. Vetrovec*, [1982] 1 S.C.R. 811.

PART II – ARGUMENT

I. The Crown's Submissions on s. 650(1)

2. First, we address the Crown's submission that there is no legal distinction between the "first stage" and the "second stage" of a privilege hearing, seeing as a court must exclude the accused from any hearing that would tend to identify the putative informer[1]. This mischaracterizes what occurs at each stage of a privilege hearing and the accused's corresponding participation rights at each stage. Since the first stage is only concerned with the identity of the putative informer, *there is no balancing of competing rights or legal interests*, and therefore "no one else [other than the Attorney General and the putative informer] will have any arguments of value to contribute to this determination"[2]. *R. v. Basi*, 2009 SCC 52 affirmed in the criminal context that neither the accused nor defence counsel have standing to appear at the first stage of a privilege hearing as there is no balancing of competing rights at this stage. The only exception is innocence at stake.

3. However, at the second stage, there *is* a balancing of competing rights. As put by the Supreme Court of Canada, "the judge must concern himself or herself with minimal intrusion"; the judge "may allow submissions from individuals or organizations other than the Attorney General and the informer"; and "[r]estricted disclosure will of course be necessary to protect the privileged information, but the protection of the open court principle demands that all information necessary to ensure that meaningful submissions, which can be disclosed without breaching the privilege, ought to be

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[1] Respondent's Factum #1, at para. 33.
[2] *Named Person v. Vancouver Sun*, 2007 SCC 43, at para. 49.

disclosed"[3]. *Basi* reiterated that the second stage involves (some) access for the accused: the accused and counsel should only be excluded "to the necessary extent"[4], they should be able to make "meaningful submissions"[5]; and, in appropriate cases, they should be furnished a report or summary of the evidence presented *ex parte*, *with sufficient editing* to not reveal the identity of the informer[6]. These passages from *Basi* are clearly referring to the *second stage* of the privilege hearing.

4. The point of the second stage is to determine what information can be disclosed to the accused, without violating the privilege. The reason is to have the accused engaged before a decision or ruling is made, not just to tell them about it afterwards. In this case, neither appellant was asking for any information that would tend to reveal the identity of E5, meaning neither appellant was asking to be involved in the first stage of the privilege hearing *or those parts of the second stage where the identity of the informer was at risk of disclosure*. But when the hearing turned to consider the evidence of a non-informer, which we know it did (because the evidence of a non-informer was ruled inadmissible), the Crown can no longer say that complete exclusion, and radio silence, were mandated. This is the purpose of *editing* and *redaction*, described in *Basi* as a key element of the second stage — a stage at which the accused is supposed to be able to make meaningful submissions, something denied by the trial judge's chosen procedure in this case.

5. Put simply, the Crown's approach merges the first and second stages, and treats them as analytically identical. But the Supreme Court of Canada is clear that they are distinct. And the distinction here would have produced a different process and possibly a different outcome.

6. Next we address the Crown's submission that Person X's evidence could only have implicated the appellants in the murders and that *amici* eliminated any unfairness

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[3] *Named Person*, at para. 51.
[4] *Basi*, at para. 53.
[5] *Basi*, at para. 55.
[6] *Basi*, at para. 57.

because their submissions led to Person X's exclusion from the Crown's case[7]. We disagree. First, the Crown's interpretation of *amici*'s role is directly contrary to *Ontario v. Criminal Lawyers Association of Ontario*, 2013 SCC 43 at paras. 50, 53-54. *Amici* cannot "replace" defence counsel and take on that role. They do not receive instructions on legal or factual issues from the accused, who may have special insight on how to address the issues being litigated in closed proceedings. Where "the terms for the appointment of *amici* mirror the responsibilities of defence counsel, they blur the lines between those two roles, and are fraught with complexity and bristle with danger"[8]. While defence counsel agreed to have *amici* appointed for an adversarial context during the first stage of the *Basi* hearing, defence counsel *never* consented or acquiesced to have *amici* effectively replace them and make submissions on the anticipated evidence of non-informer(s) or on remedies. Second, a central purpose underpinning s. 650(1) is providing the accused with *first-hand knowledge* of the case to meet, something completely denied in the procedure chosen by the trial judge.

7. Third, and as we stated in *Joint Factum #1*, Person X was *not* an informer. His anticipated evidence was not protected by informer privilege. *R. v. Welsh*, 2013 ONCA 190 cannot be so easily distinguished. *Welsh* clearly holds that the accused's consent to an *ex parte*, *in camera* procedure to deal with privilege does *not* extend to a subsequent motion about the evidence of a non-privilege holder[9]. The Crown cannot cloak a non-informer's testimony under informer privilege. That is the purpose of editing, redaction, and limiting what that witness can testify about. On these latter points, the appellants were kept in a state of enforced ignorance, the antithesis of a fair trial.

8. Finally, the Crown argues that the appellant failed to seek additional remedies at trial or have Person X's evidence admitted another way[10]. However, to consider this argument in the real world, rather than abstractly, one must travel back to the position defence counsel were in during the trial process. The accused and counsel were shut

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[7] Respondent's Factum #1, at paras. 5 and 47.
[8] *Ontario v. Criminal Lawyers Association of Ontario*, 2013 SCC 43, at para. 50.
[9] *R. v. Welsh*, 2013 ONCA 190, at para. 137.
[10] Respondent's Factum #1, at paras. 4 and 54.

out of a prolonged hearing that unfolded over many months. It took place not before a judge in a jury trial, or a case-management judge other than the assigned trial judge, but before the appellants' own *trier of fact* in a judge-alone trial. They sought involvement but were denied. They sought information and engagement but were only given the bottom line: Person X had been excluded. The trial judge heard and considered evidence and argument that, from an outsider's perspective, *must* have related to the key evidence of Person X, since it led to the exclusion of Person X. For defence counsel to steer directly into these unknown waters, in the dark, would have been reckless and risky. Could Person X's evidence be "re-admitted" based on what defence counsel applied for, in the same way that an accused person's answer on the stand can "put character in issue" during a trial? We emphasize that defence counsel were ushered out of the courtroom over their protestations, for what proved to be an extremely important and lengthy hearing before their trial judge. When they were let back in, they were blindfolded in relation to Application #65 apart from what was communicated in the abbreviated ruling. While one can always second-guess counsel decisions after a trial, we respectfully submit it should not be counted against the appellants now, on appeal, that they did not play with fire when they remained blindfolded.

9. Our criminal law does not impose upon defence counsel a standard of perfection. The appellate process "is quite generous in allowing a convicted person to overcome errors and omissions at trial… [which is] one reason why 'incompetence of counsel' arguments are relatively rare in Canada."[11] To properly situate the appellants' submissions on s. 650(1), this Court will appreciate that this was a complex trial, and that ultimately, the obligation to ensure it was fair lay in the hands of the trial judge.

II. Reply Submissions on the Curative Proviso

10. A violation of s. 650(1) results in a loss of jurisdiction over the accused. But in this case, we further assert that the breach of s. 650(1) was more than a "procedural

[11] *R. v. Meer*, 2015 ABCA 141 at para. 31.

irregularity" because it created an appearance of unfairness in the trial.[12] Although there is no strict formula to determine whether a miscarriage of justice has occurred at trial, this Court has affirmed that a miscarriage of justice occurs where an "irregularity was severe enough to render the trial unfair *or create the appearance of unfairness*."[13] And of course, a miscarriage of justice within the meaning of s. 686(1)(a)(iii) *cannot be cured* by any of the remedial provisions under s. 686(1)(b).[14] Put simply, an appellate court cannot excuse a trial that, to a reasonable observer, appeared to be unfair.

11. Nevertheless, we address the Crown's reliance on s. 686(1)(b)(iv) of the *Criminal Code*. This section states than an appeal may be dismissed where, notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellants were convicted and the court of appeal is of the opinion that the appellants suffered no prejudice thereby.

12. This Court held in *R. v. Joinson*, 1986 CanLII 1195 (BC CA) that (the precursor to) s. 686(1)(b)(iv) "preserve[s] the jurisdiction of a trial court which has failed to act at the appropriate time in the exercise of that jurisdiction, or has failed to comply with the mandatory provisions of the code… [and] empowers a court of appeal to excuse procedural errors. In either case the interests of justice, including the interests of the accused in being treated fairly, are recognized. If the error can be remedied without prejudice to the accused then Parliament has said that the case may be determined as if no error had occurred"[15]. In *R. v. Bagadiong*, 2013 BCCA 538, the factors discussed by Watt J.A. in *R. v. Simon*, 2010 ONCA 754 were adopted in circumstances where there had been an "inadvertent lapse in the conduct of the appellant's trial"[16]. Relevant factors include, but are not limited to:

i. the nature and extent of the exclusion, including whether it was inadvertent or deliberate;

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[12] See Appellants' Joint Factum #1 at paras. 67-73.
[13] *R. v. Legebokoff*, 2016 BCCA 386 at para. 44, adopting *R. v. Khan*, 2001 SCC 86 at paras. 69 and 74 (emphasis added).
[14] *Khan*, *supra* note 12, at para. 17.
[15] *R. v. Joinson*, 1986 CanLII 1195 (BC CA), at para. 21.
[16] *R. v. Bagadiong*, 2013 BCCA 538, at para. 39.

ii. the role or position of the defence counsel in initiating or concurring in the exclusion;

iii. whether any subjects discussed during the exclusion were repeated on the record or otherwise reported to the accused;

iv. whether any discussions in the accused's absence were preliminary in nature or involved decisions about procedural, evidentiary or substantive matters;

v. the effect, if any, of the discussions on the apparent fairness of trial proceedings; and

vi. the effect, if any, of the discussions on decisions about the conduct of the defence.

13. The question ultimately is whether the appellants suffered prejudice because of exclusion from a part of their trial that cannot be cured on appeal. Doherty J.A. has held that prejudice in the context of s. 686(1)(b)(iv) refers to prejudice to the accused's ability to properly defend himself and receive a fair trial, and prejudice in the broader sense of prejudice to the appearance of the due administration of justice[17]. A key marker of prejudice is the presence or absence of defence counsel at the part of the trial where the accused was excluded. Doherty J.A. holds that to the reasonable observer, defence counsel's presence ensures that the interests of the accused are fully protected and erases the appearance that the trial judge is engaged in private conversations concerning matters that are unknown to the accused[18].

14. We submit that an assessment of the *Simon* factors establishes sufficient prejudice to prevent the use of the proviso contained in s. 686(1)(b)(iv). This was a deliberate, rather than an inadvertent, exclusion from trial. Unlike the facts in *Simon*, defence counsel in this case did not initiate or concur in the exclusion, strenuously opposed it, and made its objection (continuously) known on the record.

15. None of the subjects discussed during the exclusion period were repeated on the record or otherwise disclosed to the appellants. The proceedings held in the appellants' absence were not preliminary in nature, but addressed substantive matters, specifically

[17] *R. v. Kakegamic*, 2010 ONCA 903, at para. 36.
[18] *Kakegamic*, at para. 41.

whether the sole eyewitness to the killings and shooter of three of the victims should be excluded from trial. This witness was not an informer and his testimony was not protected by informer privilege.

16. The effect of the *ex parte* hearing on the fairness of the trial proceedings engages two considerations. The first is s. 650(1). If the Court is considering the application of the proviso, then it has already found that there has been a breach of s. 650(1). Section 650(1) is a trial fairness provision and prejudice can be inferred from the accused's absence from his own trial. The second is *amici* overstepping its proper role as required under the jurisprudence, which also impacts on trial fairness.

17. The final *Simon* factor is the effect of the closed hearing on decisions about the conduct of the defence. We submit that contrary to what the Crown asserts in its factum, defence counsel did everything reasonably possible to gain access to "the room" and the appellants are not advancing arguments on appeal that should have been made at trial. The conduct of the defence was irreparably impaired by the enforced ignorance around the reasons for Person X's exclusion as a witness. Given that the appellants do not know the reasons behind this exclusion, it is completely unrealistic for the Crown to suggest that the onus was on the appellants, when the trial commenced, to apply to have Person X's testimony admitted through other means.

18. In its factum, the Crown adds two additional factors that it argues should bear on the applicability of the proviso in this case: the operation of informer privilege and the anticipated testimony of Person X. We have earlier addressed the Crown's submission that the trial judge followed all the correct procedures in addressing informer privilege in this *Reply Factum* and in *Joint Factum #1*. With respect to the Crown's argument that Person X's evidence was open and shut and would have overwhelmingly implicated the appellants in the murders, these are assertions rather than propositions that have been tested in court. No one can know how Person X would have withstood direct or cross-examination. No one can know what the trial judge's credibility and reliability assessments would have been of Person X's testimony. No one can measure what the

domino effect of findings about part or all of Person X's evidence would have been, on findings in relation to other Crown witnesses. It must be recalled that the trial judge strongly rejected the evidence of Michael Le, after he cut a deal with the Crown to testify against the appellants.

III. Reply Submissions on *Vetrovec*

19. The Crown argues that the appellants are simply inviting this Court to reassess the trial judge's findings of Person Y and K.M.'s credibility and reliability.[19] That is not accurate. The appellants have raised questions of law alleging that the trial judge improperly enhanced the *Vetrovec* witnesses' credibility because there was "no motive to fabricate"[20] or because there was no embellishment,[21] and in K.M.'s case, assessed the evidence uncritically and in a lopsided manner.[22]

20. The appellants have also alleged that the trial judge erred in law by incorrectly concluding that there was independent evidence that corroborated the *Vetrovec* witnesses *on material parts* of their testimony.[23] Although corroborative evidence need not directly implicate the accused, if a trial judge relies on corroborative evidence to rehabilitate the credibility of a *Vetrovec* witness, then that evidence must support the parts of the untrustworthy testimony that *are relevant to a fact in issue*.[24]

21. The Crown correctly asserts that a trial judge can accept the testimony of a *Vetrovec* witness without independent corroboration.[25] However, the trial judge in this case did *not* conclude that Person Y and K.M. gave truthful testimony in the absence of confirmatory evidence. Instead, *she relied on independent corroboration* to ground her

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[19] Respondent's Factum #1 at para. 76.
[20] *R. v. M.S.*, 2019 ONCA 869 at paras. 13 and 14.
[21] *R. v. Kiss*, 2018 ONCA 184 at para. 52.
[22] *R. v. Roth*, 2020 BCCA 240 at paras. 47 and 48; *R. v. Gravesande*, 2015 ONCA 774 at para. 19.
[23] See *R. v. Khela*, 2009 SCC 4 at paras. 11, 39-43.
[24] See *R. v. Calnen*, 2019 SCC 6 at para. 109: "To establish materiality, the evidence must be relevant to a *live* issue" (emphasis in original).
[25] Respondent's Factum #1 at para. 79.

credibility conclusions. For Person Y, the trial judge held that, "*[i]mportantly, Person Y's evidence is corroborated* in many respects by independent evidence, and I have accepted it on many of its essential points."[26] With respect to K.M., the trial judge also concluded that "there is evidence *from other sources* tending to show that K.M. is telling the truth in the material aspects of her testimony."[27] Thus, although a trier-of-fact may, in theory, rely on an unsavoury witness and convict in the absence of confirmatory evidence, the trial judge in this case did not do so. Accordingly, the trial judge was required to demonstrate a nexus between the purported corroborative evidence and *material* parts of Person Y and K.M.'s testimony.

22. There is no dispute that credibility findings are entitled to deference on appeal because credibility is a question of fact. However, where the trial judge's assessment of credibility is based on an erroneous legal principle or tainted by the misapprehension of a legal principle, that error of law is reviewable on the standard of correctness.[28] Furthermore, whether evidence is actually capable of corroboration is a question of law.[29]

23. The key fact in this case is that the trial judge relied on corroborative evidence before she could believe Person Y and K.M. If this Court finds that the trial judge misapplied this corroborative evidence to material aspects of Person Y and K.M.'s testimony, then her credibility findings would be tainted by legal error and no longer shielded by deference, especially since the evidence of the *Vetrovec* witnesses was essential to the convictions.

24. The Crown does not assert that the trial judge accepted the evidence of Person Y and K.M. without corroboration. To the contrary, the Crown accepts that the judge had

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[26] RFJ, para. 481 (emphasis added)
[27] RFJ, at para. 508 (emphasis added)
[28] *R. v. Paulos*, 2018 ABCA 433 at para. 16; *R. v. C.M.M.*, 2020 BCCA 56 at para. 139.
[29] *R. v. Rivera* (1974), 22 C.C.C. (2d) 105 (B.C.C.A.) at paras. 19 and 20.

significant reservations about the credibility of Person Y and K.M., and references the evidence which the judge relied upon as corroboration[30].

25. The appellants contend that the trial judge did not draw a connection between these areas of evidence and material aspects of the *Vetrovec* witnesses' testimony. The evidence relied upon as corroborative related to peripheral aspects of the evidence. The trial judge consequently fell into error. Ultimately the trial judge rehabilitated the witnesses through other impermissible lines of reasoning, such as the absence of motive to lie, or lack of embellishment, addressed in Joint Factum #1.

PART III – NATURE OF ORDER SOUGHT

26. The appellants ask this Court to set aside the convictions and order a new trial.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of September 2020.

Brock Martland, QC

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[30] Respondent's Factum #1, at para. 87 (Person Y) and at paras. 133-146 (K.M.)

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