Court of Queen's Bench of Alberta

Citation: R v MacNeil, 2022 ABQB 309

Date: 20220426
Docket: 191628577S1
Registry: Calgary

Between:

Her Majesty the Queen

Appellant

\- and -

Jacqueline MacNeil

Respondent

Memorandum of Decision
of the
Honourable Mr. Justice R.A. Jerke

Appeal of the Judgment by
The Honourable Judge M. Christopher

Dated the 21st day of October, 2021
(Docket: 191628577P1)

A. INTRODUCTION

[1] Trial fairness is critical in our system of justice. At what point does a trial become unfair due to lost evidence? That is the central issue in this appeal.

[2] The Respondent, who was self-represented at trial and during this appeal, contends that her ability to give full answer and defence and her right to a fair trial were irreparably harmed because an audio/video recorded interview between the Complainant and the investigating officer was never disclosed and inadvertently destroyed. She invokes s 7 and s 11(d) of the *Charter of Rights and Freedoms* (*Charter*), in particular the right to make full answer and defence and the right to a fair hearing.

[3] The trial judge agreed with the Respondent and directed a stay of proceedings. The Crown appeals the trial judge's decision.

[4] The appeal is granted. The stay of proceedings is vacated, and the matter is returned to the trial judge to complete the trial.

B. SUMMARY OF RELEVANT EVIDENCE

[5] Evidence regarding the missing audio/video recording was adduced at trial and during a *Charter voir dire*. The relevant evidence came from two Crown witnesses, and from the Respondent.

[6] The trial judge applied the evidence from the trial proper to the *voir dire*, even though no specific agreement or application to do so was made. The trial judge made no reviewable error in proceeding in this manner. The form of which a *voir dire* takes rests with the discretion of the trial judge: ***R v Kematch***, 2010 MBCA 18 at para 43.

[7] This *voir dire* occurred, by consent, after the Crown closed its case on the trial proper. During the *voir dire*, the trial judge specifically inquired as to "what, if any, additional evidence needed to be considered with respect to [the Respondent]'s applications." The Crown called Det. Keagan on the *voir dire*. The Crown explained that even though in the trial proper Det. Keagan was asked some questions with respect to lost evidence, those questions were not perhaps as fulsome as necessary, and since those questions were not asked in the context of a *voir dire*, in terms of procedure, it was most prudent to have him give that evidence in the *voir dire*. During *voir dire* arguments, both the Crown and the Respondent referred to some of the trial evidence.

[8] It was clear that all parties assumed that the evidence from the trial proper was being applied to the *voir dire* even though no formal application was made or contemplated.

1. The *Voir Dire* Evidence

[9] Det. David Keagan was the lead investigator for this matter. Det. Keagan had two face-to-face meetings with the Complainant. The second, which occurred on November 18, 2019, ("the interview") is the meeting of concern in this appeal.

[10] Det. Keagan met with the Complainant at the Calgary Police Service (CPS). The interview lasted about 20 minutes. The room in which the interview was conducted automatically audio and video recorded what happened in that room. Those audio/video recordings were retained on the CPS server for 13 months. After that point, the recordings were automatically overwritten. Det. Keagan did not take steps to download a copy of the audio/video recording of the interview. However, on November 19, 2019, he made electronic notes about what had occurred. The notes stated the following:

> At 1602 hour, I interview [the complainant] at the DCU softroom, located at WW-W. The following is a summary of that interview:

- Is willing to pursue court and testify if needed
- Would like the chance to have mediation with Sean and Jacki and express her the grief she caused her
- Doesn't think that Jacki will go through with it.
- Has concerns of retaliation by Jacki:
    - o Afraid that Jacki can find out about where she is living now – follow her home and cause her harm (previous history of her following other people that Sean was involved with).
    - o Afraid that Jacki will cause her grief in her recruiting application
    - o Afraid that Jacki still has friends at EMS that could disclose to her – schedule, position, personal details
- Confirmed that there has been no contact since nov of 2018 and doesn't expect any
- Thinks that Sean tried to connect with her via Instagram
- Is worried that if Jacki gets away with her behaviour, then it will only embolden her to keep being a horrible person. Mentioned Shannon being subject to her abuse as well.
- Concerned that Sean is the catalyst for most of the troubles and yet nothing ever seems to happen to him, he can do no wrong to jacki, and yet he's just as bad.

[11] Det. Keagan's notes were disclosed in the initial disclosure package from CPS directly to the Respondent on February 7, 2020. The Respondent subsequently retained counsel, who also downloaded the disclosure package that contained Det. Keagan's notes on February 12, 2020. That counsel was granted leave to withdraw on December 23, 2020. Neither the Respondent nor her counsel made any requests for further disclosure until January 22, 2021. At that point, the Respondent was self-represented and contacted the Crown directly. After some back-and-forth between the Respondent and the Crown, and the Crown and Det. Keagan, it was determined that there was an audio/video recording made of the interview, but Det. Keagan never downloaded it from the server, and it had subsequently been overwritten.

[12] Det. Keagan testified as to the nature of the interview with the Complainant. He received charge approval from the Crown in November 2019. Since it had been about a year since the initial complaint, Det. Keagan wanted to touch base with the Complainant to make sure that she still wanted to proceed with charges and was still willing to go to court and testify. During that interview with the Complainant, there was no discussion regarding the substance of the allegations, aside from some commentary by the Complainant about her fears regarding the Respondent. The notes he made were an accurate reflection of what had been discussed during the interview. Det. Keagan did not think the audio/video recording of the interview was relevant to download because he and the Complainant did not discuss the case, and only canvassed whether the Complainant was interested in proceeding. Det. Keagan had formed reasonable and probable grounds to believe an offence had occurred prior to the interview and did no follow-up investigations as a result of the interview.

[13] During cross-examination, Det. Keagan agreed that his notes indicated that the Complainant told him that she was willing to do mediation. Det. Keagan agreed that in the interview, the Complainant told him that she had offered mediation to the Respondent, but that the offer was denied. That information was not included in Det. Keagan's notes.

[14] The Respondent testified that she only received Det. Keagan's notes and did not ever receive an audio/video recording of the interview. Because she was a CPS officer, the Respondent was aware of the room in which the interview took place and knew that automatic audio/video recordings were made. She stated that as a police officer, she does not get to decide what gets disclosed to the Crown, and she must submit everything that is gathered in an investigation. The Respondent testified that she did not ever receive an offer of mediation from the Complainant or Det. Keagan.

[15] During cross-examination, the Respondent agreed that the only discrepancy in the evidence related to the issue of mediation. She also agreed that she received notes about the interview in disclosure, that she first requested disclosure on January 16, 2020, but did not request the audio/video recording of the interview until January 2021 because she did not look at her disclosure until a month before trial. She also confirmed that during cross-examination of the Complainant there was the following exchange:

> Q: Then why did you tell Detective Keagan that you did ask me [about mediation] and it was declined?
>
> A: I don't recall that was the way the conversation went. I said to Detective Keagan I would be willing to do mediation before this point, but because she is continuing on, I don't think that's going to be a not - - feasible, like, it wouldn't work with the point that we're at, so I'm not willing to do that at this point.

2. The *Voir Dire* Arguments

[16] The Respondent argued: 1) it is not up to the officer or the Crown to decide what is relevant evidence; 2) the audio/video recording of the interview was relevant to the Respondent's ability to make full answer and defence; and 3) Det. Keagan did not take reasonable steps to preserve that evidence. The focus of the Respondent's argument related to the issue of mediation. The Respondent had three reasons as to why the audio/video recording of the interview was relevant: 1) if the Complainant had wanted to do mediation, the Respondent would have agreed; 2) if the Complainant was willing to do mediation, the Complainant's fear regarding the Respondent would have been proven false; and 3) the inconsistencies in the evidence of Det. Keagan and the Complainant as it related to mediation was relevant to an analysis of their credibility.

[17] The Crown argued that because the audio/video recording of the interview never existed independently of the CPS servers, this situation was akin to a conversation in a room that isn't being recorded where the officer makes notes about what occurred. Alternatively, the loss of the audio/video recording of the interview has not deprived the Respondent of her ability to make full answer and defence. The Crown asserted that the Complainant's willingness to do mediation or the Complainant's subjective fear of the Respondent as of November 2019 were "red herrings," as neither related to the elements of the offences for which the Respondent had been charged.

[18] In terms of credibility, the Crown contended that much of its case involved emails and text communications that supported evidence from the Complainant that she was fearful of the Respondent. The Crown argued that there was no clear inconsistency between Det. Keagan's notes, his evidence at trial regarding what the Complainant said to him about mediation, and what the Complainant said at trial. Even if the Court found that there were inconsistencies, the

Respondent had the opportunity to cross-examine both Det. Keagan and the Complainant on the inconsistencies. As such, there was no interference with the Respondent's right to a fair trial.

3. The *Voir Dire* Decision

[19] The trial judge identified the main issue to be one of failure by Det. Keagan to properly preserve evidence. The trial judge articulated the issue as follows:

> [T]he issue here is whether the failure of the Calgary Police Service to preserve the audio/video recording of an interview between a member of the CPS and the Complainant is a breach of the accused's right to make full answer and defence, contrary to section 7 of the *Charter of Rights and Freedoms*. If so, the question for me is what is the appropriate remedy?

[20] The trial judge found that there was no evidence about why the Respondent or her counsel failed to request the audio/video recording of the interview but agreed with the Respondent that the lost evidence was potentially relevant to her case. The trial judge determined that the audio/video recording of the interview could have been useful to the Respondent's cross-examination. The trial judge drew this conclusion on the basis that the Respondent and the father of the Respondent's children (referred to by the trial judge as "Mr. X") are both police officers with whom Det. Keagan worked. That being the case, Det. Keagan may have improperly influenced the Complainant based on his personal knowledge of the two officers. Additionally, the audio/video recording of the interview would have been useful in testing the Complainant's willingness to do mediation against the Complainant's evidence about her subjective fear of the Respondent. The trial judge further determined that the audio/video recording would have been useful in countering the suggestion that the Respondent declined to participate in mediation, and in exploring the inconsistency in Det. Keagan's notes on that point.

[21] The trial judge found that the Respondent's s 7 *Charter* rights were infringed and was concerned about the integrity of the justice system as a result. The trial judge emphasized that no steps were taken by CPS to preserve evidence in the face of an impending trial. The trial judge focused on the fact that the trial dates were set on June 11, 2020, which was still within the 13-month retention period to access the audio/video recording of the interview, and that the impending trial heightened the obligation by Crown and police to preserve evidence.

[22] The trial judge found that there was no evidence of deliberate destruction of evidence. Rather, Det. Keagan misapprehended the concept of relevance, did not consider the matter carefully enough, and through inadvertence or negligence failed to preserve the audio/video recording by downloading it. The trial judge accepted that the relevance of the disclosure was not immediately apparent to Det. Keagan at the time of the interview, but in the context of the events, it was potentially relevant to the Respondent, so it should have been preserved and disclosed. The trial judge held that while she did not find the 13-month window for overwriting audio/video too short, she did find it was 'problematic' to fail to take steps to preserve a recording when there is ample time to do so within that time frame and it was clear that the matter was headed to trial. The trial judge found it an untenable proposition that the failure on the part of an accused to request some part of disclosure can absolve the Crown or officers of the Crown from making full disclosure.

[23] The trial judge concluded that there was an unacceptable degree of negligence on Det. Keagan's part with no satisfactory explanation for failing to download the audio/video recording

of the interview with a trial pending. As a result, the trial judge found that the Respondent's *Charter* rights were breached, and a stay of proceedings was the only remedy.

C. ISSUES

[24] Determination of this appeal requires consideration of three questions:

1) Did the trial judge err in finding that Det. Keagan's failure to download the audio/video recording of the interview amounted to unacceptable negligence?
2) Did the trial judge err in failing to consider the Respondent's lack of diligence in pursuing disclosure?
3) After finding a breach of the Respondent's *Charter* rights, did the trial judge err in finding that the only remedy was a stay of proceedings?

D. THE LAW

1. Standard of Review

[25] Questions of law are reviewed on a standard of correctness. Findings of fact and the inferences drawn from them are reviewed on a standard of palpable and overriding error: ***Housen v Nikolaisen,*** 2002 SCC 33 at paras 8, 10, and 23. The application of the law to a given factual matrix, that is, whether a legal standard is met, amounts to a question of law and attracts a correctness standard: ***R v Shepherd***, 2009 SCC 35 at paras 18 – 20; ***R v Le***, 2019 SCC 23 at para 23.

2. Lost Disclosure and Remedy

[26] Several Supreme Court of Canada and Courts of Appeal cases have articulated a number of factors when considering lost disclosure, the effect on trial fairness, and potential remedies in the face of a s 7 *Charter* breach:

1. The Crown must disclose all relevant information in its possession, whether inculpatory or exculpatory, and whether the Crown intends to rely on it or not: ***R v Stinchcombe***, [1991] 3 SCR 326.
2. The Crown's duty to disclose gives rise to an obligation to preserve relevant evidence: ***R v Egger***, [1993] 2 SCR 451 at p. 472.
3. Relevance is both relative and contextual: ***R v Jackson,*** 2015 ONCA 832 at paras 122 – 123.
4. Relevance is a low threshold and includes material that may have only marginal value to the ultimate issues at trial. Information is relevant if it is reasonably capable of affecting the accused's ability to make full answer and defence, whether in meeting the case for the Crown, advancing a defence, or otherwise in making a decision that may affect the conduct of the defence: ***R v Dixon***, [1998] 1 SCR 244 [***Dixon***] at para 22.
5. There is no absolute right to have originals produced. It is the information contained in the statement that must be disclosed, not the original statement itself. The Crown's obligation to provide disclosure does not extend to repeating the same disclosure in

different formats according to defence counsel's preference: ***R v Stinchcombe***, [1995] 1 SCR 754 at para 2; ***R v JEK***, 2016 ABCA 171 at para 38.

6. If evidence is lost or destroyed, the Crown must explain its absence. If the explanation satisfies the trial judge that the evidence has not been lost or destroyed owing to unacceptable negligence, the duty to disclose has not been breached. Where the Crown is unable to satisfy the trial judge in that regard, it has failed to meet its disclosure obligations and the accused's rights under s 7 of the *Charter* have been breached: ***R v La,*** [1997] 2 SCR 680 [***La***] at paras 20 – 21.

7. "Unacceptable negligence" has a greater degree of fault than mere negligence: ***R v Dessouza***, 2012 ONSC 465 at para 107.

8. In order to determine if there has been unacceptable negligence, the Court should analyze the circumstances surrounding the loss of the evidence:

    a. The Crown and police must take reasonable steps in the circumstances to preserve the evidence for disclosure: ***La*** at para 21;

    b. The relevance of the evidence as it was perceived at the time is an important factor. As the relevance increases, so does the degree of care for its preservation that is expected: ***La*** at para 21;

    c. A failure to produce evidence may be found to be an abuse of process if the conduct leading to the destruction of evidence was deliberately for the purpose of defeating the disclosure obligation: ***La*** at para 26; ***R v Carosella***, [1997] 1 SCR 80 [***Carosella***] at para 56.

9. Just as the Crown's disclosure obligations are ongoing, an accused must be duly diligent in pursuing disclosure. To do nothing in the face of knowledge that relevant information has not been disclosed will often justify a finding of lack of due diligence and may support an inference that failing to pursue disclosure was a strategic decision: ***Dixon*** at para 55.

10. An accused's failure to seek additional disclosure may undermine any assertion of relevance. For a remedy to be granted, it is not sufficient for the accused to speculate that the missing disclosure is "possibly relevant": ***R v Way***, 2022 ABCA 1 at paras 53 – 56.

11. If the accused establishes a breach of the Crown's duty to disclose, the accused must establish actual prejudice to his or her right to make full answer and defence in order to be entitled to a remedy under s 24(1) of the *Charter*, which includes a stay of proceedings: ***R v O'Connor***, [1995] 4 SCR 411 at para 74.

12. The trial judge must assess the degree of prejudice and any measures taken to minimize the prejudice before making a ruling. This decision should not be made before hearing all of the relevant evidence in order to determine if the prejudice was real or minimal: ***R v B(DJ)*** (1993), 16 CRR (2d) 381 at 382 (Ont CA); ***La*** at para 27.

13. If there has been a failure to disclose or an abuse of process, a stay of proceedings is appropriate in only the rarest of cases. The consequences of the lost evidence must be so prejudicial to the accused's ability to make full answer and defence that it impairs the accused's right to a fair trial: ***La*** at para 25; ***Carosella*** at paras 76 - 80.

14. A fair trial does not mean the most advantageous trial possible from the accused's point of view. A fair trial is one which satisfies the public interest in getting at the truth while preserving basic procedural fairness for the accused: ***R v Lyons***, [1987] 2 SCR 309 at p. 362.
15. If the accused's right to disclosure has been breached, but the trial process was fundamentally fair and there was no reasonable possibility that the result at trial would have been different had the undisclosed material been produced, a new trial should not be ordered: ***Dixon*** at para 24.

E. ANALYSIS

1. Did the trial judge err in finding that Det. Keagan's failure to download the audio/video recording of the interview amounted to unacceptable negligence?

[27] The trial judge made an error of law in her assessment that Det. Keagan was unacceptably negligent in failing to download the audio/video recording of the interview with the Complainant. The audio/video recording of the interview was only marginally relevant, and the interview was substantially disclosed through Det. Keagan's notes. The trial judge's conclusions about the potential usefulness of the audio/video recordings were speculative and based on negligible inconsistencies. The Respondent had the opportunity to cross-examine both Det. Keagan and the Complainant at trial on the inconsistencies.

a. Relevance

[28] Throughout her reasons, the trial judge used the phrase "could have been useful to [the Respondent] in cross-examination" and that it was "potentially relevant to the [Respondent]" when referring to the audio/video recording of the interview. The trial judge specifically declined to make a finding on whether the audio/video recording of the interview would have afforded the defence that the Respondent was attempting to put forward.

[29] The trial judge considered what the Respondent perceived as inconsistencies between the interview notes and the evidence given by Det. Keagan and the Complainant. With respect to Det. Keagan, the trial judge made the following findings:

- Det. Keagan had personal knowledge of both the Respondent and Mr. X, both of whom were CPS officers.
- Det. Keagan was aware that the Respondent had been investigated for her behaviour towards individuals who had previously been in relationships with Mr. X. Knowing this information, Det. Keagan advised the Complainant that the Respondent could potentially reach out and interact with the Complainant.
- Det. Keagan may have improperly influenced the Complainant based on his personal knowledge of the Respondent and Mr. X, and of matters about which the Complainant was unaware.
- Det. Keagan's notes about the interview were inaccurate with regards to the fact that the Respondent had been asked and declined to participate in mediation.

[30] With respect to the Complainant, the trial judge made the following findings:

- The Complainant indicated in the interview that she was willing to do mediation.

- The Complainant's indication that she was willing to do mediation could have been used to test the Complainant's assertion that she had some fear of the Respondent.

[31] As concerns disclosure, relevance is a low threshold. I agree with the trial judge that the audio/video evidence, in light of all the circumstances, including the evidence at trial and on the *voir dire*, could have been useful. But the Respondent's assertion that because the Complainant agreed to mediation, the Complainant was never fearful of the Respondent is not the only inference available on the facts. The audio/video recording of the interview would have done nothing to advance that inference. During cross-examination, the Complainant admitted that she had been willing to do mediation with the Respondent early on, but by the time of the interview did not think it was feasible. Given that admission, the argument as to the inference suggested by the Respondent was available to the Respondent in any event.

[32] The trial judge concluded that because the Respondent regarded these things as exculpatory, they had a real connection to the events in question and were therefore relevant. This is an error in reasoning. Relevance is not determined solely by the subjective view of one party or the other. Neither is that subjective view of relevance solely determinative of whether there has been unacceptable negligence.

b. Information Substantially Disclosed

[33] The trial judge erred in law in concluding that Det. Keagan's notes were insufficient to satisfy the Crown's disclosure obligation regarding the interview. The trial judge found that the day after the interview, Det. Keagan made notes regarding the contents of the interview, which were disclosed to the Respondent on February 7, 2020, after the Respondent's initial disclosure request. Det. Keagan testified that the notes were an accurate reflection of what occurred in the interview with the Complainant. Other than the inconsistency identified regarding the Respondent being asked to participate in mediation, the accuracy of Det. Keagan's notes was not challenged. The fact that the notes did not include anything about the Complainant having asked the Respondent to participate in mediation does not mean that the information from the interview was not properly disclosed. No will-say statement by a witness can capture every detail which the witness knows or would say if asked a thousand questions: ***R v Dias,*** 2010 ABCA 382 at para 40.

c. Inconsistencies

[34] The trial judge found there were significant inconsistencies between Det. Keagan's notes about the interview and the evidence at trial. The only true inconsistency surrounded the issue of mediation being offered to the Respondent. Specifically, Det. Keagan's notes indicate that the Complainant was willing to do mediation but did not think that the Respondent would go through with it. During cross-examination, Det. Keagan indicated that during the interview, the Complainant told him that she had offered mediation to the Respondent, but the Respondent had declined.

[35] The Complainant testified in the trial proper that she had been willing to do mediation and mediation was talked about at the interview.

[36] The discrepancy between Det. Keagan's notes and his evidence on this point is not significant. While it would be considered in a credibility analysis, it may not be of much weight given its lack of relationship to any of the core issues in this case.

d. Unacceptable Negligence

[37] The legal standard for unacceptable negligence applied to the facts is a question of law that attracts a standard of correctness on review. Based on the facts found by the trial judge, the legal standard for unacceptable negligence was not met and the trial judge erred in law when she came to that conclusion.

[38] As it relates to negligence, the trial judge found the following: 1) the CPS retention period for video storage was not too short; 2) there was no evidence of wilful or deliberate destruction of evidence; and 3) there was no evidence of improper motive. Rather, the trial judge found that Det. Keagan "misapprehended the concept of relevance," and "through inadvertence or negligence, failed to preserve the [audio/video] recording by downloading it." The trial judge held that "it is problematic...to fail to take steps to preserve a recording when there is ample time to do so within that time frame and it is clear that the matter is headed to trial."

[39] Det. Keagan perceived that the audio/video recording of the interview was not relevant because the substance of the allegations was not discussed with the Complainant. Det. Keagan made notes of the interview which were preserved and disclosed early in the proceedings. Possible inconsistencies between the evidence at trial and in Det. Keagan's notes about matters only peripherally related to the core allegations could not be known until the trial. Det. Keagan's perception of the relevance at the time of the interview was reasonable and remained so until the Respondent requested the audio/video recording after it had already been overwritten.

[40] The audio/video recording was preserved for 13 months, and nothing was actively done to destroy it. It was simply overwritten in the normal course.

[41] The Respondent's request to produce the audio/video recording may have changed the perception of relevance. However, the fixing of the trial date and a pending trial do not. The Crown's disclosure obligations do not become enhanced merely because an accused has exercised his or her constitutional right to a trial, nor are they diminished if an accused chooses to resolve the matter without a trial. The Crown attempted to fulfill the Respondent's request, but by the time the request came, the audio/video recording had been overwritten.

[42] Unacceptable negligence has a greater degree of fault than mere negligence. These facts, if they show negligence at all, fall far short of establishing unacceptable negligence.

2. Did the trial judge err in failing to consider the Respondent's lack of diligence in pursuing disclosure?

[43] The trial judge made an error of law in determining that it was an untenable proposition that the Respondent's lack of diligence in seeking out disclosure absolved the Crown or officers of the Crown from making full disclosure. By February 2020, within two months of being charged, the Respondent had information from Det. Keagan's notes that an interview with the Complainant had been conducted in a room that had automatic audio/video recording. Although the trial judge did not refer to it, there is evidence that the Respondent herself was aware of that room, its recording capabilities, and CPS retention policy. The Respondent failed to take any steps to obtain the audio/video recording of the interview, either herself or through counsel, until the retention window had passed.

[44] On June 11, 2020, the Respondent's counsel set trial dates for February 2021 but counsel withdrew on December 23, 2020. The Respondent confirmed that she was ready to proceed to trial on January 14, 2021 and did not request disclosure of the audio/video recording of the

interview until January 22, 2021. There was no evidence about the circumstances as to why the Respondent's counsel or the Respondent herself did not request disclosure of the audio/video recording of the interview even though it was referenced in the initial disclosure package.

[45] The trial judge recognized that the Respondent (and her counsel while retained) did not request the audio/video recording of the interview. However, the trial judge concluded that because there was unacceptable negligence on the part of police for failing to preserve relevant evidence, the Respondent's lack of diligence was irrelevant. The trial judge erred in law in coming to this conclusion.

[46] Given the timeline for when disclosure of the existence of the interview was made, the Respondent's special knowledge regarding the capacity for the room in which the interview was held to automatically audio/video record, and the timing of the Respondent's request for that recording, it is reasonable to find that the Respondent was negligent in pursuing disclosure, or to infer that she made a strategic choice to not pursue it until she knew it would be lost. Either way, this is relevant to the analysis, and the trial judge erred in failing to consider it.

3. After finding a breach of the Respondent's *Charter* rights, did the trial judge err in finding that the only remedy was a stay of proceedings?

[47] The trial judge made an error of law in directing a stay of proceedings. The trial judge erred in finding that there had been a breach of the Respondent's s 7 *Charter* rights. Even if there was a breach, this is not the 'clearest of cases' where a stay would be appropriate. The Respondent was not so prejudiced by the lost audio/video recording that she was unable to make full answer and defence. The Respondent can still receive a fair trial even though the audio/video recording of the interview has been lost.

a. No Breach of the Respondent's *Charter R*ights

[48] In my reasons above, I conclude that the trial judge erred in law in finding 1) that there was unacceptable negligence by police in failing to preserve the audio/video recording of the interview; and 2) that the Respondent's lack of diligence was irrelevant. As a result, the trial judge erred in law in finding a breach of the Respondent's s 7 *Charter* rights.

b. No Stay of Proceedings Warranted

[49] If I am wrong in my analysis of the trial judge's reasoning on the issue of whether the Crown/police breached their disclosure obligations by failing to preserve the audio/video recording of the interview, this is not the clearest of cases that would warrant the extraordinary remedy of a stay of proceedings. The trial judge erred in concluding that was the case. There are other remedies available under s 24(1) of the *Charter*, including (but not limited to) exclusion of evidence, a reduction of sentence, or no remedy. None of these were explored by the trial judge.

[50] The Respondent is still able to make full answer and defence without the audio/video recording of the interview. While the audio/video recording of the interview may have been "useful" to the Respondent in cross-examination, the fact that it was not available does not mean that the Respondent cannot receive a fair trial. A fair trial does not mean the most advantageous trial possible from the Respondent's point of view. The Respondent has sufficient information about the interview from Det. Keagan's notes and the *viva voce* evidence of both Det. Keagan and the Complainant, and they were both available for cross-examination. The interview did not contain any new information regarding the allegations other than reference to ways in which the

Complainant felt fearful of the Respondent, and information surrounding mediation. There is no suggestion by Det. Keagan that the Complainant was being untruthful in the interview.

[51] In ***La***, an officer made a 45-minute audio recording of one of the conversations with the victim, which included information that was subsequently used to investigate the accused. The recording was not made for the purposes of a criminal investigation, but for a secure treatment application for the victim who was a runaway teen. The officer made handwritten notes regarding the victim's date of birth, address, and phone numbers, but no details about the interview that he recorded. The officer testified about the contents of the recording in the secure treatment application, which included the fact that the victim told him "a few lies". The officer never provided the recording to the detectives who subsequently investigated the charges against the accused, nor was he involved in the criminal investigation of the accused. By the time of the preliminary inquiry, the recording was lost. The officer provided an explanation, which included the fact that he did not think the conversation was particularly detailed, and that it had gotten lost after a traumatic incident involving the officer.

[52] The Court found the officer's explanation to be satisfactory and determined that there was no unacceptable negligence, nor did the loss of the recording amount to an abuse of process. The accused was still able to make full answer and defence because the victim provided four additional statements to police, and both she and the officer were available for cross-examination. The Court found that the lost recording, which involved actual information about criminal activity, did not impair the accused's ability to make full answer and defence.

[53] If the circumstances in ***La*** do not rise to the level of prejudice to the accused's ability to make full answer and defence, I cannot see how the circumstances in this case, which are much less serious, can rise to that level.

F. REMEDY

[54] Since the trial judge directed a stay of proceedings, there was never a verdict rendered. As such, the appropriate remedy is to remit the matter back to the trial judge to complete the trial. While this remedy is unusual, there is significant legal authority that allows for it.

[55] Section 822(1) of the *Criminal Code of Canada,* RSC 1985, c C-46, (*CC*) gives a summary conviction appeal court authority to apply sections 683 – 689 *CC* to a summary conviction appeal. The relevant sections that apply to this case are:

> 686(4) If an appeal is from an acquittal...the court of appeal may
>
> (b) allow the appeal, set aside the verdict and
>
> (ii) ...remit the matter to the trial court and direct the trial court to impose a sentence that is warranted in law.
>
> ...
>
> 686(8) Where a court of appeal exercises any of the powers conferred by subsection (2), (4), (6) or (7), it may make any order, in addition, that justice requires.

[56] In ***R v Yelle,*** 2006 ABCA 160 [***Yelle***], the Crown appealed an order directing a judicial stay because of a violation of s 11(b) of the *Charter* for unreasonable delay. The Court allowed the appeal, overturned the judicial stay, and returned the matter for a continuation of the trial.

[57] This remedy was endorsed by the Supreme Court in ***R v Bellusci*****,** 2012 SCC 44 [***Bellusci***] at paras 34 – 37 and 40:

> [34] ... It is well established that an "acquittal" in [the context of s. 684(4) *CC*] includes a stay of proceedings, since it brings the proceedings to a final conclusion in favour of the accused: ***R v Jewitt,*** [1985] 2 SCR 128.
>
> ...
>
> [36] Understandably, the phrase "in addition" [in s. 686(8) *CC*] has been thought to connote that a court of appeal, in setting aside an acquittal or stay of proceedings, may make an order under s. 686(8) only if it substitutes a conviction or orders a new trial – its only powers explicitly conferred by s. 686(4).
>
> [37] However, in ***R v Hinse,*** [1995] 4 SCR 597, Lamer C.J. held that s. 686(8) must be given a large and liberal interpretation consistent with its "broad remedial purpose" (para 30; see also ***R v Provo,*** [1989] 2 SCR 3 at p. 20). And, although the Chief Justice considered that s. 686(8) orders are "fundamentally ancillary and supplemental" (para 31), he nonetheless held that "a court of appeal may enter an order under its residual power even if the court of appeal has not previously independently 'exercise[d] any of the powers conferred by subsection (2), (4), (6) or (7)' of s. 686" (para 30). This solution was adopted by the Alberta Court of Appeal in ***R v Yelle***, 2006 ABCA 276.
>
> ...
>
> [40] Accordingly, s. 686(8), which allows "any order...that justice requires", authorizes an appellate court to order the continuation of a trial – but only where continuation of the trial is what "justice requires" in the particular circumstances of the case. Manifestly, an order under s. 686(8) must not be at variance with the underlying judgment: ***R v Thomas***, [1998] 3 SCR 535 at para 17.

[58] The Court in ***Bellusci*** determined that an order for a continuation of the trial in front of the original trial judge can properly be made only where the interests of justice require it, where there is no undue prejudice to the parties, and where no unfairness would result. The appeal court should take into account efficiency of court resources, the witness' time, the cost to the parties, and whether there would be any prejudice to the parties or the administration of justice in allowing the trial to continue: ***Yelle*** at paras 17 – 18. Where resumption of the interrupted proceedings proves to be impractical or unfair, a new trial should be ordered: ***Bellusci*** at paras 42 – 43.

[59] In ***R v Hunter,*** 2015 ABCA 276, the Court overturned the trial judge's finding that the offender was a dangerous offender and remitted the matter back to the trial judge for a re-hearing on the appropriate sentence to be imposed. In the companion case of ***R v Hunter,*** 2015 ABCA 329 at para 4, the Court clarified that, unless the Court has concerns about returning the matter to the same judge, the presumption of judicial integrity applies: ***R v Dias***, 2011 ABCA 6 at para 1; ***L(T) v Alberta,*** 2015 ABCA 368 at para 35.

[60] In this case, the trial judge heard a significant amount of evidence over several days, and significant judicial and court resources have already been put into this matter. There was no decision by the trial judge on the merits. I do not see any prejudice to the parties or to the administration of justice by allowing the trial to continue.

[61] The Respondent is self-represented which is a factor to keep in mind when ensuring trial fairness.

[62] Pursuant to my residual authority in s. 686(8) *CC*, I am directing that the trial judge allow the Respondent to re-open her case to determine if she wishes to call evidence or apply to further cross-examine the Complainant or Detective Keagan. This ancillary order is what justice requires to ensure fairness to the Respondent given that there was some potential for confusion about whether the respondent closed her case prior to the *Charter* application.

G. CONCLUSION

[63] For the reasons above, the appeal is allowed, the stay is vacated, and the matter is remitted back to the trial judge to complete the trial, with a direction that the Respondent be allowed to re-open her case.

Heard on the 11th day of March, 2022.
Dated at the City of Edmonton, Alberta this 26th day of April, 2022.

R.A. Jerke
J.C.Q.B.A.

Appearances:

Michael Dunn and Rayne Thompson
for the Appellant

Jacqueline MacNeil
for the Respondent