

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Fox*,
2022 BCCA 403

Date: 20221122
Docket: CA47391

Between:

Rex

Respondent

And

Patrick Henry Fox

Appellant

Before: The Honourable Madam Justice Stromberg-Stein
The Honourable Mr. Justice Hunter
The Honourable Madam Justice Horsman

On appeal from: Orders of the Provincial Court of British Columbia, dated
November 26, 2020 (conviction) and April 12, 2021 (sentence)
(*R. v. Fox*, Vancouver Docket 244069-7-B).

Oral Reasons for Judgment

The Appellant, appearing in person:

P.H. Fox

Counsel for the Respondent:

D.M. Layton, K.C.

Place and Date of Hearing:

Vancouver, British Columbia
November 22, 2022

Place and Date of Judgment:

Vancouver, British Columbia
November 22, 2022

Summary:

Mr. Fox has appealed his convictions by Judge Phillips and Judge Rideout, which appeals will be heard on Friday November 25, 2022. With respect to the Rideout conviction, Mr. Fox asserts breach of disclosure obligations and/or abuse of process by ad hoc trial Crown counsel and will seek leave to adduce new evidence, including his multiple affidavits, Crown counsel's affidavits, transcripts of proceedings, and Crown disclosure. Mr. Fox applies for leave to cross-examine Crown counsel on his affidavits on eight topics, which Mr. Fox alleges demonstrate a number of discrepancies between his own affidavits and evidence of the actual events. Application denied. It is not in the interests of justice to grant the extraordinary remedy of leave to cross-examine trial Crown counsel. There is no reasonable possibility that cross-examination on any of the eight proposed topics will produce meaningful evidence to assist the Court in determining the issues in dispute on the appeal.

[1] **STROMBERG-STEIN J.A.:** These are reasons of the Court with respect to Mr. Fox's application to cross-examine trial Crown counsel.

[2] In 2017, a jury found Patrick Fox guilty of criminally harassing his former spouse and of being in possession of firearms in an unauthorized place. Underlying his conviction was his creation of a website in the name of his former spouse, which was designed to denigrate, humiliate and intimidate her, and which contained private information about her family, friends, and associates. On November 10, 2017, now Associate Chief Justice Holmes sentenced him to a period of incarceration plus three years' probation (the "Holmes Order"). The Holmes Order prohibited Mr. Fox from publishing, disseminating, or making publicly available any information about Mr. Fox's ex-wife. It required him to remove the website from public accessibility within 24 hours of his release from custody. Mr. Fox was released on December 30, 2018, and the Holmes Order came into effect.

[3] In March 2019, the Crown became aware that a website was being hosted in the name of his ex-wife under a new domain, which contained the same information as the original website, plus disclosure and transcripts from the jury trial. On April 4, 2019, Mr. Fox was charged with breaching the Holmes Order.

[4] On August 19, 2020, Judge Phillips convicted Mr. Fox of breaching the Holmes Order and sentenced him to six months' incarceration and six months'

probation (the “Phillips Order”). The Phillips Order included a condition that required Mr. Fox to take down the website within 48 hours of his release from custody. On August 20, 2020, Mr. Fox was released from custody and the Phillips Order came into effect.

[5] On September 17, 2020, Mr. Fox was charged with breaching the Phillips Order for failing to take down the website. On November 26, 2020, Judge Rideout convicted Mr. Fox of breaching the Phillips Order by failing to take down the website and sentenced him to one year of incarceration and one year of probation on the same terms.

[6] Mr. Fox has appealed his convictions by Judge Phillips and Judge Rideout, which appeals will be heard on Friday November 25, 2022.

[7] With respect to the Rideout conviction, Mr. Fox grounds part of his appeal on assertions of breach of disclosure obligations and/or abuse of process by Chris Johnson K.C., the *ad hoc* trial Crown counsel. Mr. Fox will seek leave to adduce new evidence, including his multiple affidavits, transcripts of proceedings, and Crown disclosure.

[8] By amended notice of application, filed September 9, 2022, Mr. Fox applies to this Court for leave to cross-examine Mr. Johnson on his Affidavit #1, affirmed May 19, 2022, filed by respondent Crown in response to Mr. Fox's affidavits and materials. On October 31, 2022, the Crown filed Mr. Johnson's Affidavit #2, responding to new points raised in Mr. Fox's third affidavit, filed August 11, 2022.

[9] Generally, Mr. Fox grounds his application to cross-examine on eight topics on what he alleges are a number of discrepancies between Mr. Johnson's affidavit and his own affidavit and evidence of the actual events. He also alleges Mr. Johnson has a proven, documented history of lying to the court on the record in his proceedings.

[10] The Crown opposes the application for leave to cross-examine Mr. Johnson on the basis there is no reasonable possibility that cross-examination on any of the

eight proposed topics will produce meaningful evidence to assist the Court in determining the issues in dispute on the appeal.

[11] The law applicable to the issue of whether to grant leave to cross-examine is summarized in *R. v. Mehl*, 2020 BCCA 344 [*Mehl* 2]:

[12] We turn next to the applications of the parties for leave to cross-examine certain witnesses at the hearing of the appeal. Our jurisdiction to permit the proposed cross-examinations is found in s. 683(1)(b) of the *Code*. That section provides that such an order may be made in relation to a witness who would have been a compellable witness at trial where the court considers that it is in the interests of justice to do so. Cross-examination of a witness pursuant to s. 683(1)(b) is an extraordinary remedy. The party who seeks leave to cross-examine a witness pursuant to s. 683(1)(b) must establish a foundation upon which it can be concluded that it is in the interests of justice to grant the order sought. A key consideration is whether there is a reasonable possibility that the proposed cross-examination will produce evidence that will meaningfully assist the court in determining the issues raised by the appeal: *R. v. Atzenberger*, 2018 BCCA 224 at para. 16; *R. v. Patrick*, 2020 BCCA 259 at paras. 75-79; *R. v. Jerace*, 2020 BCCA 267 at paras. 6, 12.

[Emphasis added.]

[12] The test will be met where contradictions in the affidavit evidence are central to the issues on the appeal and cannot satisfactorily be resolved on the face of the affidavits: *Atzenberger* at para. 16; *R. v. Mehl*, 2019 BCCA 438 at para. 13 [*Mehl* 1]; *Mehl* 2 at para. 12; *Patrick* at paras. 74–75; *Jerace* at para. 12; *R. v. Nelson*, 2021 BCCA 335 at para. 20. If the Court can assess the issue based on the appeal record and the affidavits, then the test is not met, and cross-examination will not be permitted: *Nelson* at para. 21; *Atzeberger* at para. 16; *Jerace* at para. 13. In particular, cross-examination of trial counsel has been characterized as an “extraordinary measure”: *R. v. Au-Yeung*, 2021 BCCA 367 at para. 31. In *Patrick*, the Court noted:

[77] Trial lawyers are part of the justice system and will likely not be traumatized by having to testify on appeal as to the circumstances giving rise to an appellant’s allegation of ineffective assistance of counsel, although there are other good reasons for not allowing cross-examination of trial counsel on a regular basis.

[13] Where cross-examination has been granted, the Court has narrowed the scope of cross-examination to be reasonably limited to the grounds of appeal and issues raised in the factums: *Mehl 2* at para. 13; *Mehl 1* at para. 14.

[14] If leave to cross-examine Mr. Johnson is granted, Mr. Fox proposes eight lines of questioning.

Topic 1: Cross-examination on why, as alleged by Mr. Fox, Mr. Johnson lied in his affidavit about speaking to Mr. Fox at pretrial court appearances

[15] Mr. Fox phrases this ground as: Why did Mr. Johnson lie in his affidavit about having courtroom discussions with him in the absence of a presiding judge at the pre-trial appearances?

[16] In his affidavits, Mr. Johnson stated that he and Mr. Fox engaged in courtroom discussions in the absence of a presiding judge on at least two occasions prior to Mr. Fox's trial date being set, and the morning of Mr. Fox's trial on November 26, 2020: Chris Johnson's Affidavit #1 at paras. 18–19, 33; Chris Johnson's Affidavit #2 at paras. 4–5. Mr. Johnson stated that these discussions concerned the Crown calling Detective Dent as a witness at Mr. Fox's trial. Mr. Fox denies these discussions took place in the manner Mr. Johnson claims.

[17] There is no reasonable possibility the proposed cross-examination would produce meaningful evidence to assist the Court in determining the issue of late disclosure or abuse of process. There is a contradiction in the evidence with respect to whether the discussions took place, but the motivation for Mr. Johnson's claim to their existence is not central to any issue on appeal.

Topic 2: Cross-examination on why Mr. Johnson withheld disclosure material for more than a month, until just before the trial

[18] Mr. Fox seeks leave to cross-examine Mr. Johnson on the reason why he was not provided disclosure until just three days before his trial.

[19] There is no reasonable possibility that the proposed cross-examination would assist the Court in determining the issues on appeal. Firstly, the proposed line of

questioning is not relevant to the ground of appeal that alleges prejudice due to the timing of the disclosure. The key issue is whether the timing of the disclosure prejudiced Mr. Fox, which can be determined without identifying the reason for the delay. Secondly, Mr. Johnson explained in his affidavits the reason for the delay in providing disclosure to Mr. Fox was the result of his heavy schedule and personal obligations during that time: Affidavit #1 at para. 32; Affidavit #2 at paras. 17–18. Consistent with his explanation, Mr. Johnson’s Affidavit #1 included as exhibits (A–D) his communication with his assistants regarding their efforts to provide Mr. Fox with disclosure. There is no evidence suggesting Mr. Johnson’s actions were motivated by bad faith.

Topic 3: Cross-examination on why Mr. Johnson “ignored repeated attempts” by Kylie Goodwillie to communicate regarding disclosure

[20] Mr. Fox seeks to cross-examine Mr. Johnson on why he “ignored repeated attempts” by a Crown legal assistant, Kylie Goodwillie. This proposed line of questioning is refused for the same reasons as in Topic 2.

Topic 4: Cross-examination on why Mr. Johnson “continued to withhold” disclosure after conviction despite “repeatedly insisting in court” he would provide it to prepare for sentencing

[21] Mr. Fox acknowledges that, although this occurred after the trial, he believes it shows there was an ongoing, deliberate effort on the part of the British Columbia Prosecution Service (the “BCPS”) to withhold the disclosure material in his case.

[22] There is no reasonable possibility that this proposed cross-examination would elicit meaningful evidence to assist the Court in determining the alleged abuse of process. Mr. Johnson explained in his affidavit he intended to send the disclosure to Mr. Fox but inadvertently failed to do so. There is no evidence indicating this was done in bad faith.

Topic 5: Cross-examination on what Mr. Johnson meant in making a particular comment at a pre-sentencing court appearance

[23] Mr. Fox seeks to cross-examine Mr. Johnson on his comment, in response to Mr. Fox saying the disclosure material is going to be published either way, “I think that may be why you’re here today, Mr. Fox, because it was published.” Mr. Fox asserts this comment was a clear admission the BCPS was prosecuting him as retaliation for publishing proof of its corruption and misconduct.

[24] The Crown’s position is that the effect of Mr. Johnson’s statement was to say publishing of disclosure should not be a concern because Mr. Fox already had a copy and it was going to be published anyway. The Crown argues ascribing meaning to an off-hand comment made during sentencing phase is not relevant to his conviction appeal. Further, Mr. Fox’s interpretation of the statement is not reasonably supported by anything else in the record.

[25] We would agree there is no reasonable possibility that proposed cross-examination on this topic would elicit meaningful evidence to assist the Court in determining any of the issues on appeal.

Topic 6: Cross-examination on why Mr. Johnson did not confirm his understanding that Mr. Fox had said he did not want or need any of the disclosure material

[26] Mr. Fox suggests Mr. Johnson could not possibly have believed Mr. Fox would be prepared to proceed with the trial considering he was self-represented and that he had not received or reviewed any disclosure material (other than the narrative regarding his arrest).

[27] There is no reasonable possibility that this proposed cross-examination would elicit meaningful evidence to assist the Court in determining the issue of late disclosure. Mr. Johnson did not state he believed Mr. Fox to have said he did not want or need disclosure. It appears Mr. Fox is referring to Mr. Johnson’s response to a letter dated October 31, 2020, from Mr. Fox to Mr. Johnson regarding disclosure. In it, Mr. Fox states he needs to receive the witness list but that he believed the case

would be based solely on his “admissions” and the testimony of one or two VPD officers. Mr. Johnson explained his response to this in his affidavits.

Topic 7: Cross-examination on why, as alleged by Mr. Fox, Mr. Johnson lied about whether disclosure provided in a later prosecution was encrypted

[28] Mr. Fox phrases this ground as follows: Why did Mr. Johnson lie to the judge at the appearance on October 14, 2021 about the disclosure material on the hard drive the Crown had provided to him not being encrypted? Mr. Fox argues this is relevant to Mr. Johnson’s credibility in the context of his affidavit, as it establishes his history of, and willingness to, lie to the court.

[29] The Crown’s position is first, that the impugned statement was made regarding an unrelated issue at a pretrial appearance concerning a different probation order, and the credibility of his statement in that respect is collateral to the matters on appeal. Second, Mr. Fox has not alleged the impugned statement was a lie in any of his affidavits. Nor has Mr. Johnson responded in his affidavits. Accordingly, there is no dispute on the evidence as to the credibility of the impugned statement. More importantly, there is no reasonable possibility that this proposed cross-examination would elicit meaningful evidence to assist the Court in determining any issue on appeal.

Topic 8: Cross-examination on why, as Mr. Fox alleges, Mr. Johnson lied about events at a police interview that took place after his arrest on a subsequent breach of probation charge

[30] Mr. Fox refers to the appearance before a judge on a bail review hearing December 23, 2021. Mr. Fox alleges Mr. Johnson lied by stating that during a police interrogation of Mr. Fox following his arrest for a subsequent breach of probation offence, the police offered Mr. Fox the option of allowing them to access his email account in his presence and under his supervision for the limited purpose of verifying whether he had emailed the website’s editor. Mr. Fox argues this is relevant to Mr. Johnson’s credibility in the context of his affidavit, as it establishes his history of, and willingness to, lie to the court.

[31] There is no reasonable possibility that this proposed cross-examination would elicit meaningful evidence to assist the Court in determining any issue on appeal. Firstly, the impugned statement concerns an unrelated topic made in a different prosecution for a breach of probation occurring after Mr. Fox's trial before Judge Rideout for the offence at issue on this appeal. Secondly, the relevant evidence suggests Mr. Johnson did not misstate what happened at the interview. At the bail review hearing, Mr. Johnson stated that the police did not want to access the appellant's entire email account and told Mr. Fox they only sought to look at the email in question—though police would presumably see all his emails in doing so, they would not examine all of them. Mr. Johnson's description of what the police sought to obtain from Mr. Fox is generally consistent with the interview transcript, which reveals that the police told him they would need to get a warrant to search his devices for the email and sought his passwords to facilitate them doing so.

Disposition

[32] In summary and conclusion, applying the legal principles to the circumstances of this case, this Court has jurisdiction to grant leave to permit the proposed cross-examination: *Criminal Code*, s. 683(1)(b). However, it is an extraordinary remedy. This is particularly so where the proposed cross-examination is of trial Crown counsel. The onus is on the applicant, Mr. Fox, to establish a foundation upon which it can be concluded that it is in the interests of justice to grant such an extraordinary remedy. For the reasons we have given, Mr. Fox has failed to do so. There is no reasonable possibility that the proposed cross-examination will produce evidence that will meaningfully assist this Court in determining the issues raised in his appeal. This Court can assess the issues based on the appeal record and the affidavits.

[33] It is not in the interests of justice to grant the extraordinary remedy of leave to cross-examine Mr. Johnson.

[34] We would dismiss Mr. Fox's application.

"The Honourable Madam Justice Stromberg-Stein"

"The Honourable Mr. Justice Hunter"

"The Honourable Madam Justice Horsman"