Citation: R. v. Hummel
2002 YKCA 6

Date: 20020626
Docket: YU450

COURT OF APPEAL FOR YUKON TERRITORY

BETWEEN:

REGINA

RESPONDENT

AND:

DANIEL HUMMEL

APPELLANT

Before: The Honourable Chief Justice Finch
The Honourable Mr. Justice Donald
The Honourable Mr. Justice Low

G.R. Coffin	Counsel for the Appellant
E.J. Horembala, Q.C. and W.B. Smart, Q.C.	Counsel for the Respondent
Place and Date of Hearing:	Whitehorse, Yukon Territory 10 June 2002
Place and Date of Judgment:	Vancouver, British Columbia 26 June 2002

Written Reasons by:
The Honourable Mr. Justice Donald

Concurred in by:
The Honourable Chief Justice Finch
The Honourable Mr. Justice Low

Reasons for Judgment of the Honourable Mr. Justice Donald:

[1] Daniel Hummel appeals from a conviction of first degree murder after a trial before Mr. Justice Veale and a jury in Whitehorse. The jury returned the verdict on 16 February 2001 and the judge sentenced the appellant on the same day.

[2] The case arose from the killing of Regina Thyrone between the 15th and the 21st April 2000. She was last seen on 15 April with the appellant. Her body was found on 21 April in a wooded area, just south of the downtown area of Whitehorse. She had been bound and beaten to death. A strap around her ankles appeared to have been used to drag her to the place where her body was found. Semen samples taken from the deceased's vagina and ligatures binding her arms and wrists provided a DNA match with a blood sample taken from the appellant pursuant to a warrant. A cigarette butt found 10 feet from the body also provided a match with the appellant's DNA.

[3] The Crown alleged the appellant killed the deceased in the course of a sexual assault, a forcible confinement, or both, and that he was therefore guilty of first degree murder: s. 231(5)(d) and (e), ***Criminal Code***.

[4] The appellant is a First Nations man and a native carver. The deceased was a blond Caucasian woman on staff with the Federal Department of Justice seconded from the Vancouver office for a few weeks to assist the Yukon office with some accounting tasks. She appears to have met the appellant in connection with his carvings. They were seen together on 15 April 2000 at a gallery and a craft shop in Whitehorse, each of which offered some of his work for sale.

[5] Her violent death shocked the community and was of course extensively covered in the media.

[6] On the afternoon of 15 April 2000 two witnesses, Andrew Connors and Lorenda Reddekopp, were walking along the clay cliffs above, and to the west of, the town when they saw a man identified by Connors as the appellant in company with a blond woman. The deceased's body was found in the same general area.

[7] On 16 April between 5:00 and 6:00 a.m. the appellant went to Arthur Joe's residence. Mr. Joe testified that the appellant drew a map and marked it with an X indicating to Mr. Joe there was a body in that location and they should try to find it. Mr. Joe said the appellant told him he had special powers as given by a shaman.

[8] Around noon the appellant was drinking beer with Gordon Good in a back alley when the appellant said, according to Mr. Good's evidence, "I hear a woman's voice calling my name" and after a pause, "from a grave".

[9] On 19 April the R.C.M.P. questioned the appellant about the deceased's disappearance. The appellant fled from the police and went into the trails on the clay cliffs. He was apprehended going in the direction where the deceased's body was eventually located. He was released on 20 April and arrested again on 23 April on a charge of first degree murder.

[10] Also on 23 April Judge Lilles of the Territorial Court issued a warrant for the taking of a blood sample from the appellant for DNA analysis.

[11] When the trial began, defence counsel applied to challenge jurors for cause on two bases: pre-trial publicity and racial prejudice. The Crown conceded there was a reasonable possibility of prejudice because of pre-trial publicity as well as a realistic potential of racial prejudice. The Crown proposed, and the judge authorized, two questions to be put in the selection of the jury:

> Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by the fact that the person charged with

> first degree murder is a First Nations man and the deceased is a white woman?
>
> ...
>
> Would your ability to judge the evidence in this case without bias, prejudice or partiality be affected by anything you have read, seen or heard about the case?

[12] The judge refused to put a question proposed by the defence:

> Do you believe that a white woman is less likely to consent to sex with an Aboriginal man than a Caucasian man?

[13] The appellant brings this appeal for a new trial on four grounds which are described in his factum in this way:

1. The Learned Trial Judge erred in refusing to allow Defence to ask questions during the challenge for cause intended to uncover any bias towards the idea of consensual sexual activity between a Caucasian woman and a First Nations man.

2. The Learned Trial Judge erred in admitting the evidence of Andrew Connors as his evidence regarding a possible sighting of Daniel Hummel and Regina Thyrone together was unreliable and any probative value was outweighed by its prejudicial effect.

3. The Learned Trial Judge erred in admitting the evidence of Gordon Good and Arthur Joe as their evidence concerning actions and statements made by Daniel Hummel was unreliable and any probative value was outweighed by its prejudicial effect.

4. The Learned Trial Judge erred in admitting DNA evidence obtained pursuant to a warrant granted improperly pursuant to s. 487.05 and therefore, obtained in violation of Section 8 of the Canadian Charter of Rights and Freedoms.

[14] For reasons which follow I do not accept that the trial judge erred as alleged. On the first ground the trial judge held, rightly in my view, the race-based question he allowed was sufficient and subsumed the more specific question he disallowed. On the second and third grounds it has not been demonstrated to my satisfaction that the trial judge erred in the exercise of his discretion in admitting the evidence of the witnesses, Connors, Joe and Good. Finally, I can find no reason to question the validity of the DNA warrant. In the result I would dismiss the appeal.

Challenge for Cause

[15] The principal thrust of the appellant's argument on this issue is that the trial judge was obliged to adopt an expansive rather than a restrictive approach to the framing of questions in order to bring potential bias to the surface. He cites the leading case on the subject, ***R. v. Williams***, [1998] 1 S.C.R. 1128, where at para. 22 Madam Justice McLachlin (as she then was) wrote for the Court, at para. 22:

> Racial prejudice and its effects are as invasive and elusive as they are corrosive. We

> should not assume that instructions from the judge or other safeguards will eliminate biases that may be deeply ingrained in the subconscious psyches of jurors. Rather, we should acknowledge the destructive potential of subconscious racial prejudice by recognizing that the post-jury selection safeguards may not suffice. Where doubts are raised, the better policy is to err on the side of caution and permit prejudices to be examined. Only then can we know with any certainty whether they exist and whether they can be set aside or not. It is better to risk allowing what are in fact unnecessary challenges, than to risk prohibiting challenges which are necessary: ....
>
> [Emphasis added.]

[16] The Crown respondent disputes the evidentiary basis for the premise of the question disallowed by the trial judge. In particular, the Crown argued that it cannot be said that there is a prevalent and widespread attitude concerning sexual relations between First Nations men and Caucasian women in general – it all depends on the specific circumstances of each instance.

[17] Moreover, the Crown submits that the kind of bias the question seeks to expose is not a notorious fact of which judicial notice could be taken. On the question of judicial notice, the Crown referred to the more recent case of ***R. v. Find***, [2001] 1 S.C.R. 863, where Chief Justice McLachlin, again speaking for the Court, wrote at para. 48:

> In this case, the appellant relies heavily on proof by judicial notice. Judicial notice dispenses with the need for proof of facts that are clearly uncontroversial or beyond reasonable dispute. Facts judicially noticed are not proved by evidence under oath. Nor are they tested by cross-examination. Therefore, the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy: *R. v. Potts* (1982), 66 C.C.C. (2d) 219 (Ont. C.A.); J. Sopinka, S. N. Lederman and A. W. Bryant, *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1055.

[18] When a realistic potential for bias is shown a trial judge must then decide what questions can be asked. According to ***Williams***, the process must be controlled so that the appellant's right to a fair trial is fairly balanced with the privacy of potential jurors. I refer to that part of the ***Williams*** decision dealing with the "slippery slope" argument to the effect that challenges for cause will inevitably lead to the American experience of lengthy and intrusive jury selections. At paras. 52, 53 and 56, these observations are made in ***Williams***:

> In my view, the rule enunciated by this Court in [*R. v.*] *Sherratt*, [[1991] 1 S.C.R. 509], suffices to maintain the right to a fair and impartial trial, without adopting the United States model or a variant on it. *Sherratt* starts from the presumption that members of the jury pool are capable of serving as impartial jurors. This means that there can be no automatic right to challenge for cause. In order to

> establish such a right, the accused must show that there is a realistic potential that some members of the jury pool may be biased in a way that may impact negatively on the accused. A realistic potential of racial prejudice can often be demonstrated by establishing widespread prejudice in the community against people of the accused's race. As long as this requirement is in place, the Canadian rule will be much more restrictive than the rule in the United States.
>
> In addition, procedures on challenges for cause can and should be tailored to protect the accused's right to a fair trial by an impartial jury, while also protecting the privacy interests of prospective jurors and avoiding lengthening trials or increasing their cost.
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> * * *
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> While cost-benefit analyses cannot ultimately be determinative, permitting challenges for cause on the basis of widespread prejudice against persons of the accused's race seems unlikely to lengthen or increase significantly the cost of criminal trials. Nor, properly managed, should it unduly impinge on the rights of jurors. As Doherty J.A. stated in [*R. v.*] *Parks*, [(1993), 84 C.C.C. (3d) 353], at p. 379:
>
> > In reaching my conclusion I have not relied on a costs/benefit analysis. Fairness cannot ultimately be measured on a balance sheet. . . . The only "cost" is a small increase in the length of the trial. There is no "cost" to the prospective juror. He or she should not be embarrassed by the question; nor can the question realistically be seen as an intrusion into a juror's privacy.
> >
> > [Emphasis added.]

[19] I concur with the view that as phrased by the defence, the question in dispute would not provide a meaningful answer. It invites a number of additional probing questions in

exploring a variety of hypothetical relationships. This would be time-consuming and potentially embarrassing to the jury panel. In the absence of any evidence of prejudice against interracial sex relations, and there is none on the record, I do not think that potential jurors should be subject to this range of questioning. In this regard I would adopt what was said by Mr. Justice Low in ***R. v. Dhillon*** (2001), 158 C.C.C. (3d) 353 (B.C.C.A.) at para. 53:

> It is not necessary for me to cite the many cases that make it clear that the questioning of potential jurors should not be intrusive. It should not involve inquiry into their lifestyles, backgrounds, or personal experiences. In this country, we have not adopted the American model, something the Supreme Court of Canada made express reference to in *Williams* at paras. 12, 13 and 52. The questions should be simple and designed to identify possible prejudice, require the potential juror while under oath to admit to it if it exists, and to impress upon the jurors sworn that they must remain impartial at all times. In my opinion, the questions asked of the potential jurors in the present case were capable of accomplishing all those things in compliance with the law as stated in *Williams*.

[20] The appellant argues that in its closing address to the jury the Crown at trial appealed to the very bias the disputed question was designed to uncover. To put this argument in context it is necessary to briefly describe the theory of the defence: the circumstances are said to be consistent with the deceased having had consensual sex with the appellant and at a

later time, not in the company of the appellant, she encountered her killer. Crown counsel urged the jury to reject the defence theory because the deceased would never have consented to have sex with the appellant since at the time of the offence he exuded a powerful odour of alcohol, his clothes were dirty, he needed a shower, he was missing his front teeth, and he was unshaven. I agree with the Crown's argument that this was not a racially-based submission but was specific to the two individuals involved. The suggestion to the jury that consensual intercourse was unlikely was directed at the appellant's personal characteristics and had nothing to do with the fact that he is an aboriginal man.

[21] The appellant did not testify. The Crown marshalled a powerful circumstantial case against him. The theory that intercourse was consensual and unconnected with the fatal beating is, without some evidence to support it, wholly unrealistic. If that is so, then there was no practical purpose to be served in posing the disputed question at jury selection, and in the end, it cannot be said that the appellant's right to a fair trial was compromised by refusing the question.

[22] In summary, on this aspect of the case, the trial judge did not err in refusing the disputed question because in my

opinion: (1) it would not have produced a meaningful answer; (2) it would have invited a lengthy and unduly intrusive inquiry; and (3) the question was unnecessary because the defence theory of consent had no realistic basis.

Admissibility of Andrew Connors' Evidence

[23] Counsel for the appellant did not present oral argument on this ground and was content to rely on the submissions in his factum. Because of their brevity I may conveniently set them out:

> 2. The Learned Trial Judge erred in admitting the evidence of Andrew Connors, as his evidence, regarding a possible sighting of Daniel Hummel and Regina Thyrone together, was unreliable and any probative value was outweighed by its prejudicial effect.
>
> The Learned Trial Judge recognized the frailty of the identification of Regina Thyrone as the woman seen by Andrew Connors and Lorenda Reddekopp, on a trail on the clay cliffs on April 15, 2000 and instructed the jury that they must not attach much weight to that identification.
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> ...
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> It is respectfully submitted that the evidence was only relevant if it was in fact Regina Thyrone. Because of the potential to mislead the jury, it rendered the trial unfair.
>
> *R. v. Harrer, [1995] 3 S.C.R. pg. 562 at paragraph 46 (S.C.C.)*
>
> It is the Trial Judge's duty to exercise properly his or her judicial discretion to

> exclude evidence that would result in an unfair trial.

[24] As mentioned, Mr. Connors made a positive identification of the appellant as the person seen on the clay cliffs but he could not identify the blond woman with the appellant as the deceased.

[25] It was in my view a matter of discretion for the trial judge to weigh in the balance the probative value of the evidence against its potential for misuse by the jury. As an exercise of discretion, the trial judge's decision to leave the evidence with the jury is entitled to some deference on appellate review.

[26] The reference to ***R. v. Harrer***, [1995] 3 S.C.R. 562, in the appellant's factum above, is for a very general proposition:

> [46] Evidence may render a trial unfair for a variety of reasons. The way in which it was taken may render it unreliable. Its potential for misleading the trier of fact may outweigh such minimal value it might possess.

[27] As I understand the position taken by the appellant, a positive identification of both the appellant and the deceased was required in order for the evidence to be sufficiently probative to outweigh its prejudicial effect. This surely

cannot be so in light of other undisputed evidence that the same two persons were seen together in town earlier that day and the DNA test results linked him with the deceased at the crime scene not far from the place he was seen by Mr. Connors. The witness testified that the blond woman "looks similar" to a photo of the deceased. Mr. Connors' identification was in my view a cogent piece of evidence which, when considered with all the other evidence, was properly left with the jury.

Admissibility of the Evidence of Arthur Joe and Gordon Good

[28] The gist of the appellant's argument regarding the admissibility of the evidence of the witnesses Arthur Joe and Gordon Good is, as I apprehend it, that the statements they attributed to him are so obscure as to be virtually meaningless and therefore they cannot have had sufficient probative value to overcome their potential prejudice.

[29] It will be remembered that Mr. Joe testified the appellant marked an X on a map he drew and suggested that they search for a body; and that Mr. Good testified that the appellant said he heard a woman calling his name from the grave.

[30] I repeat that the balancing of probative value and prejudicial effect is a discretionary function for the trial

judge and is entitled to deference from this court. It is an exercise which must be undertaken in the context of the evidence as a whole.

[31] This is not a case like ***R. v. Ferris*** (1994), 27 C.R. (4th) 141 (Alta. C.A.); affirmed (1994), 34 C.R. (4th) 26 (S.C.C.), the authority on which the appellant relies, where a witness heard only a fragment of a conversation. There the meaning of the bare statement "I killed David" overheard without any context was in the words of Mr. Justice Sopinka (at p. 27):

> . . . so speculative and its probative value so tenuous that the trial judge ought to have excluded it on the ground its prejudicial effect overbore its probative value.

[32] In the present case there was ample context in which the words could be considered. The appellant uttered the words the morning after the day the deceased was last seen alive. I do not need to repeat the other evidence connecting him with the deceased before her disappearance. The jury could fairly conclude, without engaging in any speculation, that the appellant was expressing remorse or at the very least giving voice to a troubled conscience about the death of a woman. I do not think the trial judge erred in leaving the evidence with the jury.

The DNA Warrant

[33] The appellant alleges that the warrant issued to obtain a blood sample from him for DNA testing was defective and the trial judge, as the reviewing judge, erred in not setting aside the warrant and excluding the evidence derived from it. The defects were said to arise from the following:

1. The applicant for the warrant, Constable Brian Edmonds, omitted in his sworn Information to Obtain a Warrant a report that the deceased was seen kissing an unknown man in the early morning hours of 15 April 2000.

2. He also omitted a report that the deceased had arranged to meet an unknown male sometime prior to her disappearance.

3. He did not disclose that the DNA analyst was unable to say with certainty at the time of the application whether a sample taken during the autopsy of the deceased would provide any useful information.

4. Nor did he disclose that the appellant had retained counsel.

[34] Items 1 and 2 may be conveniently considered together. They refer to reports gathered during an intense investigation

into the disappearance of the deceased and the circumstances of her death. The appellant submits they were material to the warrant application and their non-disclosure affects the validity of the warrant.

[35] The proof of the materiality was on the appellant. I do not think the appellant satisfied the onus on him. The police were unable to confirm the reports in question and they considered the information to be inconclusive.

[36] Constable Edmonds testified under cross-examination that the identity of the woman in either report could not be conclusively ascertained.

[37] In ***R. v. Araujo***, [2000] 2 S.C.R. 992, a wiretap case, there is said at paras. 46-47 to be a duty on the police to make "full and frank disclosure" and avoid "strategic omissions" in the affidavit supporting the application for an authorization. The decision went on to describe how these elements might affect the review of the authorization by a trial judge. At para. 51 the Court said:

> The reviewing judge does not stand in the same place and function as the authorizing judge. He or she does not conduct a rehearing of the application for the wiretap. This is the starting place for any reviewing judge, as our Court stated in [*R. v.*] *Garofoli*, [[1990] 2 S.C.R. 1421], at p. 1452:

> The reviewing judge does not substitute his or her view for that of the authorizing judge. If, based on the record which was before the authorizing judge as amplified on the review, the reviewing judge concludes that the authorizing judge could have granted the authorization, then he or she should not interfere. In this process, the existence of fraud, non-disclosure, misleading evidence and new evidence are all relevant, but, rather than being a prerequisite to review, their sole impact is to determine whether there continues to be any basis for the decision of the authorizing judge. [Emphasis added.]

[38] In applying ***Araujo*** to this case, I note that first of all the trial judge found nothing in the affidavit of Constable Edmonds that was misleading or false. This was a reasonable finding and I would not disturb it. Second, not only was there sufficient evidence in the affidavit to support the warrant but none of that evidence was in any way called into question by the omissions.

[39] Turning to the third omission regarding the usefulness of the autopsy sample, the appellant argues that the issuing judge may have been led to believe that the sample recovered from the deceased's body would provide DNA evidence.

[40] The portion of Constable Edmond's affidavit in support relating to this subject reads as follows:

> 32. On the 22nd day of April, 2000 at approximately 14:00 hours a Forensic Autopsy was conducted at V.G.H. by Doctor Laurel GREY, hereinafter

> referred to as Dr. GREY, the pathologist in the presence of Cst. CROUCH. As a result of the autopsy conducted by Dr. GREY a number of exhibits, including biological samples, have been seized from THRYONE by Cst. CROUCH. In later speaking to Dr. GREY, I was advised that the vaginal swabs seized from THYRONE appear to contain seminal fluid. The exhibits seized from the autopsy of THYRONE have since been forward to the Royal Canadian Mounted Police Forensic Laboratory Vancouver, by Cst. CROUCH and will be analyzed for any forensic evidence. The preliminary results of the autopsy of THYRONE according to Dr. GREY appear to reveal that THYRONE died as a result of a fatal head injury.
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> * * *
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> 36. On the 23rd day of April, 2000 at approximately 12:30 hours I received information from Sergeant Dale McGOWAN, hereinafter referred as Sgt. McGOWAN, that he had spoken to David MORRISSETTE, a civilian member, presently stationed at the Royal Canadian Mounted Police Forensic Laboratory Vancouver. MORRISSETTE is a DNA specialist assigned to the Biology Section. MORRISSETTE confirmed that he had examined the vaginal and rectal swabs seized from THYRONE and made the determination that from examining the said vaginal and rectal swabs that there is the presence of a substance indicative of semen. It is known that seminal fluid can be used in DNA profiling.

[41] With respect, I can see no force in the appellant's argument. It would have been obvious to the issuing judge that the analysis had not yet occurred at the time the warrant was sought. He would have understood that until the analysis was done no one could be certain that the sample would produce a DNA profile. Certainty at the application stage is not

required; the test in s. 487.05(1)(d) of the ***Code*** is reasonable grounds to believe that a DNA analysis will provide evidence. A similar argument was made in ***R. v. Feeney*** (2001), 86 B.C.L.R. (3d) 30 (C.A.), and rejected by this court in circumstances where a DNA warrant was issued prior to the analysis of a sample taken from the crime scene. At paras. 29 and 30, I said:

> The evidence discloses that the extraction of the sample from the cigarette butt occurred on 25 August 1997 and the Information was sworn on 15 September 1997, but the process for determining the profile from the sample was not completed until 22 September 1997. On this sequence of events, the appellant argues that the informant could not have truthfully said that the sample was suitable for analysis because it appears that suitability had not yet been determined when he swore the Information, and the Crown did not call the analyst to confirm the truth of what he told the informant.
>
> While I am doubtful that an overstatement of this kind (assuming it to be an overstatement, which has not been established) would vitiate the warrant in circumstances where the latent sample ultimately produced a profile, I think the remaining question of admissibility can be answered on a simpler basis. The informant was only required to show a reasonable ground for believing that the latent sample was suitable. The fact that he was so informed by a reliable source, the analyst, is enough to satisfy the ***Code*** requirement and it was unnecessary for the Crown to go further in responding to this aspect of the challenge to the warrant and produce the analyst to attest to what he told the informant. Reasonable grounds can be based on hearsay: *R. v. Collins*, [1987] 1 S.C.R. 265 at 279. I do not accept the argument that the Information to Obtain the DNA warrant was defective.

[42] The ruling of the trial judge on the DNA *voir dire* is consistent with that approach where he said:

> [19] Furthermore, the section does not require certainty. The words "will provide evidence" are always subject to the opening qualification that "there are reasonable grounds to believe."
>
> [20] Defence counsel went so far as to say that a DNA warrant should not issue if there was a possibility that there might not be a suitable sample for profiling. In my view, that would create an unnecessary impediment to the police investigations, and the language of s. 487.05(1)(d) does not support such an interpretation.

[43] Finally, it is said on behalf of the appellant that the police withheld from the issuing judge the knowledge that the appellant had counsel and thereby denied the judge the opportunity to consider whether he should proceed to hear the application *ex parte* or direct that notice be given. Section 487.05(1) expressly authorizes the *ex parte* procedure although the Ontario Court of Appeal held in ***R. v. F.(S.)*** (2000), 141 C.C.C. (3d) 225, the section does not exclude the option of proceeding on notice.

[44] I would not give effect to this submission. The focus of the question is not on process but on the substance of the application, namely, whether according to ***Araujo***, *supra*, there is any basis on which the warrant could have been issued.

Even if the issuing judge might have allowed defence counsel an opportunity to be heard on the application, it has not been shown that such a procedure could have affected the basis of the warrant.

Disposition

[45] I would dismiss the appeal.

“The Honourable Mr. Justice Donald”

I AGREE:

“The Honourable Chief Justice Finch”

I AGREE:

“The Honourable Mr. Justice Low”