COURT OF APPEAL OF YUKON

Citation: *R. v. Murphy*,
2014 YKCA 7

Date: 20140611
Docket: CA09-YU646

Between:

Regina

Respondent

And

Alicia Ann Murphy

Appellant

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Donald
The Honourable Madam Justice Cooper

On appeal from: An order of the Supreme Court of Yukon, dated October 27, 2009 (*R. v. Murphy*, Whitehorse Docket 08-01518).

Counsel for the Appellant:	M. Dineen and J. A. Cunningham
Counsel for the Respondent:	K. D. Parkkari
Place and Date of Hearing:	Whitehorse, Yukon April 28, 2014
Place and Date of Judgment:	Vancouver, British Columbia June 11, 2014

Written Reasons by:
The Honourable Mr. Justice Donald

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Madam Justice Cooper

Summary:

Appeal from a second degree murder conviction allowed on the basis that the prosecution engaged in oath-helping two key witnesses whose testimony was critical to the Crown's case. Also the prosecution led inadmissible evidence regarding the integrity of the police investigation when the defence did not put it in issue. A new trial was ordered.

Reasons for Judgment of the Honourable Mr. Justice Donald:

Introduction

[1] Evangeline Billy died by drowning in the Yukon River at Whitehorse on 21 June 2008. Alicia Ann Murphy, the appellant, was charged with her second degree murder. On 27 October 2009, a jury at Whitehorse found her guilty as charged.

[2] She appeals from her conviction and seeks a new trial on several grounds, including that the prosecution engaged in oath-helping two key witnesses and led inadmissible evidence of the police investigation. I would give effect to these allegations, allow the appeal, and order a new trial.

Factual Background

[3] The appellant and the deceased were acquaintances in the same social circles. The deceased's body was found in the Yukon River in the early afternoon of 22 June 2008. The clothing on her lower body had been pulled down. The Crown's case rested primarily on the evidence of the appellant's sister, Tanya Murphy, and Rae Lynne Gartner, who both testified that the appellant admitted to killing the deceased and trying to stage a sexual assault. The appellant testified that she had nothing to do with the killing and she denied making any admissions. She offered an account of her whereabouts on the night of the killing that was corroborated by independent witnesses, with the exception of a period of two hours that she said she spent in the apartment of a drug dealer and then in her own apartment. The drug

dealer died before the trial. The Crown got notice of the alibi after it was too late to investigate. The Crown argued to the jury that the alibi was false.

Issues

[4] The appellant alleged the following errors:

A. The trial judge erred by not intervening during the abusive cross-examination of the appellant and by not charging the jury sufficiently to disregard inadmissible bad character evidence.

B. The trial judge erred by allowing inadmissible oath-helping evidence about the process of taking of prior statements of the main Crown witnesses, and then further erred by not instructing the jury to disregard that evidence.

C. The appellant was denied the effective assistance of counsel in the presentation of an alibi defence.

D. The trial judge erred in allowing inadmissible opinion evidence and then further erred by not instructing the jury to disregard that evidence.

Discussion

Ground B – Oath-helping

[5] The problems arising from this ground and from ground D result from an approach taken by the prosecution at trial that enlarged the notion of “narrative” as a basis for admissibility of evidence of the police investigation. How the police took the evidence of the key admission witnesses, their impressions of the witnesses’ statements, the lead investigator’s methodology in conducting the investigation overall, and his working theories as to the crime scene and cause of death, were not led in response to any challenge to the integrity of the investigation by the defence, but out of a desire to enhance the Crown’s case.

[6] This is an impermissible strategy. The respondent's stated purpose for calling evidence surrounding the taking of statements from Tanya Murphy and Rae Lynne Gartner was to make their testimony more reliable. The evidence of their initial dealings with the police was not only irrelevant, in the sense that there was no fact in issue, but it violated the rule against oath-helping.

[7] As to the prosecution's purpose, this is what the prosecutor said in his closing address to the jury about Tanya Murphy's evidence:

> Consider the timing of Tanya Murphy's statement to the police. First of all, she didn't go to the police with this. The police came to Tanya Murphy after the fact, after they had heard from Rae Lynne Gartner. This was another part of their investigation, to go to Tanya Murphy and find out if she knew anything about this. And so it was a statement which was given by Tanya Murphy to the police very shortly after the meeting between her and her sister. She was at the detachment. You heard Constable Corbett testify about what Tanya Murphy's demeanour was as she was providing that information to the police. It was very difficult for Tanya Murphy. This wasn't some sort of lark or anything of that nature.

and as to Rae Lynne Gartner's evidence:

> Rae Lynne talked about how she hung around for a period of time, didn't want to attract attention to herself, just was trying to figure out how do I get myself away from this woman. And that eventually she left and immediately went, called her friend, asked to be picked up. Rae Lynne said she was hysterical at that time. And wouldn't she be? She then talked about call [*sic*] 9-1-1 and speaking with Constable Thur, about being extremely emotional. And again, wouldn't she be?
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> And that was corroborated by Constable Thur in his testimony. He said that when he first talked to her on the telephone she was extremely emotional, and that she continued to be that way during his initial interview of her, and then later, when they were speaking to her some more, she calmed down. <u>But all of that evidence offered by Constable Thur, and the reason for those questions to Rae Lynne Gartner about how she was feeling at the time of this, are -- were asked because that's all part of the narrative. That's part of the story</u>. And when you're looking at what she says Alicia has said to her, you can look at the way that the story came out, in <u>assessing whether Rae Lynne Gartner's evidence is reliable</u>. <u>And I say that, because of the way that the story was told, it's clearly reliable</u>.
>
> [Emphasis added.]

[8] The "story" to which counsel referred had no probative value. Had the defence raised police misconduct, such as bullying or other oppressive conduct,

then the interaction of the witnesses with the police would have had some relevance; but in any event it could not have been used to bolster the Crown's case, only to answer some point taken by the defence. No such allegation arose. What the witnesses said to the police, their demeanour, emotional condition and cooperativeness, should have had nothing to do with their testimony at trial, yet it was used to make the evidence more reliable.

[9] The leading case on oath-helping is *R. v. Béland*, [1987] 2 S.C.R. 398. After reviewing the authorities, McIntyre J., for the majority, said this in summary at 408:

> From the foregoing comments, it will be seen that the rule against oath-helping, that is, adducing evidence solely for the purpose of bolstering a witness's credibility, is well grounded in authority.

[10] In *R. v. Khan*, 2011 BCCA 382, the Court referred to a later pronouncement from the Supreme Court of Canada on this topic:

> [28] The rule against oath-helping was described as follows by Madam Justice McLachlin (as she then was) in *R. v. Burns*, [1994] 1 S.C.R. 656 at 667:
>
> > The rule against oath-helping holds that evidence adduced solely for the purpose of proving that a witness is truthful is inadmissible: *R. v. Marquard*, [[1993] 4 S.C.R. 223]. The rule finds its origins in the medieval practice of oath-helping; the accused in a criminal case or the defendant in a civil case could prove his innocence by providing a certain number of compurgators to swear to the truth of his oath: see *R. v. Béland*, [[1987] 2 S.C.R. 398], *per* Wilson J. at pp. 419-20. In modern times, it is defended on the ground that determinations of credibility are for the trier of fact, and that the judge or jurors are in as good a position to determine credibility as another witness. Therefore the fundamental requirement for expert evidence - that it assist the judge or jury on a technical or scientific matter which might otherwise not be apparent - is not met. The rule, as Iacobucci J. noted in *R. v. B. (F.F.)*, [1993] 1 S.C.R. 697, at p. 729, goes to evidence "that would tend to prove the truthfulness of the witness, rather than the truth of the witness' statements".
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> [Emphasis added.]

[11] Constable Geoffrey Corbett of the RCMP interviewed Tanya Murphy on the evening of June 22, 2008, and then again the next day. The gist of his evidence, which did not include the content of her statements to him, was that she was a willing witness, both cooperative and forthcoming. He was asked, concerning the

second meeting, whether he formed an opinion with respect to her sobriety. According to him, she was not intoxicated or impaired. Her demeanour was mostly calm but emotional at times. The prosecutor took Constable Corbett through a series of questions more appropriate for a voluntariness *voir dire* negating such things as threats, inducements and oppression. All this would have left the jury with the impression that her statements to the police were probably reliable and likely consistent with her testimony.

[12] Constable Craig Thur interviewed Rae Lynne Gartner. His evidence was led more or less in the same manner as Constable Corbett's. He first spoke to her on June 22. She had been drinking but he listened to her story and spoke to her for about an hour. He said this at trial:

> Q What was her -- what sort of shape was she in when you got there?
> A She was very emotional. I would say under the influence of alcohol, but not to the point where she wasn't -- and she was giving a story that was credible, with detail, believable. She was emotional. She -- she was quite -- quite emotional and somewhat under the influence but not heavily so.
>
> [Emphasis added.]
>
> * * *
>
> Q And so you had a conversation with her at that point, where you said -- was it an hour and a half or did you say? I'm sorry if I --
> A Well, I -- I said well over an hour. I don't know exactly how long I was at that residence. It was certainly long enough to take a lengthy recorded statement and to speak with her friend, make sure that she was going to be okay overnight if she stayed there. The friend was completely sober. I told her that we would have to speak with her again the next morning, when she was more composed.

[13] Constable Thur commented on the statement the witness gave the next day:

> Q And could you describe her demeanour during that interview?
> A Again, she -- she was upset by the whole situation. But she was much more composed, less emotional than the previous evening, and she gave a pretty coherent and detailed statement.
> Q Was there any emotion or tears or anything like that during that third --
> A I think there was a little, but it was much, much less than the previous evening.
> Q All right.

> A But there still was -- was some. I -- yes. She had mixed feelings about the whole situation. She was upset by it.
>
> [Emphasis added.]

[14] Virtually none of the oath-helping evidence was objected to, nor was any ruling or limiting instruction sought.

[15] Respondent's counsel sought to support the impugned evidence along the lines advanced below – admissible as narrative and relevant to reliability – but alternatively invoked the curative proviso found in the *Criminal Code*, R.S.C. 1985, c. C-46, s. 686(1)(b)(iii).

[16] I cannot apply the proviso to this error. The only evidence connecting the appellant to the killing is the evidence of Tanya Murphy and Rae Lynne Gartner. They were the Crown's case. The prosecutor stressed their importance in his opening address to the jury:

> Now, to just sort of go to the big picture here. <u>At the core of this case, what the Crown is relying upon to prove this charge</u> is evidence of two alleged statements which Ms. Murphy made, in which she admitted responsibility for causing the death of Evangeline Billy, or sometimes you'll hear her referred to as Evan Billy.
>
> * * *
>
> So you're going to need to pay particular attention to the evidence of Tanya Murphy and the evidence of Rae Lynne Gartner, as well as to other circumstantial evidence that the police have developed, that the Crown says will help you to determine the case, and which will, the Crown says, demonstrate Ms. Murphy's direct responsibility for killing Evangeline Billy.
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> [Emphasis added.]

[17] The error goes to the evidence of the key witnesses and cannot be said to be harmless. Since there was no other overwhelming evidence of guilt, it cannot be said the verdict would necessarily have been the same despite the error.

<u>Ground D – Inadmissible opinion evidence; Investigation evidence</u>

[18] There are two aspects of this ground stemming from the same misconception that led to the oath-helping error just discussed. I refer to the idea that the police

investigation is part of the "narrative" and that it is a legitimate purpose for the Crown to establish the integrity of the investigation regardless of the position of the defence. Accordingly, Sergeant Mark London, the lead investigator, testified at length as to how he and his team followed proper procedures and well-established protocols throughout. He was invited by the prosecutor to discuss his working theories on the crime scene and cause of death, presumably to explain what he did next. Since the integrity of the investigation was not put in issue by the defence, this was to enhance the case for the prosecution – to dress it up.

[19] The other aspect of his testimony led in this fashion to which the appellant takes objection is his offering an opinion on the crime scene, in particular, his opinion that because of the state and position of clothing on the victim's body a sexual assault had been staged. The prosecution argued this conformed with the appellant's admissions to Tanya Murphy and Rae Lynne Gartner. Sergeant London was not qualified as an expert in crime scene analysis. The issue of the background investigation was for the defence to raise. In *R. v. Van*, 2009 SCC 22, LeBel J. said this at para. 25:

> Lower courts have held that when the defence advances a theory of inadequate police investigation, the trial judge may rule that investigative evidence including hearsay is admissible for the purpose of creating a narrative of the investigation. As the Ontario Court of Appeal pointed out in [*R. v. Mallory*, 2007 ONCA 46], however, the risk in this defence strategy is inherent in the fact that the Crown is then entitled to lead evidence of the police investigation that is relevant to the line of attack (para. 87; see also *R. v. Lane*, 2008 ONCA 841, 243 O.A.C. 156). That is, the Crown might be permitted to lead investigative hearsay and opinion evidence that would be otherwise inadmissible but for its part in the narrative of the investigation.
>
> [Emphasis added.]

[20] In *R. v. Mallory*, cited above, the Ontario Court of Appeal encouraged the undertaking of a *voir dire* to assess the probative value and prejudicial effect of the investigative evidence and to warn the jury of the limited use of that evidence. None of that occurred in the present case.

[21] The prejudice to the appellant lay in the opinion of a staged sexual assault, for the Crown argued that was something only the perpetrator and the police would

have known and hence the value of the appellant's admission was enhanced. It was also prejudicial for the Crown to be able to portray the adequacy and integrity of the investigation when the defence did not make that an issue.

[22] Respondent's counsel asks us to apply the curative proviso if we should accede to this ground. While standing alone, the errors associated with this ground might not have created a miscarriage of justice, but when they form part of an overall prosecution strategy that did produce such an effect (oath-helping) then I must decline to use the proviso.

Ground A – Improper cross-examination of the appellant

[23] The appellant alleges that the cross-examination of the appellant was abusive and the trial judge erred in failing to intervene and to warn the jury to disregard inadmissible bad character evidence.

[24] I do not find that the questioning was abusive. The circumstances of the killing occurred in a milieu of drunkenness and drug abuse. By her own evidence, the appellant had a drinking and drug problem and on the weekend in question she was on a binge. The cross-examination went to the extent of her addictions, how they affected her life, work and relationship with her family, and whether they made her paranoid or aggressive. The prosecutor spent some time on this line of questioning but I am unable to say that he exceeded the proper bounds.

[25] At the prosecutor's urging, the judge gave the jury a propensity instruction in these terms:

> I also instruct you that any evidence you may have heard about the character of Alicia Murphy cannot be used as evidence to decide or help you decide that she is the sort of person that might be likely to commit the offence charged.

[26] I do not find any merit in this ground.

Ground C – Alibi

[27] The appellant alleges that she was denied the effective assistance of counsel because late disclosure of her alibi damaged the value of the evidence. By the time the Crown was told of the alibi, it was too late for the Crown to investigate its validity because the alibi witness had died. This permitted the prosecution to comment adversely on the alibi and obliged the judge to instruct the jury as to the negative effect of lateness.

[28] Fresh evidence by way of affidavits was adduced by both parties without objection. One witness was called in cross-examination before us. There was no issue as to credibility.

[29] The alibi witness was a drug dealer, known as Chukka, who committed suicide before defence counsel could have known his identity. In her instructions to counsel before trial, the appellant recounted that she went to a drug dealer's home in the early morning hours of June 22 to buy crack cocaine and then she went home for a while before meeting up again with the friends she had been drinking with.

[30] She refused to give her counsel the dealer's name because she was concerned the dealer might retaliate if she got him involved. She did not mention until after Chukka's death that she stayed at his place to smoke most of the crack cocaine that she was supposed to buy for her group. The time elapsed in this visit coincides with the time of the killing and was her alibi.

[31] The appellant argues that counsel should have told her about the necessity of timely notice of alibi. Moreover, when it came up at trial, counsel should have given an explanation to the jury for the late notice to the effect that the appellant was not told of the significance of timing. Counsel's evidence is that the appellant said nothing about an extended visit to the drug dealer that suggested an alibi and so it was not pursued.

[32] That counsel may be under a duty to offer such an explanation in these circumstances is a novel proposition and unsupported by authority. It would have

required counsel to withdraw, to become a witness, and to give a rather weak excuse for this late alibi, one that the jury would likely blame on the appellant.

[33] To succeed on this ground, the appellant must show that counsel acted incompetently and that a miscarriage of justice occurred: see *R. v. Dunbar*, 2003 BCCA 667 at para. 22. I am unable to find that either component has been satisfied.

Disposition

[34] For the reasons set out above, I would allow the appeal and order a new trial.

"The Honourable Mr. Justice Donald"

I agree:

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Madam Justice Cooper"