

SUPREME COURT OF YUKON

Citation: *R v Murphy*, 2015 YKSC 48

Date: 20151106
S.C. No. 08-01518A
Registry: Whitehorse

Between:

HER MAJESTY THE QUEEN

Respondent

And

ALICIA ANN MURPHY

Applicant

A publication ban pursuant to ss. 645(5) and 648(1) of the *Criminal Code* has lapsed.

Before Mr. Justice L.F. Gower

Appearances:

Noel Sinclair and Paul Battin
Jennifer Cunningham and Michael
Dineen

Counsel for the Respondent
Counsel for the Applicant

**RULING
(Second Disclosure Application)**

INTRODUCTION

[1] This is an application by the accused for further disclosure of 14 occurrence reports which have been held back by the Crown on the basis that they are clearly irrelevant. It is the second such application, with the first having been made in June 2015. I released my ruling on that application on July 8, 2015 and it is cited as 2015 YKSC 31. In that decision I ruled that the Crown had failed to establish that 26 of 76

occurrence reports regarding the accused's sister, Tanya Murphy ("Tanya"), were clearly irrelevant. Accordingly, I ordered them to be disclosed to the accused.

[2] The background to this matter is set out in that ruling, but for the sake of convenience, I will repeat the relevant particulars. The accused, Alicia Murphy ("Alicia"), is charged with the second-degree murder of Evangeline Billy on or about June 22, 2008. Tanya Murphy is one of two Crown witnesses who allege that the accused confessed to the murder to them; the other witness is Rae Lynne Gartner. There is very little additional evidence connecting the accused to the murder.

[3] The accused was convicted of second-degree murder following her first trial in 2009. However, that conviction was overturned by the Court of Appeal in 2014, and a new trial was directed. The accused has new counsel representing her on the retrial.

[4] The grounds for the application are that the additional occurrence reports involving Tanya Murphy may be useful to the defence in the following ways:

- 1) they may disclose discreditable conduct by Ms. Murphy which could affect the weight given to her evidence;
- 2) they may reveal that Ms. Murphy has previously made false reports or provided misleading information to the authorities; and
- 3) they may shed light on the relationship between Ms. Murphy and the accused, influencing whether or not the jury finds that she had a motive to fabricate her evidence.

[5] It is important to note that prior to the first trial on this charge, very limited disclosure was made of the past interactions between the police and Tanya Murphy. The disclosure consisted of one occurrence report summary and a criminal conviction

for common assault in 1998, without any details of that assault. After the new trial was ordered, new defence counsel, Ms. Cunningham, requested disclosure of any police records that could potentially relate to the reliability or credibility of both Tanya Murphy and Rae Lynne Gartner, as well as their updated criminal records. Defence counsel was provided with some additional disclosure and was also partially successful in the first disclosure application, as I indicated above.

THE ADDITIONAL DISCLOSURE

[6] The additional disclosure provided by the Crown has revealed the following:

- 1) Tanya Murphy's 1998 conviction for assault involved Alicia Murphy and Scott Harrison as victims. The allegations were that Tanya threatened both Mr. Harrison and Alicia with a kitchen knife and also assaulted them. Alicia Murphy gave a statement that Tanya held the knife as if she was going to stab Alicia, and that Tanya told Alicia that she was going to kill her and stab her. It was further alleged that Tanya bit Alicia three times and bent her finger. Mr. Harrison told police he could hear Alicia saying: "No Tanya, don't I'm your sister, please don't". Tanya Murphy entered a guilty plea to one "rolled up" count of assault including both Alicia and Mr. Harrison.
- 2) The Crown disclosed on April 9, 2015 that there are four youth court records for Tanya Murphy. So far as I can tell, one of those was a finding of guilt in 1994 for possession of a credit card obtained by crime. I am not aware of the particulars of the other matters.

- 3) Tanya Murphy was charged with two breaches of probation in 2000, but both charges were stayed by the Crown.
- 4) In 2006, Tanya Murphy was convicted for an assault against Roger Smith. This matter was previously described in error by the Crown as a domestic assault investigation in which Tanya was the complainant. It was also one of the matters that the Crown previously identified as being “clearly irrelevant”.
- 5) In 2008, Tanya Murphy was convicted for a breach of probation for failing to abstain absolutely from alcohol.
- 6) In July 2008, Tanya Murphy was investigated for assaulting another one of her sisters, Michelle James. This was just a few days after the death of Evangeline Billy. Michelle James alleged that Tanya slapped her on the side of the face and said “You murderer lover, you arsonist”.
- 7) In 2009, Tanya Murphy was investigated for child abuse in relation to her 12-year-old daughter.
- 8) Also in 2009, Tanya Murphy and her then common-law partner, Ian Parker, were arrested after a domestic disturbance in which each alleged assaults by the other.¹ The police eventually decided not to charge Ms. Murphy, and when this was relayed to her, she made the statement: “I’ll slit his throat”, although the officer said that she could not be sure who she was referring to.
- 9) In 2010, Tanya Murphy was a witness to an assault by Patrick O’Shea, her then common-law partner, on Thomas O’Shea. The investigating

¹ This was one of the matters I ordered to be disclosed in my earlier ruling, at para. 35.

police officer noted that portions of Tanya’s statement “were not consistent with other information learned”.

- 10) In 2011, Tanya Murphy was hired by her First Nation to clean a house in Atlin, British Columbia, where Ms. Murphy was residing at the time. Yolanda Carlick had formerly lived in the house with her children. After locating a used condom and a pair of bloodied children’s underwear, she made a complaint to the RCMP about possible child abuse by Ms. Carlick. In her statement to the police, Ms. Murphy acknowledged Ms. Carlick as a friend and someone who was close to her family. However, she was also critical of Ms. Carlick’s abilities as a mother. When Ms. Carlick was interviewed, she said that Ms. Murphy was upset with her and was motivated to make allegations against her because of a planned threesome with Tanya’s partner, Patrick O’Shea, that did not go according to plan. The investigating officer noted “The motivation for Tanya Murphy to make the complaint as Yolanda Carlick described it is consistent with the manner in which Tanya Murphy made the complaint”.
- 11) Also in 2011, Tanya Murphy was investigated for abusing drugs in the presence of her two children. A friend of her daughter alleged that the daughter, J.H., sold her a marijuana joint for five dollars. The friend alleged that J.H. said she got the marijuana from her mother. Ms. Murphy admitted to the police that she slapped her daughter for lying to her about selling marijuana.

- 12) Also in 2011, Tanya Murphy reported Denise Yeomans for driving erratically and while impaired in the Atlin area. Ms. Yeomans was found later in the passenger seat of a vehicle and was determined to be sober. Tanya was cautioned by the police concerning false complaints.
- 13) In 2013, Tanya Murphy called the RCMP to report that Caitlin O'Shea, a relative of Patrick O'Shea, was driving a particular red and white truck with no insurance or registration. The RCMP investigated and found that the vehicle was registered and insured. This was arguably a false or misleading complaint by Ms. Murphy.
- 14) In February 2014, Tanya Murphy called the RCMP to complain about being harassed by her sister Michelle James. Although Tanya did not disclose any criminal conduct, she nevertheless wanted the police to intervene.
- 15) In April 2014, Tanya Murphy called the RCMP in Atlin to report that Patrick O'Shea was intoxicated and had just left their residence in their Chevrolet Blazer. The investigating officer located Mr. O'Shea and did not observe any signs of impairment. He also located the Chevrolet Blazer, which was parked behind the couple's house and the hood was cold. This was arguably a false or misleading complaint by Ms. Murphy.
- 16) Again in May 2014, Tanya Murphy called the RCMP to report that Patrick O'Shea "was now leaving" in the Chevrolet Blazer. The investigating officer noted that the vehicle was parked in the couple's driveway and again the hood was cold. Ms. Murphy later said she "thought" that Mr.

O'Shea was going take their vehicle, but that he opened the door, put something inside and then departed on foot. Arguably, the original complaint was either false or misleading.

- 17) In June 2014, Tanya Murphy called the RCMP to report that Patrick O'Shea had threatened to hit her and had then left the residence. She then called back a short time later advising that she no longer needed the police and that "nothing had occurred". Again, the original complaint was arguably false.

APPLICATION FOR FURTHER DISCLOSURE

[7] Defence counsel seeks to vary my original disclosure order on the basis of the expanded evidentiary record resulting from the initial disclosure that I ordered on July 8, 2015. She submits that this disclosure, together with the disclosure provided prior to the original application, demonstrates a pattern of Tanya Murphy being violent or abusive towards those close to her, making arguably false allegations towards people she is angry with, and other discreditable conduct. In particular, counsel submits that this pattern demonstrates the Tanya Murphy is motivated to engage the police when she is upset with someone, as she was with the accused at the time of her statement to the police on the murder allegation. Accordingly, the defence now seeks disclosure of the remaining held back occurrence reports wherever Tanya Murphy provided a witness statement to the police. In other words, the defence submits that it may be relevant to the accused how Tanya Murphy conducted herself as a witness in those additional investigations.

[8] The Crown's position is that this application is effectively an appeal of my first disclosure ruling and that there has been no material change in the circumstances prior to that ruling to justify a variation. In other words, the Crown submits that there is no new evidentiary basis to vary. In this regard, the Crown relies upon *R. v. Khela*, [1995] 4 S.C.R. 201, in which the Supreme Court stated, at para. 10:

[10] ... The trial judge has a discretion to vary an order for disclosure on the basis of evidence which establishes that the factual foundation upon which the order was based has changed. Such an application should be made at the earliest opportunity....

[9] The Crown further submits that the accused has the onus of demonstrating to this Court that the original disclosure ruling should be varied and that she has not advanced any authority to suggest that this is possible. In my view, *Khela* is that authority and the evidentiary basis for the variation is found in the combination of the original disclosure and the additional disclosure I ordered in July.

[10] It must not be forgotten, as I previously ruled, that the defence has no onus to establish relevance.² Rather, information is relevant if there is a reasonable possibility that it could be used by the defence in meeting the case for the Crown. It is the Crown who has the onus, upon a review of its decision to refuse disclosure, to satisfy the reviewing court that the sought after information is clearly irrelevant.

[11] As the above record arguably demonstrates, Tanya Murphy's conduct as a witness has been less than stellar. I can readily imagine how defence counsel will want to cross-examine Ms. Murphy about some of these incidents. In this regard, I find a passage from the case of *R. v. M.D.*, [2015] O.J. No. 2150 (C.J.), helpful. *M.D.* was also

² 2015 YKSC 31, at para. 30

an application for disclosure of occurrence reports and other materials in a criminal matter. At para. 24, the Court stated:

[24] It is axiomatic, in my view, that if defence counsel would be permitted to pursue a line of questioning at trial which relates to the record sought to be disclosed, then that record must be relevant for disclosure purposes.

[12] Crown counsel argues that the accused has misinterpreted and extrapolated the actions of Tanya Murphy mentioned in the occurrence reports disclosed thus far. I will touch upon some of the arguments in this regard, which can only be directed towards a conclusion that the sought after reports continue to be clearly irrelevant:

- 1) In my initial disclosure order, I ruled that the 2009 occurrence report regarding Tanya Murphy's domestic dispute with Ian Parker should be disclosed.³ I noted that this incident occurred after the alleged murder on June 22, 2008, and before the trial which took place in October 2009. I agreed with defence counsel that that may be relevant (in the sense that it could possibly be of some use) to determine how Tanya Murphy perceived the favourable treatment she received with the stay of proceedings, in light of her upcoming testimony as a key Crown witness in a murder trial. Crown counsel submits, firstly, that the occurrence report was not disclosed because it could shed some light on the relationship between Tanya Murphy and Mr. Parker and therefore that the phrase allegedly spoken by Ms. Murphy, "I'll slit his throat" is irrelevant to my original reason for the disclosure. Secondly, the Crown submits that it is not clear from the occurrence report who Ms. Murphy was referring to. I reject both

³ 2015 YKSC 31, at para. 35

arguments. First, it is not necessary for the new evidence, “I’ll slit his throat”, to relate to my original reason for the disclosure. The new evidence is relevant regardless of that reason, because it is arguably discreditable conduct. Second, it is reasonable to infer that Ms. Murphy was likely referring to Mr. Parker when she made that comment.

- 2) In 2010, Tanya Murphy made a complaint to the RCMP in Atlin that Denise Yeomans had just spoken to her in an unpleasant manner, although she did not raise her voice or threaten her verbally or physically. The Crown submits that this does not suggest that Ms. Murphy’s recollection of the events was untrue. In my view, that was not the purpose of defence counsel referring to the incident. It is evident from other occurrence reports that Tanya Murphy has a strained relationship with Ms. Yeomans and this incident could be further evidence of that *animus* and Ms. Murphy’s readiness to go to the police with minor matters of a personal nature when she is upset.
- 3) Regarding the incident in 2010 involving Patrick, Thomas and Shaun O’Shea, the Crown submits that the occurrence report does not demonstrate that Tanya Murphy provided a misleading statement to the police. I acknowledge that there was some partial corroboration for certain details of her statement by Cameron O’Shea. However, it seems improbable that Thomas O’Shea would have had bright red marks on both sides of his neck as a result of running into the arm of his father, Shaun O’Shea. That, combined with the investigating officer’s opinion that

portions of Ms. Murphy statement were inconsistent with other information leads to an arguable inference that she was trying to protect her common-law partner, Patrick O'Shea, during the investigation.

- 4) Regarding the incident in May 2014, when Tanya Murphy reported to the RCMP that Patrick O'Shea "was now leaving" in their Chevrolet Blazer, the Crown says that the occurrence report does not make any suggestion that Ms. Murphy intentionally misled the police. While that may be so, there is nevertheless an inconsistency on the face of the document where Ms. Murphy later told the police "she thought he was going to take their SUV".
- 5) Regarding the incident in June 2014, when Ms. Murphy reported to the RCMP that Patrick O'Shea had "threatened to hit her and then left the residence", the Crown submits that "there was no judicial determination that Tanya Murphy was misleading the police". There is no requirement for such a judicial determination. Ms. Murphy later recanted her statement telling the police "that nothing had occurred". This is a clear inconsistency.
- 6) Regarding the incident in 2011, when Ms. Murphy reported possible child sexual abuse to the RCMP in Atlin as a result of finding a used condom and a pair of bloodied children's underwear in a house formerly occupied by Yolanda Carlick, the Crown submits that there "was no judicial finding as to the veracity of Tanya Murphy's reporting of the incident to police". Once again, there is no necessity for such a "judicial finding". The significance of the document to defence counsel is that Ms. Murphy was

apparently quite willing to provide rather extensive criticism of Ms. Carlick's abilities as a mother, combined with the investigating officer's opinion that her complaint was consistent with Ms. Murphy's anger towards her former friend over a threesome that did not go according to plan.

- 7) Regarding the incident in 2014 when Tanya Murphy complained to the RCMP about harassment from her younger sister, Michelle James, the Crown submits that this is not evidence that Ms. Murphy is "untrustworthy". With respect, that is not my understanding of the import of the document for the defence. Rather, the defence submits that the incident is significant because it shows once again Ms. Murphy's readiness to complain to the police about family members when she is upset.

[13] The Crown also argued that, as a result of my initial disclosure ruling, the accused has received "ample" disclosure regarding the credibility and reliability of Tanya Murphy for the purposes of cross-examining her at the trial. In my view, the Crown does not get to decide when the defence has enough of such evidence. If there are another 14 documents which might provide defence counsel with a basis for further damaging cross-examination, then they are relevant and ought to be disclosed.

[14] The Crown's specific arguments as to why each of the sought after occurrence reports are clearly irrelevant follow. The numbering of the list tracks Appendix "A" in my reasons of July 8, 2015, as well as the Crown's disclosure letter of December 30, 2014:

1. Haines Junction Detachment 1993 0000068– Identified as victim of sexual assault, along with her sister Alicia Murphy, by Dwayne Edward Johnson.

[15] The Crown submits that Tanya Murphy would have been approximately 14 years old when these events took place and that there is no evidence that Ms. Murphy gave a statement in relation to these events.

[16] I agree that the dated nature of the incident makes it less likely that it would be possibly relevant. However, it is reasonable to presume that if Tanya was identified as a “victim” then there should be a witness statement from her, or a witness summary, in the report. In the result, based upon the expanded evidentiary record resulting from my initial disclosure ruling, it may possibly be relevant to the accused how Tanya Murphy conducted herself as a witness in this investigation. Accordingly, I am no longer of the view that the document is clearly irrelevant.

4. Whitehorse Detachment 1998 0004545 – Identified as a witness in sexual exploitation investigation involving [J.D.] (Victim) & Stuart Bond (Accused). Accused plead guilty, received conditional sentence.

[17] The Crown submits that: (1) there is no evidence that Tanya Murphy gave a statement about these events; and (2) since the accused pled guilty, there would have been no judicial determination as to the truth of any statement she did give.

[18] Again, in my view, it is reasonable to presume that if Tanya was identified as “a witness” then she likely gave a statement. Further, there may be internal or external inconsistencies arising from the statement, despite the guilty plea. Accordingly, for the same reasons immediately above, I am no longer able to say that the document is clearly irrelevant.

26. Atlin Detachment 2011-74. Tanya Murphy a passenger in a parked vehicle involved in impaired

driving & breach UT investigation. Driver, Patrick O'Shea, given a caution.

27. Atlin Detachment 2011-76. Same as above.

[19] The Crown submits that there is no evidence that Tanya Murphy gave a statement to the police in this matter or that she provided any false information. I agree and conclude that the documents continue to be clearly irrelevant.

28. Atlin Detachment 2011-98. April 20th, 2011, complaint and request for assistance by Tanya Murphy, seeking to remove intoxicated Patrick O'Shea from their residence. Tanya Murphy interviewed with regard to complaint.

31. Atlin Detachment 2011-148. June 2, 2011, Complaint and request for assistance by Tanya Murphy, seeking to remove intoxicated Patrick O'Shea from their residence according to terms of O'Shea's probation order. Tanya Murphy interviewed with regard to complaint.

[20] The Crown submits that there is "no new evidence" to cause me to vary my initial determination that these documents are clearly irrelevant. I disagree. The new evidence is the expanded record resulting from that disclosure ruling.

33. Atlin Detachment 2011-176. June 21, 2011, RCMP investigate banging sound near Tanya Murphy's residence. Tanya Murphy arrives home at time of investigation and is interviewed. RCMP locate Patrick O'Shea, intoxicated, and arrest him for breach. Tanya Murphy interviewed with regard to investigation.

[21] The Crown submits that there is no evidence that the statement given by Tanya Murphy caused the police to arrest Patrick O'Shea. Rather, it was Mr. O'Shea's intoxication. While that may be so, for the same reasons given above, it may nevertheless be of possible relevance to the defence how Ms. Murphy conducted herself as a witness in this investigation. Accordingly, I am no longer able to say that the document is clearly irrelevant.

40. Atlin Detachment 2011-401. November 1-7, 2011. Investigation of Patrick O'Shea for 'no-contact' probation breaches arising from above noted child protection investigation.

[22] The Crown submits that there is no evidence Tanya Murphy gave any information to the police in this matter. I agree and conclude that it continues to be clearly irrelevant.

41. Atlin Detachment 2011-406. November 19, 2011. While [J.H.] residing in care she complained of sexual touching by her uncle, [R.W.]. Section 810(1) order made against Williams. Tanya Murphy interviewed with regard to complaint.

[23] The Crown submits that there is no evidence that Tanya Murphy had any animosity towards Mr. Williams. Furthermore, if a s. 810(1) order was made against Mr. Williams, it should be assumed that any information Ms. Murphy gave as part of the investigation was reliable. I tend to agree with the latter point; however, it still may be of interest to the accused how Ms. Murphy conducted herself as a witness in this matter. Accordingly, I am no longer satisfied that it is clearly irrelevant.

47. Atlin Detachment 2012-52. February 25, 2012, Patrick O'Shea arrested for 'no contact' breach and assault against Tanya Murphy. Tanya Murphy interviewed in respect of complaint.

[24] The Crown submits that there is no new evidence to justify varying my earlier determination that this matter is clearly irrelevant. I disagree. The new evidence is the expanded record resulting from my initial disclosure ruling. It may possibly be of interest to the defence how Tanya Murphy conducted herself as a witness in this matter and, accordingly, it is no longer clearly irrelevant.

60. Atlin Detachment 2012-312. August 12, 2012, complaint and request for assistance by Tanya Murphy, seeking to remove intoxicated Patrick O'Shea from their

residence according to terms of O'Shea's probation order. Tanya Murphy interviewed with regard to complaint.

68. Atlin Detachment 2013-88. Investigation of domestic assault between Real Sidney and Elisha Carlick. Tanya Murphy interviewed with regard to complaint.

71. Atlin Detachment 2013-188. July 13, 2013, complaint and request for assistance by Tanya Murphy, seeking to remove intoxicated Patrick O'Shea from their residence according to terms of O'Shea's probation order. Tanya Murphy interviewed with regard to complaint.

[25] The Crown submits that there is no new evidence to suggest that my initial disclosure ruling on these three documents should be varied. I disagree for the reasons set out immediately above.

73. Atlin Detachment 2013-341. October 24, 2013, request for assistance by Tanya Murphy, seeking RCMP assistance to take away from Patrick O'Shea his house key to their residence. Tanya Murphy interviewed. RCMP advise Murphy to seek civil remedies. File concluded.

[26] The Crown submits there is no suggestion here that Ms. Murphy gave misleading evidence and that if the RCMP advised her to seek civil remedies, it should be assumed that she provided *prima facie* reliable and accurate evidence. I agree with the first point but not with the second. The RCMP may simply have concluded that they had no jurisdiction to assist Ms. Murphy in this matter. Thus, it may nevertheless be of interest to the accused how she conducted herself as a witness. Accordingly, I am no longer satisfied that this matter is clearly irrelevant.

CONCLUSION

[27] I order that the Crown provide the following occurrence reports with reference to the item numbers in the Crown's earlier disclosure letter of December 30, 2014: 1, 4, 28, 31, 33, 41, 47, 60, 68, 71, and 73. These are already in the Crown's possession and

accordingly should be provided forthwith. The Crown is not obliged by this order to provide additional background or supporting materials in the possession of the RCMP. If such is requested by defence counsel, and the matter cannot be resolved by agreement, then defence counsel may have to make a further application for their production.

GOWER J.