IN THE COURT OF APPEAL
OF NEWFOUNDLAND AND LABRADOR

Citation: *R. v. Norris*, 2019 NLCA 29
Date: May 15, 2019
Docket Number: 201801H0022

BETWEEN:

HER MAJESTY THE QUEEN — APPELLANT

AND:

ANNE NORRIS — RESPONDENT

Coram: Welsh, White and Hoegg JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
General Division 201601G6783
(2018 NLSC 27)

Appeal Heard: November 23, 2018
Judgment Rendered: May 15, 2019

Reasons for Judgment by: Welsh J.A.
Concurred in by: White and Hoegg JJ.A.

Counsel for the Appellant: Lloyd Strickland
Counsel for the Respondent: Jerome Kennedy Q.C. and Rosellen Sullivan

Welsh J.A.:

[1] On February 24, 2018, a jury found Anne Norris not criminally responsible on account of mental disorder for the murder of Marcel Reardon on May 9, 2016. The Crown appeals that decision on the basis that the trial judge erred in law by excluding portions of intercepted conversations between Ms. Norris and another inmate in the correctional facility, by excluding medical records of a prison psychiatrist, and by failing to limit surrebuttal evidence by an expert witness.

BACKGROUND

[2] By means of an Agreed Statement of Facts, Ms. Norris admitted that: she caused Mr. Reardon's death by striking him a number of times on the head with a hammer; she placed Mr. Reardon's body under the outside stairs of the apartment building where she was residing; she had purchased a hammer the evening before, and had later met Mr. Reardon and two others downtown; in the early morning hours of May 9, 2016, she and Mr. Reardon had returned to her apartment; after causing Mr. Reardon's death, she put the hammer she had used together with other items into a backpack; later that morning she met Kevin O'Brien and proceeded with him to St. John's harbour where she threw the backpack, which was subsequently retrieved, into the harbour.

[3] During a *voir dire*, the trial judge excluded several out-of-court utterances made by Ms. Norris. The utterances are described generally by the judge (2018 NLSC 27):

> [5] The out-of-court utterances were all made by Ms. Norris in May 2017 while she was in custody awaiting trial. There was a judicial authorization for one party consent interception of the communications. An inmate, an agent of the police, sharing a cell with Ms. Norris, wore a device that allowed recording of her conversations with Ms. Norris. The Crown says that these recorded conversations or utterances are relevant to Ms. Norris' mental capacity to appreciate the nature and quality of her actions when Mr. Reardon was killed, and relevant to her mental capacity to know that what she did on that date was wrong.
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> [6] The utterances were made about a year after the killing of Mr. Reardon. By that time Ms. Norris was aware of the Crown's case. She was present throughout the preliminary inquiry and she had the full disclosure. The Defence note that there was nothing that Ms. Norris stated in these intercepted conversations that she could not have known already from her presence at the preliminary inquiry. Some utterances expose Ms. Norris' knowledge of what happened at the time of the killing, and include details of the events. Other utterances are inconsistent with the actual events and are

> obviously part of fabricated stories that Ms. Norris was generating for entertainment purposes while trying to alleviate the boredom with her cellmate.
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> [7] The statements are prejudicial in the sense that they reflect negatively on Ms. Norris' character. The context of several of the statements is Ms. Norris and her cellmate agreeing to tell fabricated stories to break boredom. The utterances, or in one case a rhyme, is presented as a form of entertainment and is not represented by either Ms. Norris or her cellmate to correspond to actual events. Part of this rhyme matches actual events, particularly the one that I call "Goodbye Marcel". Parts of those utterances are obviously made up solely for the sake of achieving a rhyme.

[4] The trial judge's rationale for excluding certain of the utterances was lack of relevance or low probative value in relation to high prejudicial effect.

[5] The medical records of Dr. Craig, a prison psychiatrist, were excluded based on the trial judge's conclusion that Dr. Craig was a person in authority for purposes of the confessions rule. The Crown submits that Dr. Craig could not properly be characterized as a person in authority, and in any event, the medical records were tendered not for the purpose of obtaining admissions, but to elicit evidence of Dr. Craig's observations and assessment made soon after Ms. Norris had been taken into custody.

[6] Regarding the surrebuttal evidence entered by Ms. Norris, the Crown submits that the trial judge erred by failing to limit the scope of the evidence led by the defence in response to the Crown's expert witness.

ISSUES

[7] At issue is whether the trial judge erred in law (1) by excluding portions of intercepted conversations between Ms. Norris and another inmate in the correctional facility, (2) by excluding the medical records of Dr. Craig, and (3) by failing to limit the scope of surrebuttal evidence.

ANALYSIS

Appeal by the Crown

[8] Pursuant to section 676 of the *Criminal Code*, the Crown may appeal against a jury's verdict of not criminally responsible on account of mental disorder only on a ground of appeal that involves a question of law alone. The issues on this appeal satisfy that requirement on the basis that a determination of whether evidence is admissible is a question of law (*R. v. Buhay*, 2003 SCC 30, [2003] 1 S.C.R. 631, at paragraph 42).

Intercepted Conversations with an Inmate at the Prison

[9] Where admissibility is based on an assessment and balancing of the probative value and possible prejudicial effect of proffered evidence, the test to be applied is discussed in *R. v. Shearing*, 2002 SCC 58, [2002] 3 S.C.R. 33. Binnie J., for the majority, referred to the decision in *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717:

> [33] … It was there held that although evidence relating to the accused's disposition will generally be excluded, exceptions to this rule will arise when the probative value of the evidence outweighs its prejudicial effect, *per* McLachlin J. (as she then was) in *B. (C.R.)*, at pp. 734-35:
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> > The analysis of whether the evidence in question is admissible must begin with the recognition of the general exclusionary rule against evidence going merely to disposition. … [E]vidence which is adduced solely to show that the accused is the sort of person likely to have committed an offence is, as a rule, inadmissible. Whether the evidence in question constitutes an exception to this general rule depends on whether the probative value of the proposed evidence outweighs its prejudicial effect.
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> [34] McLachlin J. formulated the test for admissibility of disposition or propensity evidence, at p. 732:
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> > … evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury.
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> …
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> [73] In the weighing up of probative value versus prejudice, a good deal of deference is inevitably paid to the view of the trial judge: *B. (C.R.)*, *supra*, at p. 733. This does not mean that the trial judge has a discretion to admit similar fact evidence whose prejudicial effect outweighs its probative value, but it does mean that the Court recognizes the trial judge's advantage of being able to assess on the spot the dynamics of the trial and the likely impact of the evidence on the jurors. These are evidentiary issues on which reasonable judges may differ and, absent error in principle, the decision should rest where it was allocated, to the trial judge. …

[10] As applied to this appeal, the trial judge was satisfied that there was some probative value to the utterances made by Ms. Norris in May 2017:

> [11] … The reliance by the medical experts on statements made by Ms. Norris after the fact to assist them in evaluating her state of mind as of May 9, 2016, satisfies me that there is some probative value to the utterances made by Ms. Norris in May 2017. If the doctors took the statements after the fact to assess state of mind at the time of the offence, then candid statements made by Ms. Norris to her cellmate after the fact can also be relevant.
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> [12] I also agree with the Crown that the utterances have relevance in comparing Ms. Norris' self-reporting of [her] mental state to her physicians for purposes of defence expert reports, and how should that compare with utterances made to her cellmate.
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> [14] … It is the view of Defence counsel that once the jury hears these intercepted communications, particularly the laughter in the rhymes and stories about murder, that there would be no limiting instructions that would undo the prejudice.
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> [15] As I already stated, much of the intercepted communications are 'made up' stories created for purposes of amusement. Some of the utterances have low probative value to the issue of Ms. Norris' state of mind, but still have relevance on the credibility issue. How do these utterances, in particular the ease of Ms. Norris describing these types of crimes, square up with her alleged difficulty talking about the death of Mr. Reardon in her conversation with the psychologist, Mr. Penney?
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> [16] I am allowing admission of parts of the utterances. Much will be excluded on the basis that it does not have relevance or that it has an excessive prejudicial impact and low probative value. I have been guided by the *R. v. Handy*, [2002] 2 S.C.R. 908 decision that both counsel referred to in their oral submissions, particularly paragraphs 139 to 142 dealing with moral prejudice:
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> > [139] … The forbidden chain of reasoning is to infer guilt from general disposition or propensity. The evidence, if believed, shows that an accused has discreditable tendencies. In the end, the verdict may be based on prejudice rather than proof …

[11] The trial judge reviewed each statement the Crown sought to adduce in order to assess its relevance as well as its probative value in relation to the possible prejudicial effect. He indicated that he was focusing on relevance to Ms. Norris' state of mind and to the issue of credibility, and gave reasons in each case for allowing or refusing all or part of the evidence. For example, in deciding to admit or exclude statements, the judge explained:

> [25] This is a relatively short statement, the main feature of it is Ms. Norris saying, "Thirty months for what I did." It reveals something of her state of mind. It shows

> Ms. Norris' awareness of the potential consequences. It shows an awareness of right from wrong. It includes some discussion by Ms. Norris of her anxiety issues, her use of medication to deal with that, and treatment for these anxiety issues. All of this is relevant to the issue of state of mind. Overall the statement does not have any significant issues of prejudice. All of session 1014 is admissible.
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> [26] The utterances in this session are not relevant and are all excluded. The only comment of possible relevance, near the end, was "It's my own fault I'm in here." I just take [this] as an acknowledgement by Ms. Norris that she caused the death of Mr. Reardon. It does not reveal her insight into right from wrong or state of mind. I exclude all of session 1016 on the basis of irrelevance.
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> [27] All of this session is admissible. These are utterances by Ms. Norris that have probative value to an issue before the jury, namely state of mind, and that have low prejudicial impact. Particularly, the statement, "I attacked somebody and … [unintelligible] … horribly wrong, beat to death with a fuckin hammer" and "I can't believe I fuckin did that though." This is probative to state of mind. She thinks back on it. It reveals her mental state. The prejudice is low because she is merely repeating what has already been admitted. The utterance has probative value to an issue in dispute because it indicates that she knows it was wrong, "I can't believe I did it."

See also decision of the trial judge, at paragraphs 28 to 30, and 41.

[12] On appeal, the Crown submits that the trial judge erred in excluding evidence as to a rhyme Ms. Norris made up with her cellmate. The judge recognized that "Ms. Norris speaks easily and in gruesome detail of a killing" and that the rhyme includes some details as to Mr. Reardon's death, matching details "that are admitted, or that were known, or that were disclosed through the preliminary inquiry process". However, the judge was satisfied that the rhyme "is represented by both Ms. Norris and her cellmate to be a story, to be made up". In the same paragraph, the trial judge concluded:

> [31] … The story will have high emotional impact; it exposes, in a fictional story, a cold-hearted woman killer. In this story, Ms. Norris makes light of the death. It is a story that is in incredibly poor taste, making light of a tragic death. At the end of the story, Ms. Norris says, "I'm so bad at this". In the context she is announcing that "I am so bad at making up a fictional story". And then when the two discuss writing the words down on paper, Ms. Norris says, "Like the fuck. It'll sound like an admission of guilt for me." I take this last utterance to mean that the words of the rhyme were made up; they were the opposite of a confession; they were a bad joke.

[13] In concluding that the rhyme or story is not admissible because it has low probative value, but high prejudicial impact, which "would be impossible to neutralize with a jury instruction", the judge explained:

> [32] … From start to finish, the whole song, the whole rhyme, is in the context of black humour and, in my view, cannot be taken as utterances indicative of state of mind at the time of the killing of Mr. Reardon. …

[14] The judge also referred to the decision in *R. v. Parsons* (1996), 146 Nfld. & P.E.I.R. 210 (Nfld. C.A.), in which Mr. Parsons was wrongfully convicted by a jury of murdering his mother, and which involved a song made up by Mr. Parsons and others about killing your mother. Further, the judge contrasted making up the story with her cellmate, who participated in the activity, to the difficulty Ms. Norris had in recounting the facts surrounding Mr. Reardon's death to Mr. Penney, the psychologist. He distinguished these on the basis that the former was a "fictional story" and the latter was a "real story". While the judge agreed with the Crown's submission that the ease of telling the story has probative value regarding the issue of credibility, he excluded the evidence because the "risk of the prejudice to trial fairness is too great" (paragraph 34).

[15] The trial judge excluded evidence which he explained could be taken out of context, was not sufficiently reliable to be admitted, and would create a great risk of prejudice to trial fairness (paragraph 36). At paragraph 37, the judge gave reasons for admitting portions of one session, while excluding other portions. In addition, he concluded:

> [40] … [W]here Ms. Norris starts to say, "I do have a lot of balls actually. I attacked somebody … horribly wrong, beat to death with a fucking hammer". At that point Ms. Norris begins speaking of the killing of Mr. Reardon and this includes comments that are relevant to her state of mind. These utterances … will give the jurors a glimpse into Ms. Norris' mind at the relevant time, as Ms. Norris is reporting it. All the remainder of Page 3 of the transcript is admissible. Pages 4 and 5, in which she is talking about other crimes, unrelated to the crimes that are before the Court, have little relevance, are prejudicial, and are excluded.

[16] The Crown submits that the intercepted utterances of Ms. Norris should have been admitted for purposes of cross-examination of the defence expert witnesses. For example, counsel submits, the intercepts could have been used to test the opinion of Dr. Ladha that Ms. Norris had been acting due to a delusional fear of Mr. Reardon. The Crown sought to test that theory on the basis that Ms. Norris' utterances supported a conclusion that her behaviour was psychopathic when she killed Mr. Reardon. The Crown submitted at trial that an appropriate instruction to the jury would limit the possible prejudicial effect of the utterances.

[17] The trial judge was aware of the purpose for which the Crown intended to use the utterances. Dr. Ladha obtained Mr. Penney's assessment of possible psychopathic behaviour. Both Dr. Ladha and Mr. Penney were examined and cross-examined. Further, as discussed above, many of Ms. Norris' utterances which had prejudicial effect were, in fact, available to the jury.

[18] The trial judge clearly considered the Crown's submissions. He reviewed the utterances in detail along with other relevant evidence. The judge accepted that many of the utterances had probative value, and he considered whether an instruction to the jury would address the danger of prejudice. After balancing the probative value against the prejudicial effect, the judge gave reasons for admitting many of Ms. Norris' utterances, and excluding others.

[19] In summary, the judge applied the law in exercising his discretion to admit or exclude certain of Ms. Norris' utterances. There is no basis on which to find error by the trial judge.

Medical Records of Dr. Craig

[20] The Crown submits that medical evidence relating to Ms. Norris' mental health as close as possible to the time that Mr. Reardon was killed is of particular importance. Dr. Ladha did not interview Ms. Norris until June 1, 2016, approximately three weeks after the death. Dr. Craig, a psychiatrist who provides psychiatric care to inmates of provincial correctional facilities, was the first mental health professional to interview Ms. Norris. He conducted what he termed to be a routine mental health assessment via video conference on May 19, 2016.

[21] At issue is whether the trial judge erred in characterizing Dr. Craig as a person in authority for purposes of the confessions rule, with the result that Dr. Craig's records of his interviews with Ms. Norris were excluded. The analysis engages two steps: first, a determination that the person to whom the statement was made is a "person in authority"; and, second, if that threshold requirement is satisfied, a determination that the statement was made voluntarily (*R. v. Grandinetti*, 2005 SCC 5, [2005] 1 S.C.R. 27, at paragraph 37).

[22] In this case, once the judge had determined that Dr. Craig was a person in authority, the Crown conceded that there was insufficient evidence to establish the voluntariness of Ms. Norris' statements. In the result, the records were ruled inadmissible.

[23] The question of when a recipient of a statement is a person in authority is discussed in *R. v. S.G.T.*, 2010 SCC 20, [2010] 1 S.C.R. 688. Charron J., for the majority, explained:

> [20] … It is only where the accused makes a statement to a "person in authority", that the Crown bears the onus of proving the voluntariness of the statement as a prerequisite to its admission. This, of course, is the confessions rule.
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> …
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> [22] A person in authority is typically a person who is "formally engaged in the arrest, detention, examination or prosecution of the accused": *Hodgson* [[1998] 2 S.C.R. 449], at para. 32. Importantly, there is no category of persons who are automatically considered persons in authority solely by virtue of their status. The question as to who should be considered as a person in authority is determined according to the viewpoint of the accused. To be considered a person in authority, the accused must believe that the recipient of the statement can control or influence the proceedings against him or her, and that belief must be reasonable. Because the evidence necessary to establish whether or not an individual is a person in authority lies primarily with the accused, the person in authority requirement places an evidential burden on the accused. While the Crown bears the burden of proving the voluntariness of a confession beyond a reasonable doubt, the accused must provide an evidential basis for claiming that the receiver of a statement is a person in authority.
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> (Emphasis added.)

[24] Whether the recipient of a statement is a person in authority involves both a subjective and an objective component. Abella J., for the Court in *Grandinetti*, explained:

> [38] The test of who is a "person in authority" is largely subjective, focusing on the accused's perception of the person to whom he or she is making the statement. The operative question is whether the accused, based on his or her perception of the recipient's ability to influence the prosecution, believed either that refusing to make a statement to the person would result in prejudice, or that making one would result in favourable treatment.
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> [39] There is also an objective element, namely, the reasonableness of the accused's belief that he or she is speaking to a person in authority. …

See also the summary in *R. v. Hodgson*, [1998] 2 S.C.R. 449, at paragraph 48.

[25] In this case, a *voir dire* was held to address the admissibility of Dr. Craig's records. The trial judge accepted that Dr. Craig, who was the only witness on this *voir dire*, would not automatically be considered a person in

authority solely by virtue of his status as a psychiatrist who provides psychiatric care to prison inmates.

[26] In finding that Dr. Craig was a person in authority, the trial judge indicated that he had considered: case authority provided by counsel; evidence that Ms. Norris "was in a locked room, [with a] guard outside the door"; and Dr. Craig's testimony that Ms. Norris "probably thought he was an employee of the Department of Justice".

[27] A reading of the transcript for the *voir dire*, including the trial judge's oral decision, leads to the conclusion that the judge erred in applying the law. He did not consider the question from the subjective perspective of Ms. Norris, and it is unclear whether he properly assigned to Ms. Norris the burden of establishing that Dr. Craig was a person in authority.

[28] A sufficient evidential basis for concluding that Dr. Craig was a person in authority would not necessarily require testimony from Ms. Norris. However, the fact that Ms. Norris was in a locked room with a guard outside the door must be considered in light of the fact that she was being held in a prison facility after being charged with murder. There was no evidence that she could not terminate the interview at any time, should she so wish. In response to a question, Dr. Craig testified that Ms. Norris "probably thought he was an employee of the Department of Justice". This was vague conjecture by him.

[29] Finally, Dr. Craig testified that the May 19, 2016 interview, which was done by video conference and which lasted approximately twenty minutes, was conducted as a routine mental health assessment to determine Ms. Norris' potential needs as an inmate, not to assess her mental state at the time of Mr. Reardon's death.

[30] In the circumstances, the Crown submits that Ms. Norris failed to satisfy the burden she had of establishing, on the facts, that Dr. Craig was a person in authority. As stated in *Grandinetti*, Ms. Norris must establish that, based on her perception of Dr. Craig's "ability to influence the prosecution, [she] believed either that refusing to make a statement to [Dr. Craig] would result in prejudice, or that making one would result in favourable treatment" (paragraph 38). The factors considered by the trial judge did not address Ms. Norris' subjective belief.

[31] Ms. Norris submits that she had a burden only to demonstrate that there is a "valid issue for consideration". That phrase must be considered in context. In *Grandinetti,* Abella J. explained:

> [37] … First, there is an evidentiary burden on the accused to show that there is a valid issue for consideration about whether, when the accused made the confession, he or she believed that the person to whom it was made was a person in authority. … The burden then shifts to the Crown to prove, beyond a reasonable doubt, either that the accused did not reasonably believe that the person to whom the confession was made was a person in authority, or, if he or she did so believe, that the statement was made voluntarily. …

[32] Abella J. goes on to discuss the subjective and objective components of the test. Regarding the subjective component of the test, as summarized in *Hodgson*, "it is only the accused who can know that the statement was made to someone regarded by the accused as a person in authority" (paragraph 48, point 7). That criterion can be established by testimony from the accused or by evidence of the surrounding circumstances sufficient to satisfy the burden of proof. Once the subjective component has been established, the burden shifts to the Crown to demonstrate that the accused's perception was objectively unreasonable. (See also *S.G.T.*, at paragraph 22.)

[33] In the circumstances, for purposes of determining the admissibility of Dr. Craig's records, I am satisfied that the trial judge erred in concluding, without a proper evidentiary foundation, that Dr. Craig was a person in authority. Accordingly, it is unnecessary to proceed to the second step in the inquiry.

[34] However, it is necessary to consider the effect of the error, as discussed in *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609. In that decision, Fish J., for the majority, cautioned:

> [14] It has long been established, however, that an appeal by the Attorney General cannot succeed on an abstract or purely hypothetical possibility that the accused would have been convicted but for the error of law. Something more must be shown. It is the duty of the Crown in order to obtain a new trial to satisfy the appellate court that the error (or errors) of the trial judge might reasonably be thought, in the concrete reality of the case at hand, to have had a material bearing on the acquittal. The Attorney General is not required, however, to persuade us that the verdict would necessarily have been different.

[35] In this case, I am satisfied that the admission of Dr. Craig's records would not have had a material bearing on the jury's decision. Dr. Craig's short interview via video conference on May 19th was not intended to assess Ms.

Norris' state of mind when she killed Mr. Reardon. Other expert witnesses addressed issues related to whether Ms. Norris acted out of delusional fear or for some other motive. Further, the jury had evidence of Ms. Norris' behaviour before and after Mr. Reardon was killed from which to draw inferences and assess the psychiatric and other evidence.

[36] It follows that, although the trial judge erred in concluding in the absence of an evidential foundation that Dr. Craig was a person in authority, I am satisfied that exclusion of the records would not have had a material bearing on the outcome, and that this error would not warrant a new trial. The possible cumulative effect of the error is discussed below.

Surrebuttal Evidence

[37] The Crown closed its case having entered the Agreed Statement of Facts which established, on the basis of an admission, that Ms. Norris had killed Mr. Reardon. Ms. Norris then presented evidence regarding her behaviour before and after Mr. Reardon's death as well as expert psychiatric evidence from Dr. Ladha, Dr. LeDrew, Dr. Young and Mr. Penney, for the purpose of establishing the defence of not criminally responsible on account of mental disorder. Upon completion of the defence evidence, the Crown called Dr. Gill to give expert evidence to respond to the evidence of the defence experts. Ms. Norris then sought to adduce surrebuttal evidence through Dr. Chaimowitz. Ms. Norris concedes that, in the circumstances, the Crown could not have called Dr. Gill before the defence evidence was completed. In allowing surrebuttal evidence, the trial judge was satisfied that the report of Dr. Gill was new evidence and that Ms. Norris had the right to adduce evidence in response consistent with her right to make full answer and defence.

[38] The Crown submits that the trial judge erred by failing to limit the scope of the surrebuttal evidence. At the conclusion of a *voir dire*, the judge summarized the acceptable questions:

> … Those are the areas, [1] you can ask the witness to comment on the reports of Dr. Gill, whether he agrees or disagrees, [2] to comment on the report of Dr. Ladha, whether he agrees or disagrees. [3] You can ask him to comment on the prognosis from Dr. LeDrew regarding her participation in the PIER program. [4] You can ask him to comment on the chart reviewed April 18th to May 6, 2016, whether there was any indication of psychotic symptoms. [5] You can ask him if the post-offence conduct is consistent or inconsistent with his psychiatric diagnosis of bipolar and, with psychotic symptoms. [6] You can ask him to comment on how Ms. Norris appeared in those hours before with her friends and the days after with people in the apartment

> building and other officers looking normal and acting normal. [7] And you can ask him … whether she was capable of appreciating that it was wrong, as you asked Dr. Ladha already.

The Crown submits that only the first issue, commenting on Dr. Gill's report, was proper surrebuttal evidence.

[39] Where the Crown adduces evidence to rebut a defence, the accused may be permitted to adduce surrebuttal evidence. In *R. v. Chaulk*, [1990] 3 S.C.R. 1303, Lamer C.J.C., for the majority, explained, at page 1364:

> The principle that the Crown is obliged to adduce, as part of its case, only evidence that is relevant to an element of the offence that the Crown must prove is affirmed by the corollary principle that the Crown need not adduce evidence in chief to challenge a defence that an accused might possibly raise. I approve of the analysis in this respect of Peter K. McWilliams, Q.C., in *Canadian Criminal Evidence* (3rd ed. 1990), at p. 31-5:
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> > In *R. v. Campbell* (1977), 38 C.C.C. (2d) 6 (Ont. C.A.), Martin, J.A, said at p. 26:
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> > > Rebuttal evidence by the prosecution is restricted to evidence to meet *new facts* introduced by the defence. The accused's mere denial of the prosecution's case in the witness-box does not permit the prosecution in reply to reiterate its case, or to adduce additional evidence in support of it. In practice, however, it may often be difficult to distinguish between evidence, properly the subject of rebuttal, and evidence of facts relevant to prove guilt which should have been proved in the first instance by a full presentation of the prosecution's case … .
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> (Emphasis in original.)

[40] In the case of both rebuttal and surrebuttal evidence it is necessary to determine the scope of allowable evidence. In *R. v. Dupe*, 2016 ONCA 653, the Court provided *obiter dicta* regarding the scope of surrebuttal evidence where the accused sought to recall a psychiatrist who had testified about the accused's state of mind when the victim was stabbed. The judge allowed surrebuttal evidence on four of fourteen issues raised by the accused. While the Court's decision did not turn on the issue of surrebuttal evidence, Doherty J.A., for the Court, commented:

> [69] … The trial judge understood that he had the discretion to permit surrebuttal evidence. He considered the relevance of the proposed surrebuttal testimony and whether the [accused] had had a full opportunity to address the issues which were the

> subject of the proposed surrebuttal with Dr. Gojer when Dr. Gojer testified as part of the defence … .

[41] In *R. v. Ewert* (1989), 52 C.C.C. (3d) 280 (B.C.C.A.), the accused's defence of insanity was based on the evidence of one psychologist. The Crown retained three experts who were present in court when the accused testified. The Crown's experts testified "partly on the basis of prior examination and partly on the basis of observations made in the courtroom" (*Ewert*, at page 282). Taylor J.A., for the Court, explained, at pages 283 to 284:

> … Specifically, counsel [for Ewert] sought to have Dr. Koopman [the defence expert] deal with the "twenty-two points" mentioned by Dr. Kerr [a Crown expert on rebuttal] as *indicia* of psychopathy and Dr. Kerr's contention that assessment of the accused against these criteria showed his behaviour to be psychopathic.
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> It is asserted on appeal that the accused ought to have had the opportunity to adduce surrebuttal evidence to meet this evidence given for the Crown tending to show that the conduct of the accused, <u>both before and during the trial</u>, was that of a psychopath rather than that of a person suffering from a disease of the mind as described in the defence evidence.
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> … The right of the accused to a full opportunity to answer the case entered against him by the Crown must apply to evidence given by way of rebuttal as well as to that given during the Crown's case-in-chief. The rules regarding the permissible scope of surrebuttal must, it follows, be applied liberally in favour of an accused person in such circumstances as the present.
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> …
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> In this case some of the evidence led by the Crown in rebuttal was new evidence, particularly that which dealt with the *indicia* of psychopathy and the alleged presence of those *indicia* in observed behaviour of the accused. This evidence included observations on the testimony of the accused at trial which, according to the Crown's experts, showed him to have a psychopathic personality rather than the described disease of the mind.
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> …
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> The evidence of the Crown's witnesses went not simply to denial of the thesis advanced by the defence but to establishing an alternative explanation for the accused's conduct inconsistent with the contention advanced on his behalf. For the most part, the opinions of the Crown's experts and the observations on which they were based had not been put to Dr. Koopman in cross-examination, and there had,

> therefore been no opportunity for the defence to deal with that evidence in its own case.
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> (Emphasis added.)

[42] These decisions demonstrate the balance that must be engaged when the defence seeks to adduce surrebuttal evidence. I begin with the premise that the permissible scope of defence surrebuttal evidence should be liberal in favour of the accused in order to ensure the opportunity to make full answer and defence.

[43] That said, the accused's opportunity to make full answer and defence does not mean that the defence should be permitted to "split its defence" just as the Crown is not permitted to "split its case". Failure to present its full case, whether the Crown in proving the elements of the offence, or the accused in establishing a defence, may result in prejudice to the other side and interference with the orderly and expeditious conduct of the trial.

[44] Factors that may be considered in determining the appropriate scope of surrebuttal evidence include: (1) the relevance of the proposed surrebuttal testimony; (2) whether the accused had the opportunity during the presentation of his or her defence to address the issues for which surrebuttal evidence is requested; (3) whether the accused failed to provide a complete foundation for the defence, and sought, instead to split its case; (4) the extent to which the evidence adduced by the Crown in rebuttal is new, for example, evidence directed to an alternative explanation not dealt with in the defence evidence, or Crown rebuttal evidence that included observation of the accused during the trial, as in *Ewert*; (5) whether the Crown conducted vigorous cross-examination of the defence witnesses so as to reduce the probable need to recall the witness for surrebuttal evidence; (6) the extent to which the whole of the evidence is inter-related, making the definition of a permissible scope of examination more difficult; and (7) whether the witness giving surrebuttal evidence is new or has previously testified on behalf of the accused.

[45] The above is not an exhaustive list of factors that may be considered by a judge in exercising the discretion to allow surrebuttal evidence, nor would every one be relevant in every case. Admissibility of the evidence together with the permitted scope of examination will depend on all the circumstances.

[46] In this case, the trial judge stated that the Crown's rebuttal evidence was new and that the surrebuttal evidence was relevant. These factors support his

decision to permit surrebuttal evidence. However, in defining the scope of appropriate surrebuttal evidence, the judge did not address relevant factors.

[47] In particular, the trial judge allowed surrebuttal evidence by an expert who had not yet given evidence on behalf of Ms. Norris. This had the potential to raise new issues or perspectives to which the Crown was not in a position to respond. It also resulted in the trial judge allowing Dr. Chaimowitz to answer questions and make comments on the evidence of previous defence witnesses. This amounted, in effect, to splitting the defence case. Ms. Norris could have chosen a witness who had previously testified for the defence to give surrebuttal testimony, unless none of those witnesses was competent to address the new evidence introduced by Dr. Gill, the Crown's rebuttal witness. In either case it could be expected that the scope of the surrebuttal evidence would be limited to the new evidence adduced in the Crown's rebuttal evidence.

[48] The trial judge did not impose such a limitation. Rather, Dr. Chaimowitz was permitted to comment on the evidence of the previous defence witnesses. This took him outside the parameters of addressing new issues raised by the Crown on rebuttal. Other than responding to new evidence introduced by Dr. Gill, Ms. Norris had had a full opportunity to present evidence to ground her defence of not criminally responsible on account of mental disorder.

[49] In the result, I am satisfied that the trial judge erred in failing to circumscribe appropriate parameters for the surrebuttal evidence. However, it is unnecessary to define those parameters for purposes of this appeal since, in the circumstances, application of the decision in *Graveline* leads me to conclude that, despite the errors, an order for a new trial is not warranted.

[50] Considering the evidence as a whole, I am satisfied that the judge's error regarding the permissible extent of surrebuttal evidence would not have had a material bearing on the jury's decision. The surrebuttal evidence of Dr. Chaimowitz was properly permitted insofar as he testified with respect to the report and evidence of Dr. Gill, the Crown's rebuttal witness. To the extent that Dr. Chaimowitz went beyond addressing the new evidence, the effect was to reinforce the evidence of the earlier defence experts. While this was improper, in assessing whether Ms. Norris acted out of delusional fear or for some other motive, the jury had the original testimony of the defence witnesses to consider, regardless of Dr. Chaimowitz's position, the rebuttal evidence of Dr. Gill, and significant evidence regarding Ms. Norris' behaviour before and after Mr. Reardon was killed, from which to draw inferences and assess the psychiatric and other evidence. This evidence was of such weight that the improperly

received evidence of Dr. Chaimowitz cannot reasonably be thought, in the concrete reality of the case, to have had a material bearing on the verdict (*Graveline*, at paragraph 14).

[51] Further, I am satisfied that the cumulative effect of the errors regarding the admissibility of Dr. Craig's records and the scope of the surrebuttal evidence would not have had a material bearing on the jury's decision to find Ms. Norris not criminally responsible on account of mental disorder. There is no basis on which to order a new trial.

SUMMARY AND DISPOSITION

[52] In summary, the trial judge did not err by excluding portions of intercepted conversations between Ms. Norris and another inmate in the correctional facility. However, the judge erred by excluding the medical records of Dr. Craig, and by failing to properly limit the scope of the surrebuttal evidence.

[53] Nonetheless, those errors, individually and cumulatively would not have had a material bearing on the jury's decision to find Ms. Norris not criminally responsible on account of mental disorder. There is no basis on which to order a new trial.

[54] Accordingly, the appeal is dismissed.

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B. G. Welsh J.A.

I Concur: _____

C. W. White J.A.

I Concur: _____

L. R. Hoegg J.A.