

Crown submission: R v Kyle Wayne UNGER

My Lord, Don Slough for the record and I appear with Mr. Bell on behalf of the Crown.

I am here for two reasons.

First, I am the Assistant Deputy Attorney General, and as such have responsibility for the operation of the Manitoba Prosecution Service.

Secondly, I was one of the team of prosecutors along with Robert Morrison and George Dangerfield who had conduct of the trial that ended in Kyle Unger's conviction for first-degree murder.

History of proceedings and background.

Brigitte Grenier was murdered on June 23, 1990.

The Manitoba Court of Appeal described the events of that evening in the following manner:

On Saturday, June 23, 1990, a rock music festival took place at a ski resort near Roseisle, Manitoba. The next day the nude body of the victim, Brigitte Grenier, a 16-year-old high school student, was found nearby lying in a creek in a heavily wooded part of the grounds.

The accused Kyle Unger (hereinafter referred to as "Unger"), then aged 19, was acquainted with the deceased through high school. The accused Timothy Houlahan (hereinafter referred to as "Houlahan"), then aged 17, and the deceased did not know each other before that evening.

Both accused attended the festival separately with a group of friends. A considerable amount of drinking took place. Houlahan began drinking at approximately 11:30 p.m. Some of his friends testified that he was drunk. Unger also consumed a considerable quantity of alcohol, as well as some LSD. There was evidence that the victim also consumed beer.

Around midnight Houlahan and the deceased began to dance. Witnesses testified that they were dancing closely, kissing, fondling one another and clearly enjoying each other's company. There was evidence that Unger observed this and that during the course of the evening he expressed an interest to his close friend John Beckett in having sexual intercourse with the victim. Unger and the deceased spoke to each other once or twice. There was a suggestion that the deceased rebuffed Unger, or at least did not seem interested in his company.

The deceased was last seen dancing with Houlahan at approximately 1:30 a.m. Houlahan and the deceased then left the dance area together and made their way to a nearby densely wooded and secluded part of the resort. Shortly thereafter Unger, upon his return from a visit to the washroom, told Beckett that he had seen the deceased, "going at it with some guy over there."

The music stopped around 2:00-2:30 a.m. Unger then told Beckett that he was going to "go look for some tail" (to seek sexual intercourse). The same friend who had himself been drinking was unsure exactly how long Unger was away from his sight since he slept for some time, but estimated it could have been as little as 20 or 30 minutes. Other witnesses saw Unger around a large camp-fire at approximately 3:30-4:00 a.m. They testified that he did not have any mud or dirt on his clothing, or scratches or bruises to his face. Unger left the music festival at approximately

4:30-5:00 a.m. by automobile. Considerable evidence of an inconclusive nature was given at trial whether Unger would have had time to, or did change clothing. The evidence on this point is inconclusive, given the distance to his own home (approximately 6 miles); the fact that he had no vehicle that evening and the evidence of several witnesses that he appeared to be wearing the same clothing at all times during the evening.

Having left with the deceased at approximately 1:30 a.m., Houlahan was next seen by witnesses at approximately 4:00-4:30 a.m. His face and clothing were muddled. There were scratches on his face and blood on his chin. One witness noted that it appeared he had received a good beating. When asked for an explanation, Houlahan volunteered that he had been with a girl, or had been following a girl, and had been beaten up by an unknown male and had passed out. Although he initially appeared withdrawn and unconcerned with his injuries, he later did some more drinking and conversed with friends. On leaving the area early in the morning he and a friend stopped to set fire to the contents of a barrel near the entrance to the festival area. On returning to his friend's home, Houlahan ate a hot dog and then went to bed.

The victim had suffered a terrible beating. Severe blows to the head had caused subarachnoid bleeding. She had been strangled. She had been violated with long sharp sticks. There were also bite marks found on the victim's breasts and on an arm. Dr. Norman Sperber, a forensic orthodontologist, testified that the bite marks were not made by Unger. (Unger provided specimens of his bite; Houlahan declined to do so.)

Forensic evidence tendered at trial demonstrated that Houlahan had blood on his running shoes that was consistent with that of the victim. A hair found on the deceased's pants was consistent with having originated from the Houlahan's scalp. A pubic hair found on the deceased's socks was consistent with having originated from the pubic hair sample of Houlahan. A hair consistent with Unger's scalp hair was found on the blue Nike sweatshirt worn by the deceased...

Houlahan was interviewed by the RCMP. When first seen on the evening of June 25th, the police observed visible markings about his face and hands. No statement was taken as he was a young offender and his parents were not present. In the early morning of June 27th the police obtained the first of two formal statements from him. In this statement he admitted to having consensual sexual intercourse with the deceased, but stated that he was subsequently set upon by an unidentified male and rendered unconscious. Houlahan described his assailant with sufficient detail for the RCMP to conclude that he was identifying Unger.

In the second statement made on June 29th, Houlahan directly implicated Unger as the killer of Brigitte Grenier. He provided the police with a detailed description of Unger's murder of the victim consistent with the forensic and medical evidence. According to Houlahan, Unger, while savagely attacking the deceased, commanded Houlahan to punch the victim a couple of times, which he did. On Unger's orders Houlahan then assisted Unger in moving the body. Houlahan said he did nothing further out of fear for his own safety and that he assisted Unger under duress.

My Lord, shortly thereafter, Timothy Houlahan and Kyle Unger were charged with first degree murder in relation to her murder.

It would be fair to say that Houlahan's statement and his indication of Unger's involvement exerted a significant influence over the police and prosecution view of the case.

Houlahan was a youth and the Crown sought his transfer to adult court. That process including appeals took over 13 months to complete.

In the interim, Unger's charge proceeded to preliminary hearing. Hair evidence and the evidence as to Unger's interest in the victim and his awareness of her whereabouts with Houlahan were called at the preliminary hearing.

However, following a devastating cross examination of a bite mark expert, the Crown stayed the charge against Unger. That stay was entered on December 11, 1990.

After the charge was stayed, a jailhouse informant by the name of Jeffrey Cohen came forward indicating that on the day that Unger's charge was stayed, Unger returned to the cell and told him, "I killed her and got away with it."

The Crown decided that Cohen's evidence was insufficient to re-institute proceedings against Unger. Instead, the RCMP launched an undercover investigation, a so-called "Mr. Big" operation, which was described by the Manitoba Court of Appeal in the following terms:

The undercover operation commenced June 13, 1991. On that date two undercover RCMP officers staged a breakdown of their vehicle outside the hobby farm in rural Manitoba where Unger was staying. During the course of the ensuing 12 days, Unger admitted to the undercover officers that he had murdered the victim.

Much evidence was directed to the undercover operation dealing with the scope and planning of it, and whether as a result of the actions of the undercover officers it was so unbalanced as to be unfair.

Four undercover operatives in all were involved -- all RCMP officers. One officer in particular, Larry Tremblay (Tremblay), befriended Unger. The plan was to give Unger the impression that the undercover team was involved in criminal activities and to leave him with the idea that he could become part of the organization. Corporal Larry Forbes (Forbes) was cast in the role as the head of the organization. In the first week or so of the undercover operation, Tremblay established a personal relationship with Unger. He conveyed the notion that he liked Unger and that he was out to help him become involved in the organization. During this initial period, Unger on four separate occasions advised Tremblay that he had been wrongfully imprisoned for murder. No clarification was requested by Tremblay on any occasion. On June 22, 1991, Tremblay and Unger attended at Forbes' apartment. Tremblay had cautioned Unger -- who was anxious to make a good impression -- that he must be truthful. Early in the discussion Forbes said to Unger:

'Larry tells me you whacked somebody. That's fine with me. That's, that's fuckin' excellent. It's the kind of thing that, uh, I know that I'm dealing with somebody that's on my fuckin' -- somebody that I can trust ... That's the kind of person I'm looking for.'

Although Unger had told Tremblay that he wanted to talk to Forbes about the murder, he had not admitted his guilt. Notwithstanding, Unger did not correct Forbes. In this and other conversations Forbes emphasized to Unger that he had to be able to trust Unger and that, having left the impression that the undercover group was involved in an illegal activity (which Unger assumed to be drugs), he was not interested in taking into the group someone with ongoing problems with the police. Unger, initially hesitatingly and ultimately with demonstrable enthusiasm, confessed to the murder. Throughout his numerous discussions with Forbes and Tremblay, he maintained that he had acted alone.

On June 23, 1991, Unger, Tremblay and Forbes visited the scene of the murder. In conversations that took place between June 23rd and June 25th, Unger contradicted himself with respect to details concerning the murder, although the essential details of the beating and strangulation of the victim remained the same and were consistent with the forensic evidence.

Also on June 23, 1991, a conversation was intercepted between Unger and Beckett in which Unger stated that he had obtained a trusted position with a criminal organization and would be making a lot of money. He indicated that he got the job because of the reputation he had gained as a result of being charged with murder.

On June 25, 1991, Unger was re-arrested and charged once again with first degree murder. Shortly thereafter a direct indictment was preferred.

My Lord, I can also tell you that a joint trial commenced on January 20, 1992 resulting in both Unger and Houlahan being convicted of first degree murder on February 28, 1992.

Both Unger and Houlahan appealed to the Manitoba Court of Appeal.

Unger's appeal was dismissed by the Manitoba Court of Appeal.

Unger sought leave to appeal to the Supreme Court of Canada but leave was denied.

Houlahan's appeal to the Manitoba Court of Appeal was allowed but he committed suicide while on bail.

Disclosure issues

My Lord, there have been suggestions made that this is yet another case where important evidence was not disclosed to the defence when it ought to have been. I will now deal with that issue.

On November 17, 1991, the Supreme Court of Canada released the Stinchcombe decision, which as we all know dramatically changed how disclosure was dealt with by the police and the Crown.

As suggested by the preceding chronology virtually all of the investigation was completed prior to the release of the Stinchcombe decision.

That decision has been interpreted many times since its release with the result that the scope of disclosure has been steadily expanded by subsequent Supreme Court of Canada decisions.

At the time of its release in 1991 it was understood to state that the Crown was obliged to provide all relevant and admissible evidence to the defence whether favorable to the accused or not. After November 17, 1991 that obligation was placed on the prosecutors who had conduct of the Unger and Houlahan prosecution.

In my experience at the time of Unger's trial the practice of the police whether it be the RCMP or the Winnipeg Police Service was to provide the Crown attorney's office with that material they considered to be relevant to the case against the accused.

Other material they did not consider to be relevant would not be provided.

Since Stinchcombe practices have changed and the Crown receives virtually the entire investigative file and the Crown makes the determination as to disclosure in keeping with Stinchcombe and the subsequent cases, interpreting that decision, which I would submit has broadened the test for disclosure to something well beyond relevance and admissibility.

1) Satanism

The first alleged non-disclosure relates to the suggestion that Houlahan was a Satanist.

This assertion is based on a variety of material in RCMP files.

This suggestion was based on evidence that people acquainted with Houlahan were interested in Satanism.

In addition there were alleged statements by a jailhouse informant that Houlahan told him of his interest in Satanism. The RCMP investigated the jailhouse informant and immediately discovered that the circumstances of the conversations were not consistent with the known facts and were incredible. This information was neither admissible nor relevant. It was worthless.

There was other information that Houlahan three years prior to the murder when he was 14 years old, had broken into a neighbor's house, moved her underwear and tore up her marriage certificate. Once again this information was neither admissible nor relevant.

This information proves nothing and would never be admitted in a trial.

2) Evidence relating to Houlahan's statement

The second non-disclosure issue relates to information that when Houlahan gave one of his statements to an RCMP officer, that officer noted a comment by Houlahan to the effect "what if it's not Unger". When that comment was made the officer asked Houlahan: "Is it Unger or not?" Houlahan replied it was. As you are aware anything Houlahan said in his statement about Unger was not admissible against Unger so it is difficult to know how this information would have been used by Unger's counsel.

In addition it was the same RCMP officer's opinion that at times it sounded as if Houlahan was telling how Houlahan killed Brigitte Grenier but telling it as if Unger did it. This opinion evidence is not admissible and is speculative in nature.

But that being said, given the evolution of the law relating to disclosure there is no doubt that if this case was being prosecuted in 2009, this information would be provided to the defence.

3) Jailhouse informant Jeffrey Cohen seeking consideration

The final non-disclosure issue relates to evidence relating to a jailhouse informant, Jeffrey Cohen, who testified against Unger. Cohen's evidence was that after the Crown stayed the charges against Unger at his preliminary hearing Unger returned to his cell and said, "I killed her and got away with it." Cohen provided this information several months after the conversation supposedly occurred but prior to the undercover operation with respect to Unger.

He also testified that he did not ask for or receive any consideration for giving that information up or giving evidence. However shortly before the trial in 1992 Cohen was in custody and the Crown and police were in discussions about how to manage Cohen.

The RCMP entered into discussions with Cohen's counsel and at that time counsel made reference to perhaps trying to make some kind of deal for Cohen. Cohen's lawyer was advised that the Crown had instructed that there would be no deals made in exchange for Cohen's testimony. Subsequently the matter was briefly discussed with the Crown and it was reiterated there would be no deals.

Subsequently Cohen himself made reference to being able to make some type of deal and was advised by the police that there would be no deals.

This information was not provided to defence and while there were no deals or consideration for Cohen's testimony the fact the issue was raised by Cohen and his counsel should have been communicated to defence counsel.

In summary while we acknowledge there were some issues relating to disclosure it is our submission that in the overall scheme of things these issues were not particularly significant.

Further to jailhouse informants

In his report dated in dealing with the Soponow case September 2001 former Supreme Court of Canada Justice Cory described jailhouse informants as the most deceitful and deceptive group of witnesses known to frequent the courts. Justice Cory also emphasized the need for restraint in calling evidence which may be of dubious evidentiary value.

It should be noted that the Crown in closing did not portray Cohen's evidence as being particularly compelling. The Crown stated:

"Well, you remember Cohen, Jeffrey Ira Cohen, the much maligned little man who told you that he had overheard the conversation in the prison cell. Whether he did or didn't, he obviously told the police he had."

"We have Cohen, you can make of him what you like. Whether he's telling you the truth or not is a matter for you."

In summary since 1992 attitudes towards calling jailhouse informant evidence have undergone a transformation. Current Manitoba Prosecution Service policy severely restricts the calling of jailhouse informants and no Crown attorney would now consider calling evidence of the nature of that offered by Cohen.

My Lord, there are two other matters I would like to outline for you this morning.

Hair Comparison Evidence

It was the discovery that hair comparison evidence used in Unger's trial was invalid that ultimately resulted in today's proceedings.

As the court is aware hair comparison evidence is based on expert opinion based on the microscopic examination and comparison of a hair found at the crime scene with a known sample.

Back in the day, the expert would not state the hair absolutely came from the same person, but rather would state the hair was consistent with the known sample and that based on the expert's experience the chance of having it match the known sample but be from a different person would be very small.

At Unger's trial an expert provided an opinion that a hair taken from the sweatshirt worn by the victim was consistent with a known sample from Unger.

However, the evidence at trial was that Unger and the victim spoke during the course of the evening and that the transfer of the hair could have occurred during this conversation or alternatively during the struggle associated with the victim's homicide.

Accordingly this evidence was equivocal and acknowledged as such by Crown and defence.

In 2004 as a result of a number of cases where DNA testing showed hair comparison evidence to be invalid the Manitoba Prosecution Service undertook a review of homicide cases to determine if hair comparison evidence played a role in convictions for those offences.

Mr. Unger's case was identified as one of those cases where hair comparison evidence had been led and DNA testing established that the hair in question did not belong to Unger.

Given this flaw in the evidence called against Unger a s. 696 review was undertaken resulting in the Federal Minister of Justice ordering this matter be brought before this Court for re-trial.

The emergence of DNA testing has to a great extent superseded and to a large extent discredited hair comparison evidence so that it is no longer relied upon.

Nevertheless, I would submit that hair comparison evidence met the evidentiary standard at the time of the trial.

"Mr. Big" Operation

So-called "Mr. Big" operations have been used across Canada and in many cases provided relevant and reliable evidence resulting in the convictions of guilty people.

In a relatively recent Manitoba case, Bridges, a "Mr. Big" operation resulted in a detailed confession and the suspect leading the police to the previously undiscovered body of the victim.

In Newfoundland and Labrador a similar operation resulted in the exoneration of wrongly convicted accused Gregory Parsons.

I previously outlined for the Court the nature of the undercover operation and the evidence that operation produced in the case against Mr. Unger.

There is no doubt that without Mr. Unger's confession to the undercover police officers this matter would never have gone to trial and Mr. Unger would not have been convicted.

That fact is illustrated by the reality that at Unger's preliminary hearing the hair comparison evidence and the circumstantial evidence were tendered but when the teeth mark evidence was discredited the Crown stayed the charge.

For reasons already stated, the jailhouse informant evidence was so obviously weak as to be incapable of supporting a prosecution.

Without Unger's willingness to confess to the horrific murder of a person he described as a friend there was no case against him.

It has been suggested that the Crown's case against him is improbable and that his confession was inconsistent with the known facts.

Those arguments were made to the jury and were rejected.

His appeals failed.

Final Disposition

My Lord, as previously indicated, in the 17 years since the trial enormous advances have been made in the technology associated with DNA testing.

Since the order was made referring this matter back to this Honourable court, extensive further DNA testing of exhibits from the crime scene has been undertaken. The results of that testing were provided to our office in September of this year.

The testing did not find any trace of Unger on any of the exhibits.

Accordingly we have a horribly violent crime and no physical evidence linking Unger to that crime.

All that remains in terms of evidence of Unger's guilt are his statement to the undercover police officers during the course of the "Mr. Big" operation.

To reiterate, we now know that the hair on the victim's sweatshirt was not Unger's. With the benefit of Justice Cory's words in the Sophonow report and Prosecution's revised policies the jailhouse informant evidence would not be called. This evidence is no longer available to support Unger's confession.

The new DNA testing produced no trace of Unger at the crime scene.

Taking into account these circumstances, a group of very experienced Crown attorneys has reviewed the file and it is their conclusion that it would be unsafe to retry Unger on the available evidence.

Therefore the Crown will be calling no evidence.