2011 ONSC 2406
Ontario Superior Court of Justice

R. v. Spence

2011 CarswellOnt 3004, 2011 ONSC 2406, [2011] O.J. No. 2051, 249 C.R.R. (2d) 64, 85 C.R. (6th) 72, 94 W.C.B. (2d) 328, 94 W.C.B. (2d) 356

Her Majesty the Queen and Lenworth Anthony Spence and Andrew Turner, Defendants

Howden J.

Heard: April 13, 2011
Judgment: April 28, 2011
Docket: 09-225

Counsel: G.M. Flosman, R. Williams, for Crown
B. Bytensky, J.A. Morische, for Defendant, Lenworth Anthony Spence
D. Midanik, for Defendant, Andrew Turner

Subject: Criminal; Constitutional; Evidence

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Criminal law --- Constitutional authority — Prosecutorial responsibility — Rights and duties — In prosecution

Witness preparation — Accused S and T were jointly charged with first degree murder and kidnapping — W, former co-accused, made plea agreement and became key Crown witness — In preparation for trial, Crown prosecutor showed W surveillance video and time-stamped stills from entrance to building where victim was held — W subsequently changed his evidence as to sequence of arrivals and departures during night in question — Defence counsel raised concern that time stamps influenced W's evidence — S applied for discharge of jury and continuation of trial by judge alone on basis of witness contamination — Application granted — Probable cause of change of W's evidence was assistance from Crown before he testified, in particular, comment by prosecutor that part of his evidence at preliminary inquiry could not be true — Prosecutor who prepared W for trial failed to abide by recommendations of Kaufman Commission for conduct of witness interviews and Crown trial manual — Contamination of witness by pre-trial practices is abuse of process — Kaufman recommendations are to be treated as standard to be followed when Crown is preparing witness subject to Vetrovec caution — Accused's right to fair trial under ss. 7 and 11(d) of Canadian Charter of Rights and Freedoms had been violated by prosecutor's conduct and would be imperilled should trial go on as constituted — Mistrial and continuation of trial without jury was proper remedy.

Criminal law --- Pre-trial procedure — Election — Re-election by accused — Right to re-elect — Miscellaneous

Accused S and T were jointly charged with first degree murder and kidnapping — W, former co-accused, made plea agreement and became key Crown witness — In preparation for trial, Crown prosecutor showed W surveillance video and time-stamped stills from entrance to building where victim was held — W subsequently changed his evidence as to sequence of arrivals and departures during night in question — Defence counsel raised concern that time stamps influenced W's evidence — S applied for discharge of jury and continuation of trial by judge alone — Application granted — Probable cause of change of W's evidence was assistance from Crown before he testified, in particular, comment by prosecutor that part of his evidence at preliminary inquiry could not be true — Prosecutor who prepared W for trial failed to abide by

recommendations of Kaufman Commission for conduct of witness interviews and Crown trial manual — Accused's right to fair trial under ss. 7 and 11(d) of Canadian Charter of Rights and Freedoms had been violated by prosecutor's conduct and would be imperilled should trial go on as constituted — Both accused were willing to re-elect to proceed without jury and counsel were willing to have all orders to date apply should trial continue without jury — This remedy would protect society's interest in search for truth while ensuring that W's evidence received difficult, open and careful scrutiny that was ensured by trial judge's duty to provide reasons for judgment — It could not be assured that Vetrovec warning about evidence they had already heard would be effective or followed by jury — Crown's discretion to refuse consent to re-election is not immune from judicial review where accused's right to fair trial under Charter is threatened — Mistrial and continuation of trial without jury was proper remedy.

Criminal law --- Charter of Rights and Freedoms — Charter remedies [s. 24] — Stay of proceedings

Accused S and T were jointly charged with first degree murder and kidnapping — W, former co-accused, made plea agreement and became key Crown witness — In preparation for trial, Crown prosecutor showed W surveillance video and time-stamped stills from entrance to building where victim was held — W subsequently changed his evidence as to sequence of arrivals and departures during night in question — Defence counsel raised concern that time stamps influenced W's evidence — Accused applied for stay of proceedings — Application dismissed — Probable cause of change of W's evidence was assistance from Crown before he testified, in particular, comment by prosecutor that part of his evidence at preliminary inquiry could not be true — Prosecutor who prepared W for trial failed to abide by recommendations of Kaufman Commission for conduct of witness interviews and Crown trial manual — Contamination of witness by pre-trial practices is abuse of process — Accused's right to fair trial under ss. 7 and 11(d) of Canadian Charter of Rights and Freedoms had been violated by prosecutor's conduct and would be imperilled should trial go on as constituted — While trial judge has residual discretion to stay proceedings under s. 24(1) of Charter in cases where accused's right to fair trial is breached, this was not one of "clearest of cases" that required permanent stay — Less drastic remedies were available under s. 24(1) — Mistrial and continuation of trial without jury was proper remedy.

Criminal law --- Constitutional authority — Prosecutorial responsibility — Abuse of process — Conduct of prosecution

Accused S and T were jointly charged with first degree murder and kidnapping — W, former co-accused, made plea agreement and became key Crown witness — In preparation for trial, Crown prosecutor showed W surveillance video and time-stamped stills from entrance to building where victim was held — W subsequently changed his evidence as to sequence of arrivals and departures during night in question — Defence counsel raised concern that time stamps influenced W's evidence — Accused applied for removal of Crown prosecutor — Application dismissed — Probable cause of change of W's evidence was assistance from Crown before he testified, in particular, comment by prosecutor that part of his evidence at preliminary inquiry could not be true — Prosecutor who prepared W for trial failed to abide by recommendations of Kaufman Commission for conduct of witness interviews and Crown trial manual — Contamination of witness by pre-trial practices is abuse of process — Accused's right to fair trial under ss. 7 and 11(d) of Canadian Charter of Rights and Freedoms had been violated by prosecutor's conduct and would be imperilled should trial go on as constituted — Very high threshold exists for removal of prosecuting counsel — While no bad faith was alleged, ignorance of important Crown preparation standards resulting from public inquiry's recommendations made conduct more serious — Conduct also offended spirit and purpose of witness exclusion and non-communication orders during trials — There was no likelihood of prosecutor having to testify as witness, no credibility issue involving him, and no personal interest in case or conflict of interest — Mistrial and continuation of trial without jury was proper remedy.

Criminal law --- Trial procedure — Preliminary matters — Powers of court — Declaration of mistrial

Accused S and T were jointly charged with first degree murder and kidnapping — W, former co-accused, made plea agreement and became key Crown witness — In preparation for trial, Crown prosecutor showed W surveillance video and time-stamped stills from entrance to building where victim was held — W subsequently changed his evidence as to sequence of arrivals and departures during night in question — Defence counsel raised concern that time stamps influenced W's evidence — Accused applied for mistrial — Application dismissed — Probable cause of change of W's

evidence was assistance from Crown before he testified, in particular, comment by prosecutor that part of his evidence at preliminary inquiry could not be true — Prosecutor who prepared W for trial failed to abide by recommendations of Kaufman Commission for conduct of witness interviews and Crown trial manual — Accused's right to fair trial under ss. 7 and 11(d) of Canadian Charter of Rights and Freedoms had been violated by prosecutor's conduct and would be imperilled should trial go on as constituted — Situation required not mistrial, per se, but remedy which could allow trial to proceed while recognizing that treatment of Crown's evidence was proper, open and transparent to public and to accused — Vetrovec warning could be given to jury, directing them to look for confirmatory evidence from objective source, but task would be challenging and no one would know how they dealt with W's evidence because of jury secrecy — Further, immediate re-trial sought by defence if mistrial simpliciter were ordered might not be possible — Mistrial and continuation of trial without jury was proper remedy.

Criminal law --- Charter of Rights and Freedoms — Charter remedies [s. 24] — Exclusion of evidence

Accused S and T were jointly charged with first degree murder and kidnapping — W, former co-accused, made plea agreement and became key Crown witness — In preparation for trial, Crown prosecutor showed W surveillance video and time-stamped stills from entrance to building where victim was held — W subsequently changed his evidence as to sequence of arrivals and departures during night in question — Defence counsel raised concern that time stamps influenced W's evidence — Accused applied for exclusion of W's evidence — Application dismissed — Probable cause of change of W's evidence was assistance from Crown before he testified, in particular, comment by prosecutor that part of his evidence at preliminary inquiry could not be true — Prosecutor who prepared W for trial failed to abide by recommendations of Kaufman Commission for conduct of witness interviews and Crown trial manual — Accused's right to fair trial under ss. 7 and 11(d) of Canadian Charter of Rights and Freedoms had been violated by prosecutor's conduct and would be imperilled should trial go on as constituted — Exclusion of W's evidence would neither be fair to public interest in search for truth nor warranted by actions and attitude of Crown — W was principal witness for Crown and associate of virtually every person close to case, including both accused — His evidence, while requiring very careful scrutiny from several perspectives, should not be dispensed with in circumstances of this case — Mistrial and continuation of trial without jury was proper remedy.

Annotation

Although this was a fact-specific decision, it may well have important repercussions for the criminal justice system, at least in terms of the preparation for testifying informants. It is a pity that legislatures and appellate courts have not done much thus far to implement the recommendations made by Justice Fred Kaufman and other jurists who have conducted public inquiries into wrongful convictions. Justice Kaufman made recommendations that would have minimized the use of police informants and provided stringent guidelines when they were used. Justice Howden has placed a great deal of reliance in those recommendations in finding the witness preparation in this case to amount to an abuse of process. His judgment may therefore be influential in signalling to Crown counsel the care that must be taken in preparing such witnesses to testify.

Tim Quigley

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Table of Authorities

Cases considered by *Howden J.*:

R. v. Bain (1992), 10 C.R. (4th) 257, [1992] 1 S.C.R. 91, 69 C.C.C. (3d) 481, 87 D.L.R. (4th) 449, 133 N.R. 1, 51 O.A.C. 161, 7 C.R.R. (2d) 193, 1992 CarswellOnt 66, 1992 CarswellOnt 981 (S.C.C.) — referred to

R. v. Brooks (2000), 2000 SCC 11, 2000 CarswellOnt 292, 2000 CarswellOnt 293, 141 C.C.C. (3d) 321, 182 D.L.R. (4th) 513, 30 C.R. (5th) 201, 129 O.A.C. 205, 250 N.R. 103, 46 O.R. (3d) 640 (headnote only), [2000] 1 S.C.R. 237 (S.C.C.) — referred to

R. v. Brown (1996), 1996 CarswellOnt 5551 (Ont. Gen. Div.) — considered

R. v. Buric (1996), 106 C.C.C. (3d) 97, 48 C.R. (4th) 149, 28 O.R. (3d) 737, 90 O.A.C. 321, 36 C.R.R. (2d) 62, 1996 CarswellOnt 1592 (Ont. C.A.) — considered

R. v. Buric (1997), 1997 CarswellOnt 985, 114 C.C.C. (3d) 95, 1997 CarswellOnt 984, [1997] 1 S.C.R. 535, 32 O.R. (3d) 320, 98 O.A.C. 398, 209 N.R. 241, 42 C.R.R. (2d) 187 (S.C.C.) — referred to

R. v. D. (D.) (2000), 2000 SCC 43, 2000 CarswellOnt 3255, 2000 CarswellOnt 3256, 191 D.L.R. (4th) 60, 259 N.R. 156, 36 C.R. (5th) 261, 148 C.C.C. (3d) 41, 136 O.A.C. 201, [2000] 2 S.C.R. 275 (S.C.C.) — referred to

R. v. Dell (2000), 2000 CarswellOnt 5093 (Ont. S.C.J.) — considered

R. v. Jewitt (1985), 1985 CarswellBC 743, [1985] 2 S.C.R. 128, [1985] 6 W.W.R. 127, 20 D.L.R. (4th) 651, 61 N.R. 159, 21 C.C.C. (3d) 7, 47 C.R. (3d) 193, 1985 CarswellBC 813 (S.C.C.) — considered

R. v. Khan (2002), 2002 CarswellOnt 3086 (Ont. S.C.J.) — considered

R. v. Khela (2009), 62 C.R. (6th) 197, 238 C.C.C. (3d) 489, 301 D.L.R. (4th) 257, 383 N.R. 279, 265 B.C.A.C. 31, 446 W.A.C. 31, 2009 SCC 4, 2009 CarswellBC 69, 2009 CarswellBC 70, [2009] 1 S.C.R. 104 (S.C.C.) — referred to

R. v. Latimer (2003), 2003 CarswellOnt 3722 (Ont. S.C.J.) — distinguished

R. v. McGregor (1999), 22 C.R. (5th) 233, 1999 CarswellOnt 857, 61 C.R.R. (2d) 329, 43 O.R. (3d) 455, 118 O.A.C. 385, 134 C.C.C. (3d) 570 (Ont. C.A.) — considered

R. v. Ng (2003), 2003 ABCA 1, 2003 CarswellAlta 613, 327 A.R. 215, 296 W.A.C. 215, 18 Alta. L.R. (4th) 77, [2003] 11 W.W.R. 429, 105 C.R.R. (2d) 315, 173 C.C.C. (3d) 349, 12 C.R. (6th) 1 (Alta. C.A.) — considered

R. v. O'Connor (1995), [1996] 2 W.W.R. 153, 1995 CarswellBC 1098, 1995 CarswellBC 1151, [1995] 4 S.C.R. 411, 44 C.R. (4th) 1, 103 C.C.C. (3d) 1, 130 D.L.R. (4th) 235, 191 N.R. 1, 68 B.C.A.C. 1, 112 W.A.C. 1, 33 C.R.R. (2d) 1 (S.C.C.) — considered

R. v. Regan (2002), [2002] 1 S.C.R. 297, 2002 CarswellNS 61, 2002 CarswellNS 62, 2002 SCC 12, 282 N.R. 1, 91 C.R.R. (2d) 51, 49 C.R. (5th) 1, 201 N.S.R. (2d) 63, 629 A.P.R. 63, 161 C.C.C. (3d) 97, 209 D.L.R. (4th) 41 (S.C.C.) — considered

R. v. White (2011), 82 C.R. (6th) 11, 2011 SCC 13, 2011 CarswellBC 485, 2011 CarswellBC 486 (S.C.C.) — referred to

R. c. Xenos (1991), 43 Q.A.C. 212, 1991 CarswellQue 1025, 70 C.C.C. (3d) 362 (Que. C.A.) — distinguished

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 7 — referred to

s. 11(d) — referred to

s. 24(1) — considered

APPLICATIONS by two accused for various orders, including stay/mistrial, exclusion of evidence, removal of Crown prosecutor, and discharge of jury.

***Howden J.*:**

1 The defendants each apply for a range of orders including a stay/mistrial, exclusion of the evidence of Tafari Williams (formerly accused of the same murder and kidnapping of Jonathan Chambers), and removal of Mr. Ray Williams from the prosecution. Lenworth Spence also requests discharge of the jury and continuation of the trial by judge alone, a disposition not opposed by the co-defendant Andrew Turner. The Crown opposes entirely the defence applications, asserting that there is nothing improper that has occurred. The Crown denies that its pre-trial preparation of witnesses including Tafari Williams has offended any legal standard and that the remedies sought are disproportionate to what has occurred.

2 Mr. Spence and Mr. Turner are jointly charged with the first degree murder and kidnapping of Jonathan Chambers. The murder is alleged to have occurred on March 7, 2007, and the kidnapping during the late evening and night of March 6 and 7, 2007. The defence applications were brought following the second day of Tafari Williams' evidence and after the 5th sitting day of the trial.

3 Tafari Williams (known on the street as "Rock") is a key witness for the Crown. He has made a plea agreement with the Crown to testify against the applicant-defendants. He is the major player, accomplice and sometime friend of a group of men involved in the trade in illegal drugs, mostly cocaine. That group often hung out at Andrew Turner's apartment at 440 McMurchy Avenue, South Tower, in the City of Brampton. The group included Andrew Turner (street name "Frame"), Lenworth Spence ("Blue"), Terrance Walker ("Gator"), Robert Henry ("Fame"), and Gregory Miller ("Shorty"). Williams described Fame as his best friend, then Walker, Spence, Turner and Miller. Tafari Williams referred to Jonathan Chambers as a trusted friend by the time he began to supply cocaine to Chambers (Williams could not say when that was). They had done several deals virtually every month since and leading to March 2007. Williams said that once Chambers did not pay him, and a few other times Chambers only made a partial payment, but "we'd work something out".

4 In February 2007, according to Tafari Williams, he was one of several drug dealers who went to Los Angeles to close a deal for 30 kilos of cocaine. His share was three kilos, with a potential street value of close to $100,000. The deal failed to close on time and Williams returned to Brampton for personal reasons, and was to return to the United States a day later to obtain his portion. Williams said that he tried to go back there, but he was refused entry at the U.S. border due to his criminal record, so he returned home to Brampton. He said it was then that Jonathan Chambers called him, saying he knew someone who was in the market for one kilo of cocaine. Chambers introduced Williams the next day to gentlemen known as Wolf and Bounty, in the parking lot of Williams' condo. Williams had no cocaine but said he would make some calls. He called Blue, then on finding he had enough to make a deal, Williams met with Chambers and Blue and introduced them. It was left to them to complete their deal, according to Williams.

5 This evidence was given by Tafari Williams on April 4 and 5, the third and fourth days of hearing evidence at this trial. It is the Crown's position that the deal went bad. Spence provided the product, now one and one-third kilos, to Chambers who met Wolf and Bounty in a vehicle parked on the street. Chambers provided the cocaine and received the money in ziplock bags and took it up to Spence's room nearby. By the time they discovered that the bags had mostly worthless paper in them,

Wolf and Bounty had disappeared with the cocaine. It is alleged that Chambers and Spence came to the apartment of Andrew Turner at 440 McMurchy Avenue, Brampton. Henry and Walker also came and later, Gregory Miller. Williams met Spence and Chambers in the bedroom where Williams was told the details of the failed deal. Why? Williams said he wanted to talk to them because he had introduced them and he felt responsible to an extent. At one point later in the bedroom, it is alleged by Williams that Spence brandished a gun and tied Chambers hands. Turner held the gun pointed at Chambers at one point. Williams says that he prevailed on Spence to let Chambers call some friends to try to raise the money or locate Wolf and Bounty. Chambers tried to do so well into the early hours of the morning.

6 It is alleged that that morning, March 7th at about 8am, Frame, Blue, Gator, Rock and Shorty took Blinkers (or Jonathan Chambers) with them in two cars. At about 7:30 a.m. on March 7, 2007, Williams had awakened after a sleep of about 2 hours. On getting up, Henry mentioned an acquaintance of Williams from prison named Pinchers and that he was in the Sheppard Ave. area. Pinchers' name had come up earlier in discussions about getting some money or finding Bounty and Wolf. They all got on their jackets and left the apartment except Henry. On Williams' evidence, he just followed along with the rest, supposedly to drive east to Sheppard Avenue. It is alleged by the Crown that they took Chambers north past Barrie, to the 4th Line of Oro-Medonte, where he was shot five times by Andrew Turner. It is Blue, Lenworth Spence, who, the Crown alleges, instigated the killing of Chambers; his motive was to send a message to others that he would not be trifled with.

7 Subsequently, on April 30, 2008, Andrew Turner and Tafari Williams were arrested by different police teams, Turner for kidnapping and conspiracy to kidnap, Williams for first degree murder and kidnapping. By the end of the day, following a long and detailed interview of Tafari Williams, Andrew Turner was identified by Tafari Williams as the shooter. Later, Williams entered a plea agreement with the Crown, agreeing to be a Crown witness against Spence and Turner in return for his plea to accessory after the fact to murder and Crown assistance toward a sentence of 5 years. The murder charge against him was withdrawn. He has been released recently on parole.

8 The first two days of evidence heard from witnesses who described how the deceased's body was found and from the identification officer as to items seized and marks noted and photographed at the scene. Tafari Williams took the stand on the 3rd day of the Crown's case, after an intervening weekend. Ever since his plea agreement on July 15 2009 and well before that, it would have been obvious to the authorities including Mr. Flosman and Mr. Ray Williams, the two assistant Crown Attorneys assigned to this case, and to the defence counsel, that Tafari Williams was a key witness for the Crown and that, as an informant, his evidence would have to be the subject of the special instruction known as a Vetrovec warning as part of the trial judge's instructions to the jury. That instruction is exemplified in Wart's Manual of Criminal Jury Instructions (Final 31):

> *Tafari Williams (TW)* testified for the Crown. There is a special instruction that has to do with his evidence. It is an instruction that you must keep foremost in your mind when you are considering how much or little you will believe of or rely upon his evidence in making your decision in this case.
>
> You have heard that *TW* has a criminal record, has lived since 1997 outside the law as a dealer in illegal drugs, sought a deal in exchange for giving evidence for the Crown, and has a strong motive to lie in order to shield himself from a first degree murder charge.
>
> Common sense tells you that, in light of these circumstances, there is good reason to look at his evidence with the greatest care and caution. You are entitled to rely on his evidence even if it is *not* confirmed by another witness or other evidence, but it is dangerous for you to do so. Accordingly, you should look for some *confirmation* of his evidence from somebody or something other than Tafari Williams before you rely upon his evidence in deciding whether Crown counsel has proven the case against the persons charged beyond a reasonable doubt. To be confirmatory, the testimony of another witness or witnesses or other evidence should be of a quality and independence from the witness that will help restore your faith in *relevant* parts of his evidence.

> TW and the circumstances in which he testified might well make you wish that somebody or something else confirmed what he said. You may believe his testimony, however, if you find it trustworthy, even if no one or nothing else confirms it. When you consider it, however, keep in mind *who* gave the evidence and the *circumstances* under which he testified.
>
> You may find that there is some evidence in this case that confirms or supports some parts of TW's testimony. It is for you to say whether this or any evidence confirms *or* supports his testimony, and how that affects whether or how much you will believe of or rely upon his testimony in deciding this case.
>
> The evidence to which I am about to refer illustrates the kind of evidence that you may find confirms or supports TW's testimony. It may help you. It may not. It is for you to say.

9 While giving this instruction (or one like it) to the jury is said to be in the judge's discretion, it has been held that it is mandatory in cases where a witness has a lengthy criminal record or just hasn't been caught, has a strong motivation to lie, and approached the police seeking a deal in exchange for his evidence. The common sense rule can be expressed as a search for evidence that on a material issue confirms the witness's story where that witness suffers from a potential lack of credibility. In the words of Wigmore in his text *Evidence* (Chadbourne rev., 1978, para. 2059, at 424):

> (W)hatever restores our trust in him personally restores it as a whole...The important thing is, not how our trust is restored, but whether it is restored at all.
>
> *The Law of Evidence in Canada (2d)*, by J. Sopinka, S. Lederman and A.W. Bryant; Butterworths Reprint # 1, 2001, at 17.13 to 17.15.

10 The issues of Tafari Williams' credibility and of any objective confirmatory evidence are therefore exceptionally important to a proper consideration of Tafari Williams' evidence by the trier of fact. He has a criminal record, has a strong motivation to lie because he has avoided murder and kidnapping charges and the plea agreement requires compliance with his statement identifying Turner as the shooter, and he sought a deal with the Crown in exchange for his evidence. One important source of confirmation is the surveillance video taken by cameras at the entrance/exit doors to and from 440 McMurchy. The arrivals and departures of those in the building including those in Turner's apartment are recorded on these video stills and the video itself, as are the times stamped on them. Their importance was well-known to the Crown counsel before Tafari Williams gave evidence. When I asked why they were important in view of Tafari Williams being able to testify to what he saw up to and at the site of the shooting, one of the prosecutors, Ray Williams explained:

> But there's no photos or video of that. The significance of the McMurchy (sic, video evidence) is that it's at least objective evidence of when people are coming and going and not solely dependent on what Tafari Williams says. (Tr. Trans., p.5, April 6/11)

Several persons who were in Turner's apartment on the night of March 6-7, 2007, not only came there but left and came back and I understand those movements are shown on the video and the video stills, together with the time of each entry and exit stamped on them.

11 In the afternoon of April 5, Ray Williams referred to these video recordings for the first time as being entered on consent:

> We've got a video, Your Honour, which I understand can be played on consent at this stage from my friends, taken from 440 McMurchy. These videos have times on them...we've got both is (sic) both the video and some still photos. And on the video, there's a time stamp of when the images is alleged to have been captured and the time stamp is also on the bottom of the photograph.

He proceeded to show Tafari Williams the video where it read 12:03 am on March 7 2007 and asked the witness to identify the person shown. Tafari Williams identified the person as Gregory Miller. Miller appeared to be inside the building close to a stair. It was at this point that Mr. Midanik objected. I suggested, and counsel agreed, that as the jury was there, the Crown would use the time to have the witness continue with his narrative up to the time the group were to leave in the morning. This was done.

12 Tafari Williams described when he and Fame left the apartment to get some food at a local diner using Shorty's PT Cruiser. Chambers was using the phone still, having started in the early hours of March 7th. Williams said it was about 3:30 a.m. when he and Fame left. Williams was asked whom he remembered being in the apartment when they returned. The video evidence is that they returned at 4:25 a.m. His evidence at the preliminary on this point had been that Turner and Walker were in the apartment as well as Chambers, Miller, and Spence. Before the jury on April 5th, Tafari Williams stated:

> I don't remember exactly who's there from who's not there. I remember Jonathan being there. I remember... I remember Gregory Miller is there.
>
> The Court: Sorry?
>
> TW: Gregory Miller is there. And Mr. Spence is there.
>
> The Crown (RW): You mentioned the name Ken earlier...
>
> TW: Oh, I didn't see him there at the time.
>
> *(Tr. Trans. p.24, April 5/11)*

13 After Tafari Williams had reached the point in his evidence where the group exited from the building, the jury was excused for the day. That was April 5th. Mr. Midanik stated that he wanted to see a list of all photographs and documents shown to this witness before he was called and requested that this witness not be shown any more time-stamped stills or clips. He said that the witness was looking at video pictures with times on them and his evidence has already changed from his preliminary evidence as to the sequence of arrivals and departures. He said he had no problem with the video clips and stills being entered through another witness but not through this witness because of his singular importance to both sides. Mr. Midanik objected that he wanted to cross-examine this witness on his memory of events in March 2007, and not on what he saw in preparation for trial; at present, the witness is being influenced by the times stamped on each photograph and by the cell records he was shown. Mr. Bytensky joined with the same concerns. The Crown requested an adjournment until the following morning to consider its position. It was agreed that the Crown would deliver to the defence the list of documentary evidence shown to Tafari Williams in preparation for trial and this was done overnight.

14 On April 6, 2011, Ray Williams described his preparation session with Tafari Williams the day before he began his evidence, being Sunday, April 3rd. He had reviewed the order of subjects to be covered with Tafari Williams in chief; he highlighted the exhibits to be put to him - those included the still photos from the video and the video itself with the times and dates on them showing persons coming and going, and the times, to and from 440 McMurchy on March 6 and 7, 2007. I include here the list of items to which Tafari Williams was given access on April 3, according to the Crown.

> **Materials Related to Statement Made on April 30, 2008:**
>
> • Viewed the DVD
>
> • Provided with transcript of statement
>
> • Provided with diagram of the vehicles making the turn and positioning of the parties (May 1, 2008)
>
> **Preliminary Hearing Transcript of Williams' Evidence:**
>
> ***R. v. Turner Preliminary Hearing:***
>
> • August 17, 2009
>
> • August 19, 2009

R. v. Spence, Walker, Millar and Henry Preliminary Hearing:

- September 16, 2009
- September 17, 2009
    - Diagram of Turner's apartment and Layout of furniture (Exhibit 5)
- September 18, 2009
- September 21, 2009

Materials Related to Plea:

- Indictment dated July 13, 2009 signed by Michael Minns, Deputy Crown Attorney
- Plea Agreement, dated July 13, 2009
- Agreed Statement of Facts filed on plea
- K.G.B. Form and excerpt from statement provided on April 30, 2008 (pages 95 to 143). Williams' signature is on each page
- Transcript of Plea, July 13, 2009 before Justice Stong
- Criminal Record of Tafari Williams

440 McMurchy Video:

- All clips where stills were taken
- All photographs that were disclosed to you

Cell Phone Records of Tyron Willis:

Listened to Telephone Intercepts Where Williams was Part of Call:

- Call 015, November 9, 2007 at 14:02:44 (Williams and Henry)
- Call 023, November 10, 2007 at 12:40:15 (Williams and Unknown Male)
- Call 032, November 16, 2007 at 20:19:07 (Williams, Spence, Brad Johnson and Vice — real name unknown)

Collection of Police Occurrences Connected to Williams:

- All prior occurrences found in disclosure, tabulated and dated
- Spanning from October 9, 1994 to February 10, 2006

15 Ray Williams proceeded to advise the Court on April 6 of his preparation session with Tafari Williams on April 3, including the following.

> Crown: I'll just provide some background.
>
> Your Honour, on Sunday I met with Tafari Williams, an officer present, in preparation for his evidence.

We met here at the courthouse, in the Crown's office. And at that meeting, we reviewed, or I reviewed the order that I wanted to go through things because by this point, I had typed up an outline.

And highlighted the exhibits that I wanted to put to him. In the course of doing that, I showed him either copies or I think photographs that I planned to put to him when he was on the stand.

To me it seemed reasonable and prudent to show him what I planned to put to him while he was giving his evidence.

There was no plan to take new information from Mr. Williams given the late stage and again, it was just to try and inform him and get him comfortable about what I was trying to accomplish during the examination-in-chief. It even included a trip down to the courtroom just to look into the window so he would see what the courtroom looked like, to see it. So as I said in the time meeting with him, I showed him the 440 McMurchy video, clips of it as well as photographs — still photographs taken from the video. I showed him clips where he's in them — in the video and in the photographs as well as clips when he's not in the photograph.

Again, this wasn't an (sic) free exchange of information back and forth, this is what I'm going to show you. Have a look at it.

In doing that, I showed him the stills and the video of when Mr. Walker and Mr. Turner leave 440 McMurchy. The sequence of events is kind of important. So when Walker and Miller — sorry Walker and Turner leave 440 McMurchy, I then show him the video and stills of when Mr. Williiams and Mr. Henry leave 440 McMurchy, the stills and video of when Williams and Henry return to 400 McMurchy.

And then the video and stills of when Mr. Turner and Mr. Walker return to 440 McMurchy. I alerted him to the fact that at the preliminary inquiry he said that when he returned that basically everybody was present.

The Court: In the apartment?

Crown: Yes...In showing him the photos I said, that can't be true, just given the sequence of when people are coming and going. I don't want to talk to you about it, I'm just alerting you to that. (Emphasis added)

And I told him that I expected that he would be cross-examined on that point. In the process of meeting him, [I] tried to outline what I anticipated cross-examination to be; on his record, prior occurrences, involvement in the drug world, things of that nature.

But this was one part of his evidence I said, I anticipate you to be cross-examined on and we didn't talk about it further.

And we just continued with giving him the overview and the outline of how I wanted to go through the evidence, kind of the order that I was going to go through it.

The issue arose yesterday in showing the photographs to Mr. (Tafari) Williams and that caught my friends somewhat by surprise — by surprise because I did not disclose that I had shown these photographs and clips to Williams. I should have done that, but because nothing — no information came from it, I just didn't put my mind to it

At this stage, I recognize that I should have told them what I had done, and they were told about this yesterday including what materials Mr. Williams looked at, as well with me highlighting with Mr. Williams that there's an inconsistency in his evidence between what he says and the photographs. *(Tr. Trans., pp.3-4, April 6/11)*.

My plan was to put the clips and the stills of Williams when he's in them and as well when he was out of them to — for him to identify who it is. And one of the concerns Mr. Midanik raised was that showing him the photographs beforehand and doing it on the stand Williams is seeing the time stamp.

The Court: Has related the two.

Crown: That's right. And in some cases the time stamp is significant. And I apologize for doing that. And it seemed prudent to me that he view the things that I planned on puttying in and it only seemed prudent to —

The Court: The consent you mentioned. You said yesterday this was on consent. What was the consent?

Crown: The consent is that the video can be put in.

The Court: At some point.

Crown: Yeah. We had not discussed at all how the video would be used to question the accomplices.

The consent didn't extend to that far. (Emphasis added)

Mr. Midanik raised the concern about the propriety of doing that. I can tell you it bothered me, you know, any time that it's suggested that you've done anything improper, I've thought about it, and I don't think it's improper having shown Williams these things.

The Court: In any event. Is that it?

Crown: In any event, what we're prepared to do and subject of course to my friends' request and Your Honour is to only show Williams clips of when he's in the video, and by virtue of that, only the stills where he's in the still. Of course, the stills come directly from the video. I will not show Williams any more photographs or video where he's not in it. I won't get him to, obviously, identify or talk about what he sees in the video. *(Tr. Trans., pp.2 to 7, Apr. 6/11*, emphasis added)

16 At both preliminary hearings, Tafari Williams had said nothing about knowing when Gregory Miller appeared on the scene at 440 McMurchy. And on his return from Tim Horton's with Henry, Williams recalled that not only the three he mentioned at trial were in Turner's apartment but also Turner and Walker. Yet the security video shows that Turner and Walker left the apartment at 2:07 a.m. and did not return until after Williams' 4:25 return from Tim Horton's, at 5:05 a.m. Turner and Walker could not have been in the apartment on Williams' return as he had said at the preliminary hearing. His trial evidence changed from his preliminary evidence regarding these points and is now confirmed by the only objective evidence available to the jury. His pre-trial evidence at the preliminary hearings was not confirmed by the video evidence shown him before trial.

17 I should add here Mr. Flosman's submission about the statement of Mr. Williams on the day of his arrest - April 30, 2008. There is no dispute that, at that time, he had been told many things about the strength of the Crown's case against him and after all that, Mr Flosman submitted that Williams knew when Gregory Miller (Street name Shorty or Shortman) had come into the McMurchy apartment. Unfortunately, that is not what happened in my view. The police interviewer showed Williams a photograph of Miller and told Williams what time it was. At p.127 of the April 30/08 interview transcript:

Officer: Okay do you recognize that person on this paper?

T. Williams (TW): I think that's Shorty.

Officer: Yeah that's Shorty, he's coming in the building we think at just after midnight which is kinda what you said.

TW: Mmm hmmmm.

Officer: That makes sense.

TW: Mmm hmmmm.

18 Tafari Williams did not come out with the evidence about Miller's arrival time and the absence of Turner and Walker on his return at 4:25am at either preliminary hearing, only after his preparation session with the Crown the day before his trial

evidence began. I find the probable cause of his change of evidence from the presence of Turner and Walker on Williams' return at 4:25 a.m. to their absence has only one explanation — the assistance from the Crown the day before the start of Williams' evidence. I understand from both sides that there is little if any objective independent evidence to confirm Williams' evidence after Spence and Chambers arrive in the evening of March 6 other than the video evidence. And that was what Mr. Ray Williams had shown Williams fully and sequentially on Sunday April 3rd regarding who was present or not throughout the night, including on his return to the apartment at 4:25 a.m. Then the Crown told him that his evidence at the preliminary hearings "cannot be true". This is tantamount to saying to the witness, "you are wrong". Ray Williams told me that he pointed out that "there's an inconsistency in his evidence between what he says and the photographs." Two days later, Tafari Williams changed his evidence on this point from the preliminary and gave the time when Miller came in the night of March 6, 2007 as he was looking at the time-stamped photograph which he had seen at the preparation session and changed his evidence to coincide with the time-stamped photographs by saying that Turner and Walker were not in the apartment on his return at 4:25 a.m.

19 Mr. Bytensky explained the defence theory of the case from Mr. Spence's perspective. He asserts that Tafari Williams has lied as to virtually all portions of his evidence. It is alleged that Tafari Williams was one of the parties to the drug deal involving Chambers and Chambers' associates, Wolf and Bounty, and suffered a large financial loss as a result. Williams therefore had motive to harm Chambers. And at 440 McMurchy, Williams was the primary actor in the events that occurred on the night of March 6-7 2007, not Spence. Finally, it is the accused Spence's assertion that he had no personal financial stake in the transaction and so had no motive to harm Chambers but Tafari Williams did.

20 Mr. Bytensky separated the types of documents shown to Tafari Williams on April 3 into 3 categories:

1. Evidence from third parties shown to Williams including the McMurchy video and time-stamped stills

2. Evidence which Williams was told was not true — i.e. the sequence of comings and goings during the night of the alleged kidnapping

3. Evidence of the witness's own telephone records showing frequency of calls to others including Chambers in the material period leading up to the time of the shooting.

Pertaining to the first category, Mr. Bytensky referred to an occurrence in court on April 4. Before the lunch break that day, Mr. Williams had testified that all the contacts between Chambers and Williams about the failed drug deal occurred after he had tried unsuccessfully to enter the U.S. After lunch, Tafari Williams changed his evidence on this point and said that several of the meetings with Chambers and his associates took place before his abortive return to the U.S. Only the lunch at Moxie's with Spence, Miller, Williams, Brad Johnson and Josh on March 6 th occurred after the attempt to return to the U.S.A. When questioned, Mr. Tafari Williams denied speaking to anyone, he just remembered that he had been incorrect. Mr. Bytensky suggested that this change could be attributed to Williams' having seen and reviewed his telephone records of February and March 2007 the day before in the meeting with the Crown, allowing him to tailor his evidence towards the objective evidence shown in his phone records.

20 Mr. Bytensky submitted that the witness should not have been shown the phone records or heard the telephone conversation with Brad Johnson and Spence and an unnamed party where Williams was involved in a very small fraction of the call ("no. 032"). He should not have been taken through the video and clips with the time stamps the day before his evidence was to start and he should not have been told by Ray Williams that part of that sequence he had testified to earlier could not be true. It is the same thing as telling a witness that he is wrong, a direction that both the Kaufman Commission and the Crown's own manual warn against in order to avoid contaminating the evidence. It was submitted that as the witness's changes in evidence are consistent now with the objective evidence, Williams could only be seen as having been rehabilitated from his Vetrovec status as a suspect witness. He described the Crown's exposing Williams to these pieces of evidence, and telling him part of his prior evidence could not be true, as Crown conduct which has seriously prejudiced the defence. He stated therefore that the document and the conduct in categories 1 and 2 and call no. 032 in category 3 were not properly exposed to him.

21 It was submitted by Mr. Bytensky that courts have cited and used the recommendations of the Kaufman Report on the wrongful conviction of Guy Paul Morin in other cases and the report contains recommendations flowing from the evidence before it as to how witness preparation should be approached to avoid contaminating the witness. What happened here offends at least six of those recommendations as well as several of the 1999 guidelines in the Crown Manual which issued the year after the Kaufman report in 1999. By telling a witness like Williams that he was wrong and by showing him the third party evidence, the Crown has opened the door to the witness tailoring his evidence in at least three instances referred to above. For instance, Williams' prior evidence refers to only 2 phone contacts with Chambers whereas the phone records refer to numerous contacts between them. The jury has heard his evidence which is now confirmed by the objective records he saw and was taken through in detail the day before his evidence before the jury. The jury cannot disabuse itself of what it has already heard and no instruction will achieve anything more than emphasizing his changed evidence and its agreement with the objective evidence, to the accused's prejudice. He suggests that what the Crown did here has violated Mr. Spence's right to a fair trial under S. 7 and s. 11(d) of the *Charter*, is an abuse of process, and following the Supreme Court of Canada in *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.) at para. 69, that there are remedies less serious than a stay where the violative conduct fails the "clearest of cases" standard, depending on the balance required between societal and individual interests and the integrity of the judicial system. Mr. Bytensky asks for an order to continue the trial without a jury, or a mistrial and an immediate new trial with a new jury. He pointed to *R. v. McGregor* (1999), 43 O.R. (3d) 455 (Ont. C.A.) and *R. v. Dell*, [2000] O.J. No. 5323 (Ont. S.C.J.) as establishing the jurisdiction to order trial without a jury on a charge of first degree murder.

21 Mr. Midanik submitted that the way that these issues came to light was via Crown leading, Crown tainting in its preparation of the witness, and Crown failure to appreciate the seriousness of what its conduct has done. He further submits that the Crown's attitude and conduct have violated the entire trial process and will continue to threaten the fair trial rights of the accused men. He submits that the more important the witness, the more careful should be the Crown's preparation practice. That degree of care is set out in the recommendations of the Kaufman Commission to avoid witness contamination. He asked for orders removing Ray Williams from further participation in the case, exclusion of the evidence of Tafari Williams or a permanent stay of proceedings. He received instructions from Mr. Turner that he would re-elect judge alone if I were to find that was the proper remedy. Mr. Midanik concluded, citing *Witnesses* by A. Mewett and P. Sankofif at p.6-4, that while the dividing line between permissible advice and impermissible coaching is a difficult one to draw conceptually, "counsel must remember that they must not distort the evidence of the witness, and their intention in eliciting facts will play a critical role in determining whether this line has been crossed. Lawyers should also remember that...improper suggestions to the witness may ultimately be exposed."

22 On behalf of the Crown, Mr. Flosman characterized the defence applications and submissions as overstatements and hyperbole and that the law remains as stated in *R. v. Buric* (1996), 106 C.C.C. (3d) 97 (Ont. C.A.), aff'd. (1997), 114 C.C.C. (3d) 95 (S.C.C.). He submitted that if, by what has happened the credibility and reliability of Tafari Williams' evidence has been affected, it is a matter of weight or importance of the evidence, not its admissibility, and weight of evidence is for the jury to decide after a full cross-examination of the witness. He rejected the request for removal of Ray Williams as failing by a large margin to meet the high threshold that must be met. He submitted that nothing improper has occurred, no prejudice has been suffered, and a stay or mistrial or exclusion of evidence are "disproportionate to what has transpired". I asked Mr. Flosman, given the importance of confirmatory objective evidence to rehabilitate the suspect credibility of Tafari Williams as a Vetrovec-type witness, how is it a test of his credibility, if the Crown has reviewed most or all of the objective evidence with him before the trial, not only his prior statements, and told him his prior evidence on one point could not be true, and has shown him the entire time-stamped videoed sequence, to simply have him repeat it in court. I did not hear an answer to that question, just a number of suggestions as to issues left for cross-examination.

23 Since *Buric*, the report of the Kaufman Commission into the wrongful conviction of Guy Paul Morin was released. The Kaufman Commission examined in detail the investigation, trial and conviction in 1992 of the murder of a young girl which happened in 1984. On June 26, 1996, the Commission on Proceedings Involving Guy Paul Morin was established. The Honourable Fred Kaufman, a former judge and a person of great experience and authority in the criminal law, was appointed as Commissioner. He heard from witnesses who participated in all phases of the investigation, the judicial proceedings, the prosecution and experts in the law and police investigation. His report drew certain conclusions as to why Guy Paul Morin

was wrongly convicted. He found that various practices which had led to the wrongful conviction had become systemic and he made various recommendations directed at police investigators, Crown prosecutors, defence lawyers, judges and administrative staffs, which arose from the practices that led to the wrongful conviction of Mr. Morin.

24 *Buric* became the subject of a portion of the Commission report dealing with "jail-house informant" evidence. In *Buric*, the appellate court ruled that the trial judge had underestimated the ability of the jury to deal with most difficult issues. In that case, the issue was the reliability of the evidence of an informer who had had access to most of the prosecution's case, whose evidence on one point had changed the night before his testimony was to start, and whose evidence would point away from himself to another. Labrosse J.A., whose judgment was upheld in the Supreme Court of Canada, expressed, as have many others, the commonly held belief that modern juries are able, with judicial help, to deal with issues that concern the quality of the evidence including the reliability of an informer's evidence. To the contrary, the Commissioner, having heard a variety of informed views on jailhouse informant evidence, concluded:

> It is my strongly held belief that the dangers associated with jailhouse informant evidence, together with its great potential to mislead, should make such evidence presumptively inadmissible. A trial judge should determine whether the evidence...meets a threshold of reliability... (Report, Vol. 1, p.632)

25 No such law has been adopted but this does show the extreme concern that cases of wrongful convictions constantly raise over this issue. The problems caused by jailhouse informants can be compounded by the process of pre-trial "preparation" of witnesses by the Crown in proceedings that are secret and therefore largely immune from testing by cross-examination. Two studies from the United States have commented on this aspect of informant or what they call "co-operating witness" evidence and the difficulties encountered by improper preparation of such witnesses by prosecutors. It has been found that:

> Witnesses who...testify on behalf of the government against criminal defendants in exchange for some form of favourable treatment have enormous incentives to testify falsely in order to obtain leniency. Rules of disclosure, including the mandatory disclosure of official leniency agreements, and the trial safeguard of cross-examination exist to ensure that juries correctly evaluate the credibility of these witnesses.
>
> Nevertheless, commentators have recognized that despite rules of disclosure and trial safeguards, there is an inherently high risk that cooperating witnesses will testify falsely and will be believed by juries, thus resulting in convictions of the innocent, Prepped at length and in secret, skilled at lying, armed with important facts that may have been inadvertently (or deliberately) fed to them by the prosecution, co-operators often appear highly confident and credible on the witness stand. Because the co-operator's testimony is developed in secret and without documentation, his polished, incriminating account is largely unassailable on cross-examination. Lacking any knowledge of what transpired between the prosecutor and the cooperating witness during pre-trial proffer sessions and interviews, defence counsel has little basis from which to cross-examine the co-operator about the process by which the government developed the co-operator's testimony. HeinOnline — 74 Fordham L. Rev. 257, 2005-2006, by S. Roberts: *Should Prosecutors be Required to Record their Pre-trial Interviews with Accomplices and Snitches*.

Another study found that witness contamination was notoriously difficult to detect because trial preparation is done in secret and a cooperating witness is easily manipulated, often presents in a convincing manner, and cross-examination to expose coaching is extremely limited. Juries typically have been found in the United States to believe them. HeinOnline — 23 Cardozo L. Rev, 829 2001-2002: *Witness Coaching By Prosecutors*, by B.L. Gershman.

26 The Kaufman Commission in my view performed a service to the practice of criminal law by addressing this aspect, the potential for witness contamination before trial by police and/or Crown, with a series of sensible guidelines which emphasize that it is the evidence of the witness that is to go before the jury and not the evidence as the prosecution may want it filtered through other items in its case. The Crown Manual, issued in draft form in 1999 in answer to the Commission Report and regularly used by most Crown prosecutors, also addresses, in part, guidelines for the conduct of witness interviews. Both include much the same points. I will use the ones from the Kaufman Report here.

Recommendation 103: Prevention of contamination of witnesses through information conveyed.

Police officers should be specifically instructed on the dangers of unnecessarily communicating information (known to them) to a witness, where such information may colour that witness' account of events.

Recommendation 107: Conduct of Crown interviews.

Earlier in this Chapter, I have noted the dilemma facing Crown attorneys when preparing witnesses for trial. On the one hand, counsel should not be suggestive, and should not try to dovetail the evidence of a number of witnesses to make a perfect whole. On the other hand, counsel may understandably wish, in fairness to a witness and with a view to ascertaining the true facts, to advise the witness of conflicting evidence in order to invite comment and reflection.

I have previously suggested guidelines respecting the conduct of interviews. I reiterate them here.

(a) Counsel should generally not discuss evidence with witnesses collectively.

(b) A witness's memory should be exhausted, through questioning and through, for example, the use of the witness' own statements or notes, before any reference is made (if at all) to conflicting evidence.

(c) The witness' recollection should be recorded by counsel in writing. It is sometimes advisable that the interview be conducted in the presence of an officer or other person, depending on the circumstances.

(d) Questioning the witness should be non-suggestive.

(e) Counsel *may* then choose to alert the witness to conflicting evidence and invite comment.

(f) In doing so, counsel should be mindful of the dangers associated with this practice.

(g) It is wise to advise the witness that it is his or her own evidence that is desired, that the witness is not simply to adopt the conflicting evidence in preference to the witness' own honest and independent recollection and that he or she is, of course, free to reject the other evidence. This is no less true if several other witnesses have given conflicting evidence.

(h) Under no circumstances should counsel tell the witness that he or she is wrong.

(i) Where the witness changes his or her anticipated evidence, the new evidence should be recorded in writing.

(j) Where a witness is patently impressionable or highly suggestible, counsel may be well advised not to put conflicting evidence to the witness, in the exercise of discretion.

(k) Facts which are obviously uncontested or uncontestable may be approached in another way. This accords with common sense.

27 The recommendations of the Kaufman Commission have had an impact on many phases of criminal law practice since the report issued in 1998. That impact has occurred up to the highest level of the court system. The Supreme Court of Canada has approved several practice changes based on the Kaufman Commission Report. The areas affected so far have been in the in-court caution and treatment of evidence of jailhouse informants (*R. v. Brooks*, 2000 SCC 11 (S.C.C.), at paras. 81-83); the importance of complete neutrality of expert witnesses and the dangers of the expert as advocate, including the occurrence of several wrongful convictions as a result (*R. v. D. (D.)*, [2000] 2 S.C.R. 275 (S.C.C.) at paras. 48-53); the treatment and potentially misleading quality of post-offence conduct and demeanour evidence and how it can be usefully introduced in circumscribed situations *R. v. White*, 2011 SCC 13 (S.C.C.), at paras. 44-60 and 141-145); the Vetrovec caution again and the proven wrongful convictions resulting from reliance on jailhouse informant evidence despite warnings to juries (*R. v. Khela*, 2009 SCC 4 (S.C.C.)); and the importance of the Crown's role remaining objective and distinct from that of the police (though remaining co-operative) and the instances of wrongful convictions found by the reports of the Royal Commission regarding Donald Marshall and the

Kaufman Commission Report resulting from "the Crown's failure of objectivity throughout the process", (*R. v. Regan*, 2002 SCC 12 (S.C.C.), at paras. 66-70).

28 The impact upon, and assistance of the Kaufman Commission to, courts and the provinces' Attorneys General in formulating approaches to several areas of systemic abuse is demonstrable at all appeal levels and in administrative and practice reforms since 1998.

29 The area of standards for Crown pre-trial interviews was expressly addressed by the Kaufman Commission in the above recommendations. Those guidelines have been available to Crown prosecutors for years directly from the Commission Report and as reflected in the Crown's own Manual. Because of the uncertain history of informant evidence, the Kaufman guidelines are particularly important to observe in such cases.

30 In this case, I find that the Crown prosecutor who prepared Tafari Williams for trial on April 3, 2011, failed to abide by the Kaufman recommendations and the Crown Trial Manual issued as a result of the Kaufman Report. The following list of instances of noncompliance includes only those that he has referred to voluntarily. There is no complete record of the interview itself; the police notes lack the detail of exactly what words, manner and techniques were used throughout the interview. Because these abuses are systemic, it is quite probable that the prosecutor overlooked other instances because they simply did not occur to him in the absence of evidence of any review by him of the Kaufman recommendations and the Crown's own manual regarding pre-trial interviews. In my view, because of the special importance of non-contamination of an accomplice/informant's evidence with knowledge of other objective evidence in the Crown's possession and because of the secrecy of Crown witness preparation, there should be zero tolerance for any straying from the recommended guidelines and, in future, an accurate record of the full exchanges between the witness and the police, Crown and informant-witness.

31 The following set out what I find to be breaches of the Kaufman recommendations:

- Recommendation 103 — While it refers only to police conduct, it must be taken to apply also to Crown prosecutors because it involves potential contamination of a witness before trial. The police in this case had told Tafari Williams most of their case after his arrest on April 30, 2008 in convincing him to seek a deal and testify for the Crown. However, by the time of the preliminary hearings, that tainting seemed to have worn off to some extent - Williams volunteered no time for Mr. Millar's arrival and included Turner and Walker as being back in the apartment before Tafari Williams returned at 4:25 a.m. When this came up on April 3, 2011, the prosecutor told him that his evidence in regard to their presence at that time could not be true and showed him all of the video and video clips with the related times in order to have him see fully the sequence of events on March 6 and 7, 2007 as well as his cell phone records which showed the number of calls between Williams and Chambers before and after Williams' abortive return to the U.S. in late February or early March. His evidence changed to coincide with the video clips and the cell records.

- Recommendation 107(b) — This recommendation was not followed. There was no indication of the Crown exhausting all questions regarding the witness' memory before showing him conflicting evidence.

- Recommendation (c) — No recollections of the witness were recorded in writing on April 3, The officer was present but the notes are far from complete regarding even what Ray Williams recalled as having happened without notes.

- Recommendation (d) — The questioning appeared to be suggestive. The prosecutor was showing the witness all of his cell records, the video and time stamped clips, which appears to be the only record of the whereabouts of the parties during the period of the alleged kidnapping.

- Recommendation (e) - (e) and (f) should be read with (j). Tafari Williams was a jailhouse informant and should be classed as suggestible because he is subject to the plea agreement with the Crown as protection from future murder and kidnapping charges.

- Recommendation (g) — This recommendation was not followed. I see no evidence that the witness was advised to keep to his or her own evidence in preference to adopting conflicting evidence. In fact, the reverse was suggested by the prosecutor.

• Recommendation (h) — I have already found that regarding the sequence of persons in and out of the apartment building at 440 McMurchy, the prosecutor did tell the witness, in effect, that he was wrong by saying that his evidence could not be true.

• Recommendation (i) — There is no written record of any new evidence given by the witness during the preparatory interview, nor is there any evidence that in fact, the witness did not give some new evidence at that time.

32 There is no appellate authority as yet dealing with pre-trial Crown preparation practices in relation to the Kaufman recommendations. At least, none were cited to me. As in other areas of the criminal law, the Kaufman Report has had a demonstrable effect. Its recommendations appear in the criminal law text *Examination of Witnesses in Criminal Cases* (5th ed.) by Earl J. Levy as proper practices for the preparation of witnesses. The contamination of a witness by pre-trial practices is serious and in my view, an abuse of process.

33 The suggestive questioning and exposure of the video and cell records to Tafari Williams the day before he testified would not have become apparent in this case but for the defence objections when the photographic evidence began to be presented to Tafari Williams, apparently on consent, then it developed that no consent had been given to the photographic evidence being entered through Tafari Williams, and the prosecutor's own synopsis has been given without an adequate record (written or taped) of the entire prep session with Tafari Williams. I find that, particularly with a jailhouse informant as a witness, the Kaufman recommendations in numbers 103 and 107 must be carefully followed to avoid showing that witness the "objective independent" evidence which may form virtually all of the so-called confirmatory evidence in this case. There should be a difference between a theatrical production and a trial, between memorization of lines or items of evidence and a testing of a suspect witness's recollection of events. I find that the Kaufman recommendations are to be treated as the standard to be followed when the Crown is preparing a witness subject to a Vetrovec caution, in other words, a jailhouse informant, in which category Tafari Williams clearly falls (see para. 8 above). I also find, given the systemic nature of the problems here and the Crown's continuing failure to appreciate what has occurred, there is probably other conduct by the interviewing prosecutor which falls below the Kaufman standard.

34 It is symbolic of the Crown's failure to recognize that its own manual and the Kaufman guidelines were not followed that the Crown's case book contains the citation for the 2nd edition of the Levy text *Examination of Witnesses in Criminal Cases*, the edition which pre-dates the Kaufman findings. It was inserted in the Crown's factum to support the proposition that it is all right to tell a witness of apparent contradictions between present and past testimony or other evidence. The 5th edition of this work, published after the Kaufman Commission recommendations were made public, sets out the pre-trial witness guidelines in full as proper practice. That reference did not appear in the Crown's responding material. And none of that material dealt with the problem of preparing an accomplice-cooperating witness for trial where exposure to other evidence could undermine the caution against accepting the evidence of such witnesses without confirmation by other evidence.

35 I find that the accuseds' right to a fair trial under ss. 7 and 11(d) of the *Charter* is imperilled should the trial go on constituted as it is, and it has already been violated by the conduct of one of the Crown counsel. I accept that it was not his intention to do so, but by apparently being unaware of the standards for Crown preparation of witnesses, that is the result of his conduct.

36 In considering remedy under s. 24(1) of the *Charter*, there is a residual discretion in the trial judge to stay proceedings in cases of breach of an accused's right to a fair trial. However, that remedy is reserved for only the "clearest of cases". *R. v. Jewitt*, [1985] 2 S.C.R. 128 (S.C.C.), at para. 25, I do not find that this is one of those clearest of cases of abuse of process and *Charter* breach that requires a permanent stay of proceedings. This is a case where I have found, on a balance of probabilities, that the applicants' rights under s. 7 and s. 11(d) of the *Charter* have been breached. There are less drastic remedies available under s. 24 of the *Charter* which can address the violation in question here and any continued threat of similar conduct, deliberately or inadvertently. As L'Heureux-Dube held, with the majority on this point, in *R. v. O'Connor*, [1995] 4 S.C.R. 411 (S.C.C.) at paras. 65-6, and 69:

> **65** For this reason, the principles of fundamental justice, including the "fairness of the trial", necessarily reflect a balancing of societal and individual interests: *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 539 (per La Forest J.); *R. v. E. (A.W.)*, [1993] 3 S.C.R. 155, at p. 198 (per Cory J.); *Cunningham v. Canada*, [1993] 2 S.C.R. 143; *R. v. Levogiannis*, [1993] 4 S.C.R. 475, at p. 486. As such, they reflect both individual and societal interests. In my view, it is undisputable that the preservation of the integrity of the judicial system is one of these interests.
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> **66** Second, I would note the beginnings of a strong trend toward convergence between the *Charter* and traditional abuse of process doctrine. *In R. v. Xenos* (1991), 70 C.C.C. (3d) 362 (Que. C.A.), for instance, the accused had been charged with arson and attempting to defraud an insurance company. It emerged in cross-examination that the Crown's key witness had arranged with the insurers to be paid $50,000 by the insurers if the accused was convicted. The trial judge found an abuse of process, but declined to order a stay. Rather, in convicting the accused, he said that he had ignored this evidence. The Court of Appeal agreed in principle with the trial judge that a stay was not the only remedy for an abuse of process and went on to rule that the appropriate remedy was in fact to exclude the witness's testimony in a new trial before a different judge. This case is an excellent example, in my mind, of how courts are becoming increasingly bold and innovative in finding appropriate remedies in lieu of stays for abuses of process.
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> . . .
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> 69 Remedies less drastic than a stay of proceedings are of course available under s. 24(1) in situations where the "clearest of cases" threshold is not met but where it is proved, on a balance of probabilities, that s. 7 has been violated. In this respect the *Charter* regime is more flexible than the common law doctrine of abuse of process. However, this is not a reason to retain a separate common law regime. It is important to recognize that the *Charter* has now put into judges' hands a scalpel instead of an axe — a tool that may fashion, more carefully than even solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system.
>
> (Emphasis added)

37 The defence asks that Ray Williams be removed as a trial prosecutor. There is rightly a very high threshold for removal of a prosecuting counsel, *R. v. Brown*, 1996 CarswellOnt 5551 (Ont. Gen. Div.). As Hill J. of this court stated in *R. v. Khan*, 2002 CarswellOnt 3086 (Ont. S.C.J.) at para 24, "Applications for prosecutorial recusal are rare. This is as it should be. The conduct and competence of Crown Attorneys is, as a rule, exemplary: *R. v. Bain* (1992), 69 C.C.C. (3d) 481 (S.C.C.), at 511 per Cory J. Because the role of a prosecutor in a criminal case is a quasi-judicial one, Crown counsel is not an advocate for a conviction - the prosecutor is a public officer for justice and fairness." As soon as Mr. Ray Williams became aware that he had not disclosed to the defence what he had begun to do with the photographic evidence before the jury, and that he did not have a consent to introduce it as he did, he disclosed to the court and to the defence a record from his memory of what had happened. I have outlined it earlier in this decision. No bad faith is alleged. However, ignorance of important Crown preparation standards resulting from the public inquiry's recommendations, which are now well known in the profession, makes the conduct more, not less, serious, particularly given the type of witness in question.

38 In addition, this conduct offends the spirit and purpose of witness exclusion and noncommunication orders during trials. See *R. v. Latimer*, [2003] O.J. No. 3841 (Ont. S.C.J.) at para 27 where O'Connor J. set out the two potential infringements of an accused's fair trial rights addressed by a non-communication order during cross-examination as (i) assistance regarding the strategy of the cross-examiner and (ii) tainting of a witness by knowing how to tailor his evidence. Though Tafari Williams was not under cross-examination, the conduct of the prosecutor, as far as we know it, certainly assisted him in tailoring his evidence to coincide with the surveillance video sequence of events on the relevant night. The prosecutor of course is not a witness but he is subject to a trust as a quasi-judicial officer that he will not undermine court processes that are meant to protect fair trial rights by misusing the trust given counsel to prepare witnesses for trial. Nevertheless, I see no likelihood of his having to testify as a witness, there is no credibility issue at this time involving him, nor, as was stated in *Brown*, is there a personal interest

in the case or involvement in a conflict of interest. Therefore the application to remove Mr. Ray Williams from this case does not meet the high threshold required and is not granted.

39 I have considered the request by the defence for a mistrial. In my view, this situation requires not a mistrial per se but a remedy which can allow the trial to proceed while recognizing that the treatment of the Crown's evidence is proper, open and transparent to public and to the accused men. For instance, the jury has heard from the key witness evidence that has been tainted. The extent of that tainting is known in part but due to the lack of a record and the Crown's continuing belief that it did nothing improper, there is the continuing prospect of more. I cannot assure myself or the public or the applicants that whatever instructions I give the jury should the trial continue as constituted, would be understood or followed or that they would not simply exacerbate the situation. I can give the jury a generalized Vetrovec warning now and a more detailed one at the end of the trial. This directs them that they can believe the witness Williams without more but it would be dangerous to do so. So they are directed to look for confirming evidence from an objective source and they have already heard Williams' altered evidence at trial that agrees with the surveillance tape. So I would emphasize to them that he was given access to the surveillance tape, the times of the clips and stills and to the cell records the day before he testified and they must weigh that aspect and whether it adds to his credibility or not and whether it can even be considered as confirmatory evidence because he was shown it with all the time stamps on it, allowing him to piece the sequence together as he had not at the preliminary hearing. So they are told to look for confirming evidence and then are told that the video and the cell records may no longer qualify as confirmatory evidence or that they do not and the jury still has to look for other confirmation, or assess whether, despite the dangers of doing so (of which they know little), they should accept Mr. Williams' evidence without any confirmation. This is a problem challenging for a judge trained in the law, let alone for lay people, no matter how perceptive they may otherwise be. And no one would know how the jury dealt with Williams' evidence because of jury secrecy. As well, given the number of serious trials waiting to be heard in Simcoe County and the limited space available to house major trials, I doubt that the immediate retrial sought by Mr. Bytensky if a mistrial simpliciter is ordered is possible here. I will return to the mistrial application shortly as part of a more suitable solution.

40 I do not see the exclusion of Tafari Williams' evidence as either fair to the public interest in the search for truth or as warranted by the actions and attitude of the Crown. This is a very different case from *R. c. Xenos* [1991 CarswellQue 1025 (Que. C.A.)] where a witness was being paid in effect for his evidence or *R. v. Latimer* where a police witness was found to have violated a noncommunication order by speaking to another witness about the evidence. Mr. T. Williams is the principal witness for the Crown and, as the associate of virtually every person close to this case including both accused, his evidence, while requiring very careful scrutiny from several perspectives, should not be dispensed with in the circumstances of this case. There is no doubt that Ray Williams' conduct breached the purpose of a witness exclusion and non-communication order, but he is not strictly a witness bound by that order. He has other duties which I have referred to and the failure to live up to his duty to the justice system has led to my finding of a *Charter* breach of the S.7 right to a fair trial and s. 11(d).

41 There is another remedy left open to me in this case by the willingness of both accused men to re-elect to proceed without a jury and counsel's willingness to have all orders to date apply to this trial should it continue without a jury. This remedy, which involves a mistrial plus continuation, would protect society's interest in the search for truth while ensuring that the witnesses' evidence receives the difficult, open and careful scrutiny that is ensured by the trial judge's duty to provide reasons for judgment. This factor ensures the required transparency for each party and the public to see exactly how Tafari Williams' evidence is dealt with including its reliability, credibility and the weight to be attached to it. The jury is bound by secrecy not to provide any reasons and so it could never be known whether they either could understand how to approach Tafari Williams' evidence having heard what they have, or whether they approached it with full awareness of the dangers of accepting such evidence without more.

42 In *R. v. McGregor*, [1999] O.J. No. 919 (Ont. C.A.), the Ontario Court of Appeal upheld the court's jurisdiction on a charge of first degree murder to order a trial without a jury where to change the venue would deprive the accused of his constitutional right to make full answer and defence. As well, Chadwick J. held to the same effect in circumstances of late Crown disclosure and a resulting change in direction of the trial that would mean expanded time and interruptions for *voir dires* and a potential mistrial by loss of too many jurors. *R v Dell, supra*. This remedy would ensure that the trial can continue in order to determine the guilt or innocence of the applicants while at the same time evidence entered in part to buttress the witness's credibility as

independent and objective but which was put before him in full before trial would be handled in a fully transparent manner. I cannot now assure myself or the parties that a jury would or could deal with this witness' evidence properly, or that a jury instruction added to a Vetrovec caution concerning the evidence they have already heard would be effective or followed by the jury. Furthermore, on the very day of my ruling, I received from a juror a request to be excused on grounds of late-developing hardship. There will be at least one *voir dire* of some length in future, probably others involving KGB statements, and the jury has already lost 8 days on account of the requirements for counsel of these applications and some expectation that the length of the case after this witness could well result in a mistrial due to loss of more jurors if it exceeds the estimated time by the end of June or early July. There is therefore an expectation, as in *Dell*, of a mistrial in future. I do not rest on this point but it must be mentioned as part of my considerations. Lay people cannot be asked to sit for expanding and seriously interrupted periods of time under the stress many feel as part of a murder trial, even where they are paid at the maximum juror rate per day.

43 Both applicants have instructed their counsel that they would re-elect trial by judge alone in this court. No severance is proposed on that account, according to Mr. Midanik and Mr. Bytensky.

44 *McGregor* as well as *R. v. Ng* (2003), 173 C.C.C. (3d) 349 (Alta. C.A.) hold that the Crown's discretion to refuse consent to re-election or not is not immune from judicial review in cases where, as here, the accused men's right to fair trial under the *Charter* is threatened.

45 In all the circumstances, and having balanced the individual interests of the applicants and societal interests in a full and fair trial, I find that a mistrial and continuation of the trial without a jury, subject to the rulings made to date and enabled by consent of all parties to the evidence to date applying, is the proper remedy.

46 Procedurally, where the parties through counsel can agree, and if to do so would require a mistrial order followed by continuance on the present record, grounds for an order to that end exist. I note that, despite this remedy being applied for by Mr. Bytensky in Mr. Spence's Notice of Application and accepted by Mr. Turner, the Crown elected to not take a position on it during argument. It is my view that the Crown is entitled to exercise its discretion to agree to a re-election or not. The Crown has a discretion to exercise which it is entitled to do, but it must be exercised subject to review judicially by the court. I have since heard the Crown's refusal to consent to the re-election. In the circumstances here, which include the Crown's own conduct and continuing responsibility for the Charter violation and abuse of process which I have found, I have over-ruled that refusal.

47 I had gone through the necessary analytical steps before release of the original endorsement but not all of my reasons were set out fully for want of time. This Amended Ruling provides those reasons in full; I am attaching as Schedule A the text of my original endorsement. The order granting the application to dispense with the jury and continue the trial without a jury is granted, on consent regarding all rulings and evidence applying from the trial to date and the Crown retaining all its rights of appeal. I thank counsel for their assistance to the court which I know from their conduct to date will continue to be forthcoming.

Schebule "A"

CITATION: R. v. Spence 2011 ONSC 2406

COURT FILE NO.: 09-225

DATE: 20110415

ONTARIO *SUPERIOR COURT OF JUSTICE* *BETWEEN:*	)	
HER MAJESTY THE QUEEN	)	G.M. Flosman and R. Williams, for the Crown
— and —	)	
LENWORTH ANTHONY SPENCE and	)	B. Bytensky and J.A. Morische for the

ANDREW TURNER	)	Defendant Lenworth Anthony Spence
	)	
Defendants	)	
	)	D. Midanik, for the Defendant Andrew
	)	Turner
	)	
	)	*HEARD:* April 13, 2011

Ruling

Howden J.:

1 The defence objections and applications for a stay/mistrial, exclusion of evidence, removal of one of two prosecutors, and continuation by judge alone to be dealt with by this ruling arose from what occurred on the eve of trial and on the 5th day of trial. Mr. Spence and Mr. Turner are jointly charged with the first degree murder and kidnapping of Jonathan Chambers. The murder is alleged to have occurred on March 7, and the kidnapping on March 6 and 7, 2007.

2 It is the Crown's theory that Jonathan Chambers and two potential buyers, Wolf and Bounty, were introduced by one Tafari Williams (street name Rock), an associate and probable leader of the group including Spence and Turner and a friend of Jonathan Chambers, all of whom were involved in the illicit drug trade involving mostly cocaine. Williams had no product at the time so he put Spence, also known as Blue, in touch with Chambers. The deal later went bad, Spence receiving mostly worthless paper from Chambers (or Blinkers on the street), who had acted as the middle man between Blue and Wolf and Bounty. They made off with the cocaine before Chambers and Spence realized the expected $50,000 was not in the bags Chambers had been given. It is alleged that Chambers, with Spence, came to the apartment of Andrew Turner at 440 McMurchy Avenue in Brampton and that he was held there overnight while he attempted to raise the money or locate Bounty and Wolf by numerous telephone calls. In the morning of March 7, it is alleged that the two accused men, Tafari Williams, Terrance Walker, and Gregory Miller, took Jonathan Chambers with them and headed north in two cars to the 4th line of Oro-Medonte, not far from the City of Barrie where he was shot 5 times and died.

3 Subsequently, on April 30, 2008, Andrew Turner and Tafari Williams were arrested by different police teams, Turner for kidnapping and conspiracy to kidnap, Williams for first degree murder and kidnapping. By the end of the day, following a long and detailed interview of Tafari Williams, Andrew Turner was identified by Tafari Williams as the shooter. Later, Williams entered a plea agreement with the Crown, agreeing to be a Crown witness against Spence and Turner in return for his plea to accessory after the fact to murder and Crown assistance toward a sentence of 5 years. He has been released recently on parole.

4 Following the evidence of witnesses describing how the deceased's body was found and evidence from the identification officer, Tafari Williams took the stand on the 3rd day of the Crown's case. Ever since his plea agreement on July 15 2009 and well before that, it would have been obvious to the authorities including Mr. Flosman and Mr. Ray Williams, the two assistant Crown Attorneys assigned to this case, and to the defence counsel, that Tafari Williams was a key witness for the Crown and that, as an informant, his evidence would have to be the subject of the special instruction known as a Vetrovec warning as part of the trial judge's instructions to the jury. That instruction is exemplified in Watt's Manual of Criminal Jury Instructions (Final 31):

> *Tafari Williams (TW)* testified for the Crown. There is a special instruction that has to do with his evidence. It is an instruction that you must keep foremost in your mind when you are considering how much or little you will believe of or rely upon his evidence in making your decision in this case.
>
> You have heard that *(specify characteristics of witness or other circumstances that require evidence to be treated with caution).*
>
> Common sense tells you that, in light of these circumstances, there is good reason to look at his evidence with the greatest care and caution. You are entitled to rely on his evidence even if it is *not* confirmed by another witness or other evidence,

> but it is dangerous for you to do so. Accordingly, you should look for some *confirmation* of his evidence from somebody or something other than Tafari Williams before you rely upon his evidence in deciding whether Crown counsel has proven the case against the persons charged beyond a reasonable doubt. To be confirmatory, the testimony of another witness or witnesses or other evidence should be of a quality and independence from the witness that will help restore your faim in *relevant* parts of his evidence.
>
> TW and the circumstances in which he testified might well make you wish that somebody or something else confirmed what he said. You may believe his testimony, however, if you find it trustworthy, even if no one or nothing else confirms it. When you consider it, however, keep in mind *who* gave the evidence and the *circumstances* under which he testified.
>
> You may find that there is some evidence in this case that confirms or supports some parts of TW's testimony. It is for you to say whether this or any evidence confirms *or* supports his testimony, and how that affects whether or how much you will helieve of or rely upon his testimony in deciding this case.
>
> The evidence to which I am about to refer illustrates the kind of evidence that you may find confirms or supports TW's testimony. It may help you. It may not. It is for you to say.

5 While giving this instruction (or one like it) to the jury is said to be in the judge's discretion, it has been held that it is mandatory in cases where a witness has a lengthy criminal record or just hasn't been caught, strong motivation to lie, and approached the police seeking a deal in exchange for his evidence. The common sense rule can be expressed as a search for evidence that on a material issue confirms the witness's story where that witness suffers from a potential lack of credibility. In the words of Wigmore in his text *Evidence* (Chadboume rev., 1978, para. 2059, at 424):

> (W)hatever restores our trust in him personally restores it as a whole...The important thing is, not how our trust is restored, but whether it is restored at all.
>
> *The Law of Evidence in Canada (2d)*, by J. Sopinka, S. Lederman and A/W. Bryant; Butterworths Reprint # 1, 2001, at 17.13 to 17.15.

6 This issue of confirmatory evidence is therefore exceptionally important to a proper consideration of Williams' evidence. By April 5th, the 4th day of trial, Tafari Williams was still being examined in chief. He referred to the men who were in Turner's apartment when he arrived, that Chambers and Spence arrived after him, and after evidence of spending time with them and some others in the bedroom, Williams was asked what time Gregory Miller arrived. He said: "Early in the morning, maybe 12:00 o'clock." *(Tr. Trans, p. 14)*. He talked of leaving around 3:30am with Robert Henry to get food at the local Tim Horton's. *(Tr. Trans, p. 14)*. Later that day, Williams is asked who was in the apartment when he returned from Tim Horton's and he said:

> I don't remember exactly who's there from who's not there. I remember Jonathan being there. I remember...I remember Gregory Miller is there.
>
> The Court: Sorry.
>
> T. Williams: Gregory Miller is there. And Mr. Spence is there.
>
> Crown: You mentioned the name Ken earlier.....
>
> T. Williams: Oh, I didn't see him there at the time.
>
> *(Tr. Trans., P. 24)*

7 Between the questions about Miller's time of arrival and Tafari Williams' evidence about his trip out for food for about an hour, the Crown counsel, Mr. Ray Williams explained at p. 16 of the trial transcript:

> We've got a video, Your Honour, which I understand can be played on consent at this stage from my friends, taken from 440 McMurchy. These videos have times on them...we've got both is both the (surveillance) video and some still photos. And on the video, there's a time stamp of when the images is alleged to have been captured and the time stamp is also on the bottom of the photograph.

8 Subsequently, the following day, Mr. Ray Williams, on being questioned by me as to why he had said these photos were being entered on consent at that time, admitted that the consent consisted of entering the video and time-stamped stills at some point. He had never discussed with other counsel how he was intending to use them in questioning "the accomplices" like T. Williams, Miller and Walker. That concession also apparently meant that he had never told them he would be using these surveillance photos at all during Tafari Williams' evidence.

9 Crown counsel Ray Williams proceeded to show Tafari Williams the video at 12:03am of March 7, 2007 and asked the witness to identify the person shown. He said it was Gregory Miller, apparently shown close to one of the entrance-ways to the building where Mr. Turner's apartment was. Mr. Midanik made his first objection at that point regarding these time-stamped images. Because there was time left and the jury were in, all counsel agreed that the Crown could carry on with the witness's in-chief testimony until he reached the point where the group from Turner's apartment had put on their coats and exited the building. The witness said that he, Miller, Spence, Turner and Chambers were there. Near the Catera was Terrance Walker (known as Gator), its owner, and near the PT Cruiser were Spence, Turner and Chambers.

10 Mr. Midanik and Mr. Bytensky then put on the record their concerns and a request to the Crown for a list of everything that had been shown the witness prior to his testifying and to limit the photos to only the ones that the witness was in as some of Tafari Williams' evidence from the preliminary hearing had changed and they wanted to cross-examine the witness on what he actually remembers and not simply what he's seen lately in preparation sessions including these time-stamped images from the surveillance video recording. Overnight, the Crown did supply the list requested but other issues arose that Mr. Ray Williams addressed the following day, being Wednesday, April 6.

11 Ray Williams described his preparation session with Tafari Williams the day before he began his evidence, being Sunday, April 3rd. He had reviewed the order of subjects to be covered with Tafari Williams in chief; he highlighted the exhibits to be put to him - those included the still photos from the video and the video itself with the times and dates on them showing persons coming and going, and the times, at 440 McMurchy on March 6 and 7, 2007. Ray Williams then told the Court:

> Crown: The sequence of events is kind of important. So when Walker and...Turner leave 440 McMurchy. I then show him the video and stills of when Mr. Williiams and Mr. Henry leave 440 McMurchy, the stills and video of when Williams and Henry return to 400(sic) McMurchy.
>
> The Court: Okay.
>
> Crown (RW): And then the video and stills of when Mr. Turner and Mr. Walker return to 440 McMurchy. I alerted him to the fact that at the preliminary inquiry he said that when he returned that basically everybody was present.
>
> The Court: In the apartment?
>
> Crown (RW): Yes....In showing him the photos I said, that can't be true, just given the sequence of when people are coming and going. I don't want to talk to you about it, I'm just alerting you to that.
>
> The Court: Yes.
>
> Crown (RW): And I told him that I expected that he would be cross-examined on that point. In the process of meeting him, I tried to outline what I anticipated cross-examination to be; on his record, prior occurrences, involvement in the drug world, things of that nature. But this was one part of his evidence I said, I anticipate you to be cross-examined on and we didn't talk about it further...

> ...The issue arose yesterday in showing the photographs to Mr. (Tafari) Williams and that caught my friends somewhat by surprise... because I did not disclose that I had shown these photographs and clips to Williams. I should have done that, but because nothing... no information came from it, I just didn't put my mind to it.
>
> The Court: Okay.
>
> Crown (RW): At this stage, I recognize that I should have told them what I had done, and they were told about this yesterday including what materials Mr. Williams looked at, as well with me highlighting with Mr. Williams that there's an inconsistency in his evidence between what he says and the photographs. *(Tr. Trans., pp.3-4, April6/11)*.

12 That Mr. Ray Williams understood at all times the significance of Williams' evidence at trial agreeing with the photographic time sequence of the comings and goings of Turner and Walker and T. Williams and Henry, his evidence at both preliminaries being different from his trial evidence as to whether Turner and Walker were in the apartment on Williams and Henry's return from Tim Horton's and whether he knew when Gregory Miller entered the apartment on March 6-7, is clear from the April 6th transcript. Mr. Ray Williams explained it to me himself:

> The Court: I take it, he's (Tafari Williams is) going to be asked and will testify as to later on, who's in the cars and who's going up to....
>
> Crown (RW): But there's no photos or video of that. The significance of the McMurchy is that it's at least objective evidence of when people are coming and going and not solely dependent on what Williams says.

(Tr. Trans., p.5, April 6/11)

13 Mr. Ray Williams explained further his intention for the stills and video of having Williams identify the various people in them. He then said, indicating his contrition for what had happened:

> Crown (RW): And one of the concerns Mr. Midanik raised was that showing him the photographs beforehand and doing it on the stand Williams is seeing the time stamp.
>
> The Court: Has related the two.
>
> Crown: That's right. And in some cases the time stamp is significant. And I apologize for doing that. And it seemed prudent to me that he view the things that I planned on putting in...

(Tr. Trans, pp.5-6, April 6/11)

14 At both preliminary hearings, Mr. Williams had said nothing about knowing when Gregory Miller appeared on the scene at 440 McMurchy. And on his return from Tim Horton's with Henry, Williams recalled that not only the three he mentioned at trial were in Turner's apartment but also Turner and Walker. Yet the security video shows that Turner and Walker left the apartment at 2:07 a.m. and did not return until after Williams' 4:35 return from Tim Horton's, at 5:05 a.m. Turner and Walker could not have been in the apartment on Williams' return as he had said at the preliminary hearing. His trial evidence as it stands now regarding these points is confirmed by the only objective evidence available to the jury. His pre-trial evidence at the preliminary hearings was not confirmed by the video evidence shown him before trial.

15 I should add here Mr. Flosman's submission from the statement of Mr. Williams on the day of his arrest - April 30, 2008. At that time, he had been told many things about the strength of the Crown's case against him but after all that, he did say that Gregory Miller (Street name Shorty or Shortman) had come into the McMurchy apartment after midnight. Unfortunately, that is not what happened in my view. The police interviewer showed Williams a photograph and told Williams who was depicted and what time it was. At p.127 of the April 30/08 interview transcript:

> Officer: Okay do you recognize that person on this paper?

T. Williams (TW): I think that's Shorty.

Officer: Yeah that's Shorty, he's coming in the building we think at just after midnight which is kinda what you said.

TW: Mmm hmmmm.

Officer: That makes sense.

TW: Mmm hmmmm.

16 Tafari Williams did not come out with this evidence at either preliminary hearing, only after his preparation session with the Crown the day before his evidence began. I find the probable cause of his change of evidence regarding the presence of Turner and Walker on Williams' return at 4:25 a.m. has only one explanation — the assistance from the Crown the day before the start of Williams' evidence. I understand from both sides that there is little if any objective independent evidence to confirm Williams' evidence after Spence and Chambers arrive in the evening of March 6 other than the video evidence. And that was what Mr. Ray Williams had shown Williams fully and sequentially on April 3rd regarding who was present or not throughout the night, including on his return to the apartment at 4:25 a.m. Then the Crown told him that his evidence at the preliminary hearings "cannot be true" and "there's an inconsistency in his evidence between what he says and the photographs." Two days later, Tafari Williams changed his evidence on this point from the preliminary and gave the time when Miller came out the night of March 6, 2007 as he was looking at the time-stamped photograph which he had seen at the preparation session.

17 Other documents extrinsic to Williams and shown to TW as listed by the Crown were: cell records of Tyron Willis, an alias of Tafari Williams, 3 telephone intercepts to which Williams was a party, and the diagram of the vehicle turn and position of parties (said to be related to Williams' statement on April 30, 2008 on his arrest, as well as all clips and all photographs of and in 440 McMurchy.

18 The Crown's position is that this was normal preparation of a witness for trial, that Mr. Ray Williams had done nothing improper and the answer to these applications by the defence was the Ontario Court of Appeal decision in *R v Buric* [1996] CarswellOnt 1592, the majority decision written by Labrosse J.A. and upheld in 1997 by the Supreme Court of Canada. In *Buric*, the police had shown an informant statements of other witnesses when they were trying to persuade him to testify against those originally co-accused of murder with him. The Court of Appeal majority held that the issue was solely witness tainting, not Crown or police misconduct, and the trial judge was wrong in treating the issue as a question of admissibility rather than weight which is for the jury. The remedy lay in the right of the accused to cross-examine on the tainting issue and in proper instructions by the trial judge alerting the jury to the problems with this evidence. The crown does not concede any impropriety in preparing T. Williams for trial.

19 The applicant Mr. Spence asks for a stay of proceedings on grounds of violation of his s. 7 and 11(d) right to a fair trial, and that the Crown's conduct amounted to an abuse of process, for exclusion of the evidence of Tafari Williams, permitting Mr. Spence to reelect trial by judge alone, or a mistrial and immediate start of a new trial. In the end, Mr. Bytensky stressed the mistrial request or proceeding by Judge alone so that there would be complete transparency as to how the evidence of Tafari Williams was dealt with, jury secrecy preventing whether the jury would or could follow instructions regarding how they could use Williams' evidence following his being tainted by the Crown's preparation technique.

20 The applicant Mr Turner seeks a stay, exclusion of Williams' evidence, removal of Mr. Ray Williams as prosecution counsel, limiting the use of the surveillance video and stills from it if the trial proceeds, and mid-trial instruction addressing the pre-trial conduct of the Crown and a mid-trial Vetirovec instruction. At the hearing, Mr. Midanik indicated that his client would also re-elect judge alone with or without Crown consent if that remedy under s. 24(1) of the *Charter* were granted.

21 Since *Buric*, the report of the Kaufman Commission into the wrongful conviction of Guy Paul Morin was released. It addressed the problem of potential witness contamination before trial by police and Crown with a series of guidelines. The Crown Manual issued in draft form also addresses, in part, guidelines for the conduct of witness interviews. Both include the

following guidelines. I will use the ones from the Kaufman Report here, which are also recommended in substance by the Crown Manual.

22 Recommendation 103: Prevention of contamination through information conveyed. Police should be instructed specifically on the dangers of unnecessarily communicating information known to them to a witness where it may colour the witness's account.

Recommendation 107: Conduct of Crown Interviews

(a) Counsel should not discuss evidence with witnesses collectively.

(b) A witness's memory should be exhausted before any reference is made to conflicting evidence.

(c) Questioning should be non-suggestive.

(e) Counsel *may* then choose to alert the witness to conflicting evidence and invite comment

(f) In doing so, counsel should be mindful of the dangers associated with this practice.

(g) It is wise to advise the witness that it is his or her own evidence that is desired, that the witness is not simply to adopt the conflicting evidence in preference to his or her own honest and independent recollection.

(h) Under no circumstances should counsel tell the witness that he or she is wrong.

23 The Crown Manual also states that where the Crown counsel honestly believes a witness is honestly mistaken, counsel may appropriately inquire into the circumstances surrounding the witness's present recollection. Counsel should not tell a witness that he or she is wrong. Both documents stress that the evidence sought is the witness's own recollection, not mere adoption of evidence from other sources. Neither suggest the technique used here of showing the witness more than his own statements or prior evidence or conversations he was a party to and telling him his evidence could not be true. At no time did Mr. Ray Williams give Tafari Williams the warning in (g) above.

24 The Kaufman recommendations stem from an in-depth inquiry into a well-known wrongful conviction and the practises that brought it about. The courts in *Buric* did not have the benefit of its recommendations and *Buric* is not a case of coaching a witness beyond or contrary to his recollection just before trial.

25 It is symbolic of the Crown's failure to recognize that its own Manual was not followed - and the very result its guidelines and those of the Kaufman Commission were to prevent, has occurred here - that the Crown's case book contains as a citation a reference to the 2nd edition of the text by Earl J. Levy, *Examination of Witnesses in Criminal Cases*, an edition which pre-dates the Kaufman findings and recommendations. It was inserted for the proposition in the Crown's factum that it is proper to tell a witness of apparent contradictions between present and past testimony or statements. The 5th edition of the same work, published post-Kaufman, adopts the Kaufman recommendation as proper practice. They were not followed by Crown counsel here, I so find, and they should have been as a minimum standard when preparing a Vetrovec-type witness.

26 In my view, I find that the accuseds' right to a fair trial is imperilled should the trial go on constituted as it is and it has already been violated by the conduct of one of the Crown counsel. I accept that it was not his intention but by apparently being unaware of the standards for Crown preparation of witnesses, that is the result of his conduct by showing the witness evidence extrinsic to his own and by telling him at one point that he was wrong.

27 As soon as Mr. Ray Williams became aware that he had not disclosed to the defence what he had done and that he did not have a consent to introduce the video evidence as he did, he disclosed to the court and to defence a complete record of what had happened. I have outlined it earlier in this decision. There is rightly a very high threshold for removal of a prosecuting counsel. No bad faith is alleged. However ignorance of important improvements in Crown preparation standards resulting from a thorough and well-respected public inquiry makes the conduct more, not less serious. Nevertheless, I see no likelihood of his

having to testify as a witness; there is no credibility issue involving him nor, as was stated in *R v Brown* 1996 CarswellOnt 5551(SCJJ is there a personal interest in the case or involvement in a conflict of interest The application to remove Mr. Ray Williams is not granted.

28 I do not find that this is one of those clearest of cases of abuse of process and *Charter* breach that requires a permanent stay of proceedings. This is a case where I have found, on a balance of probabilities that the applicants' rights under s. 7 and s. 11(d) of the *Charter*. There are less drastic remedies available under s. 24 of the *Charter* which can fit well the particular case. As L'Heureux-Dube held, with the majority on this point, in *R v O'Connor* [1995] 4 SCR 411 at paras. 65-6, and 69:

> **65** For this reason, the principles of fundamental justice, including the "fairness of the trial", necessarily reflect a balancing of societal and individual interests: *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 S.C.R. 425, at p. 539 (per La Forest J.); *R. v. E. (AW.)*, [1993] 3 S.C.R. 155, at p. 198 (per Cory J.); *Cunningham v. Canada*, [1993] 2 S.C.R. 143; *R. v. Levogiannis*, [1993] 4 S.C.R. 475, at p. 486. As such, they reflect both individual and societal interests. In my view, it is undisputable that the preservation of the integrity of the judicial system is one of these interests.
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> **66** Second, I would note the beginnings of a strong trend toward convergence between the *Charter* and traditional abuse of process doctrine. *In R. v. Xenos* (1991), 70 C.C.G (3d) 362 (Que. C.A.), for instance, the accused had been charged with arson and attempting to defraud an insurance company. It emerged in cross-examination that the Crown's key witness had arranged with the insurers to be paid $50,000 by the insurers if the accused was convicted. The trial judge found an abuse of process, but declined to order a stay. Rather, in convicting the accused, he said that he had ignored this evidence. The Court of Appeal agreed in principle with the trial judge that a stay was not the only remedy for an abuse of process and went on to rule that the appropriate remedy was in fact to exclude the witness's testimony in a new trial before a different judge. This case is an excellent example, in my mind, of how courts are becoming increasingly bold and innovative in finding appropriate remedies in lieu of stays for abuses of process. Professor Stuesser points out in "Abuse of Process: The Need to Reconsider" (1994), 29 C.R. (4th) 92, at p. 99, moreover, that the common law in the United Kingdom and Australia urges judges to look at lesser remedies before entering stays of proceedings. He argues that these authorities support the view that even under the common law, the remedy for abuse of process is no longer only a stay of proceedings.
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> **69** Remedies less drastic than a stay of proceedings are of course available under s. 24(1) in situations where the "clearest of cases" threshold is not met but where it is proved, on a balance of probabilities, that s. 7 has been violated. In this respect the *Charter* regime is more flexible than the common law doctrine of abuse of process. However, this is not a reason to retain a separate common law regime. It is important to recognize that the *Charter* has now put into judges' hands a scalpel instead of an axe — a tool that may fashion, more carefully than ever, solutions taking into account the sometimes complementary and sometimes opposing concerns of fairness to the individual, societal interests, and the integrity of the judicial system.

29 I have considered the request by the defence for a mistrial. In my view, this situation does not satisfy the test for ordering a mistrial per se and it would mean that the time put into this case so fer, or a great deal of it, would be wasted. As well, given the number of serious trials waiting to be heard in Simcoe County and the limited space available to house major trials, I doubt that the immediate retrial sought by Mr. Bytensky if a mistrial simpliciter is ordered is possible here. I also cannot assure myself or the public or the applicants that whatever instructions I give the jury should the trial continue, would be understood or followed or that they would not simply exacerbate the situation. There is another less severe remedy than either exclusion of Tafari Williams' evidence, which is unnecessary and I reject it as not being called for, or a mistrial and a retrial.

30 In *R. v McGregor* (1999) O.J. No. 919, the Ontario Court of Appeal upheld the court's jurisdiction on a charge of first degree murder to order a trial without a jury. This remedy would satisfy the proper concerns with how Tafari Williams evidence including the issues over the improper way he was prepared for trial will continue to imperil the fairness of this trial and have done so already. It would ensure that evidence entered in part to buttress the witness's credibility as independent and objective but which was put before him in full before trial where no need had been voiced by him to do so would be handled in a fully transparent manner so that the public and the applicants would know the principles on which this key witness's evidence will be dealt with.

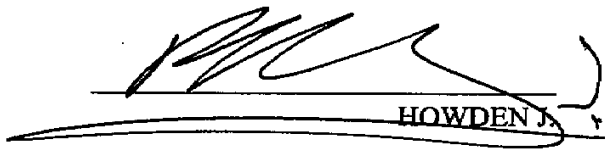
31 Both applicants have instructed their counsel that they would re-elect trial by judge alone in this court. No severance is to be proposed on that account, according to Mr. Midanik and Mr. Bytensky.

32 *McGregor* as well as *R v Ng*, [2003] 173 CCC (3d) 349 (Alta. C.A.) hold that the Crown's discretion to refuse consent to re-election or not is not immune from judicial review in cases where, as here, the accused men's right to fair trial under the *Charter* is threatened.

33 In all the circumstances, and having balanced the individual interests of the applicants and societal interests in a full and fair trial, I find that continuing the trial without a jury is the proper remedy.

34 Procedurally, if the parties through counsel can agree, and if to do so would require a mistrial order followed by continuance on the present record, grounds for an order to that end exist, I note that, despite this remedy being applied for by Mr. Bytensky in Mr. Spence's Notice of Application and accepted by Mr. Turner, the Crown elected to not take a position on it during argument It is my view that the Crown is entitled to exercise its discretion to agree to a re-election or not. If this remedy of re-election on a continued or new trial is opposed by the Crown, I will hear from counsel for the Crown in light of my findings on these applications, on Monday April 18 at 10:00 a.m. on that subject, as well as other counsel before any order is made to discharge the jury. The Crown has a discretion to exercise which it is entitled to do, but subject to review judicially by the court.

35 I have gone through the necessary analytical steps but not all of them are fully set out in this endorsement for want of time. The order granting the application to dispense with the jury and continue the trial without a jury is granted subject to hearing from the Crown on Monday, April 13 at 10:00 a.m. and subject to issuance later of more complete reasons to follow, to be incorporated into this endorsement. I will finalize the order on April 18 after hearing from the Crown and ruling on any refusal to allow re-election.



Graphic 1

Released: April 15, 2011

Order accordingly.