**CITATION:** R. v. Wallace, 2020 ONSC 2332
**COURT FILE NO.:** CR-20-340-00MO
**DATE:** 20200420

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

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| **BETWEEN:** | |
| Her Majesty The Queen<br>Prosecution/Respondent | T. Shuster, for the Crown |
| **– and –** | |
| Jesse Wallace, Lindsay Ainsworth, and Alexis Yorke<br>Accused/Applicants | J. Goldlist for Wallace<br>B. Walker for Ainsworth<br>A. Audet for Yorke |

**HEARD: February 27, 2020**

**REASONS FOR DECISION ON APPLICATION**
**(ABUSE OF PROCESS)**

PURSUANT TO SECTION 648(1) OF THE CRIMINAL CODE, NO INFORMATION REGARDING THIS APPLICATION SHALL BE PUBLISHED OR BROADCAST OR TRANSMITTED IN ANY WAY BEFORE THE JURY RETIRES TO CONSIDER ITS VERDICT OR UNTIL FURTHER ORDER OF THE COURT.

**THE HONOURABLE JUSTICE J. R. HENDERSON**

## INTRODUCTION

[1] Jesse Wallace ("Wallace") and Lindsay Ainsworth ("Ainsworth") are charged with two counts of second-degree murder and two counts of offering an indignity to a human body regarding the deaths of Deidra Smith ("Smith") and Justin Robichaud ("Robichaud").

Alexis Yorke ("Yorke") is charged with two counts of being an accessory after the fact to the murders.

[2] In these pre-trial applications, the three accused persons allege that the conduct of the Crown constitutes an abuse of process. They submit that the appropriate remedy is an order for a stay of the proceedings.

[3] The Crown initially proceeded against the three accused separately and conducted three separate preliminary hearings. At two of the preliminary hearings the Crown subpoenaed, or otherwise compelled, the non-subject accused persons to testify. Then, after they were each committed for trial, the Crown chose to jointly prosecute the three accused in this single indictment in the Superior Court of Justice. Now that the three accused are jointly charged, the accused persons are not compellable to testify as witnesses at the trial.

[4] The accused submit that the Crown has manipulated the process so that each accused was forced to give up their right to remain silent; that each accused was compelled to testify in what is now their own proceedings; that the Crown has obtained pre-trial discovery of the defence cases; and that the Crown has obtained committals at the preliminary hearings based on what is now inadmissible evidence.

[5] The accused allege that the Crown's conduct constitutes an abuse of process as the Crown has compromised the fairness of the trial for the accused and has undermined the integrity of the judicial process. Moreover, the accused submit that their rights set out in ss. 7, 11(c), and 11(d) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") have been breached.

[6] The Crown submits that it has a broad prosecutorial discretion, and that the Crown has exercised its discretion in this case for proper purposes. Therefore, the Crown submits that there has been no abuse of process and no breach of the *Charter*. In the alternative, the Crown submits that if there has been an abuse of process or a breach of the *Charter*, then a stay of the proceedings is not the appropriate remedy.

**THE BACKGROUND FACTS**

[7] Wallace and Yorke are common-law partners. Ainsworth is Wallace's step-sister. Wallace and Yorke lived in the upstairs portion of a house in St. Catharines, and the deceased, Smith and Robichaud, rented the basement apartment in that house.

[8] It is alleged that Wallace and Ainsworth killed Smith and Robichaud on January 1-2, 2018. It is further alleged that on January 2, 2018, Wallace, Ainsworth, and Yorke drove from St. Catharines to a remote area in Haliburton where they disposed of the bodies.

[9] The three accused were arrested in July 2018. Ainsworth and Yorke both provided video-recorded statements to police officers after their arrests. Wallace declined to speak with police and gave no statement.

**THE JUDICIAL PROCEEDINGS**

[10] The preliminary hearing of Wallace was held over six court days from August 7 to 14, 2019. Wallace was committed for trial by a judge of the Ontario Court of Justice on September 12, 2019.

[11] The Crown subpoenaed both Ainsworth and Yorke to attend and give evidence at Wallace's preliminary hearing. The Crown played their recorded police statements as evidence at the preliminary hearing pursuant to s. 540(7) of the *Criminal Code* and did not ask any questions of them. Then, in both cases, pursuant to s. 540(9), Ainsworth and Yorke were cross-examined by counsel for Wallace.

[12] The preliminary hearing of Yorke was held over four court days from August 26 to 29, 2019, and Yorke was committed for trial on August 30, 2019. Neither Wallace nor Ainsworth were called as witnesses.

[13] The preliminary hearing of Ainsworth commenced on September 29, 2019, and continued for 12 days to October 16, 2019, at which time Ainsworth was committed for trial.

[14] The Crown subpoenaed Yorke to attend and give evidence at Ainsworth's preliminary hearing, and the Crown compelled Wallace, who was in custody, to attend and give evidence pursuant to a court order. Both Wallace and Yorke were called to the witness stand to give *viva voce* evidence on behalf of the Crown. In both cases, Wallace and Yorke were subject to direct examination by the Crown, and defence counsel for Ainsworth chose to not cross-examine.

[15] After all three accused were committed for trial, the Crown filed this joint indictment on November 4, 2019.

**THE POSITIONS OF THE PARTIES**

[16] Wallace's position is that his prior conduct is indicative of his efforts to exercise his right to remain silent; he did not provide a statement to police or make any utterances to civilians. Despite his efforts, Wallace submits that he was forced to give up that right, in breach of s. 7 of the *Charter*, when he was compelled to testify at Ainsworth's preliminary hearing.

[17] Further, Wallace submits that when the Crown decided to proceed jointly against all

accused, the Crown created a situation in which Wallace had been compelled to testify as a witness in his own proceedings, contrary to s. 11(c) of the *Charter*. By proceeding in this way, Wallace suggests that the Crown used its discretion so the Crown could do indirectly what s. 11(c) prohibits.

[18] In addition, Wallace submits that the only pieces of evidence against him at his preliminary hearing were the statements given by Ainsworth and Yorke to police. Because of the joint indictment, the Crown cannot compel Ainsworth or Yorke to testify at the trial. Therefore, Wallace now stands trial having been committed entirely on evidence that the Crown cannot adduce at trial.

[19] Ainsworth submits that her right to remain silent was breached when she was compelled to testify at Wallace's preliminary hearing. Although the Crown did not ask Ainsworth any questions, the Crown caused Ainsworth to attend by way of subpoena and made Ainsworth available for cross-examination. This meant that Ainsworth was compelled to answer questions under oath with respect to the alleged offences.

[20] Further, Ainsworth submits that when the Crown decided to proceed jointly against all accused, the Crown created a situation in which Ainsworth had been compelled to testify as a witness in her own proceedings, contrary to s. 11(c) of the *Charter*.

[21] Yorke submits that her right to remain silent was breached twice as she was compelled to testify on two occasions. First, Yorke was subpoenaed to Wallace's preliminary hearing and cross-examined by Wallace's counsel, and later Yorke was subpoenaed to Ainsworth's preliminary hearing where she was subject to direct examination by the Crown.

[22] Like Wallace and Ainsworth, Yorke submits that when the Crown decided to proceed jointly against all accused, the Crown created a situation in which Yorke had twice been compelled to testify as a witness in her own proceedings, contrary to s. 11(c) of the *Charter*.

[23] All three of the accused take the position that the Crown's predominant purpose for calling Ainsworth and Yorke as witnesses at Wallace's preliminary hearing and for calling Wallace and Yorke at Ainsworth's preliminary hearing was to obtain incriminating evidence against the accused witnesses, and obtain disclosure of the defence cases, not for the purpose of advancing the Crown's case against the accused who was the subject of the preliminary hearing.

[24] The applicants suggest that the Crown's decision to join the three accused on a single indictment following their respective committals provides a lens through which the court may retrospectively examine the earlier decisions made by the Crown. All three of the

accused submit that the Crown's conduct amounts to abuse of process in both the main category and the residual category for abuse of process claims as set out in *R. v. Babos*, 2014 SCC 16, [2014] 1 S.C.R. 309, at para. 31.

[25] The position of the Crown is that the Crown has the discretion to decide whether to prosecute accused persons separately or jointly. Therefore, the Crown submits that its decision to initially proceed separately, and later to proceed jointly, against the three accused is a decision to be treated with deference by this court as it is an exercise of prosecutorial discretion.

[26] Further, regarding the compellability of witnesses, the Crown submits that it had legitimate public purposes for compelling Ainsworth and Yorke to testify at Wallace's preliminary hearing, and for compelling Wallace and Yorke to testify at Ainsworth's preliminary hearing. The Crown submits that its predominant purpose for calling any of the accused persons as a witness was not to obtain evidence that would incriminate the witness, but to advance the prosecution of the subject accused.

[27] The Crown denies that the Crown's conduct amounts to an abuse of process, either in the main category or the residual category, as described in the *Babos* decision.

**THE LAW**

***Canadian Charter of Rights and Freedoms***

[28] The relevant provisions of the *Charter* are as follows:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 11. Any person charged with an offence has the right ...
>
> > (c) not to be compelled to be a witness in proceedings against that person in respect of the offence;
> >
> > (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
>
> 24. (1) Anyone whose rights or freedoms … have been infringed or denied may apply to a court … to obtain such remedy as the court considers appropriate and just in the circumstances.

***Abuse of Process***

[29] The common law doctrine of abuse of process has been applied to a variety of circumstances involving state conduct. There are two categories of abuse of process. The first category applies to individual rights, such as the fairness of the trial for the accused and the individual's procedural rights. There is also a residual category that is engaged where the prosecution is conducted in a manner that connotes unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and undermines the integrity of the judicial process: see *R. v. O'Connor*, [1995] 4 S.C.R. 411, at para. 73.

[30] In the *O'Connor* decision, at paras. 70-73, the Supreme Court of Canada found that the common law doctrine of abuse of process is now subsumed under s. 7 of the *Charter* and should not be considered separately unless circumstances arise to which the *Charter* does not apply. This was later confirmed in *R. v. Nixon*, 2011 SCC 34, [2011] 2 S.C.R. 566, at paras. 35-37.

[31] The onus to establish abuse of process rests on the accused on a balance of probabilities: see *O'Connor*, at para. 69, and *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, at para. 19.

[32] The distinct categories of abuse of process were discussed in *O'Connor*, at para. 73, in *Nixon*, at para. 36, and in *R. v. Anderson*, 2014 SCC 41, [2014] 2 S.C.R. 167, at para. 49. At para. 50 of the *Anderson* decision, Moldaver J. wrote, "Regardless of the precise language used, the key point is this: abuse of process refers to Crown conduct that is egregious and seriously compromises trial fairness and/or the integrity of the justice system."

[33] In *Babos*, the Supreme Court of Canada again considered the categories of abuse of process. Moldaver J., for the majority, stated, at para. 31:

> These cases generally fall into two categories: 1) where state conduct compromises the fairness of an accused's trial (the "main" category); and 2) where state conduct creates no threat to trial fairness but risks undermining the integrity of the judicial process (the "residual" category).

[34] In the main category of cases, the concern is about the fairness of the accused's trial. Establishing prejudice of the requisite degree is key to meeting the test; proof of prosecutorial misconduct, while relevant, is not a prerequisite: see *Nixon*, at para. 39, and *R. v. Keyowski*, [1988] 1 S.C.R. 657.

[35] In the residual category of cases, prejudice to the accused's interests, although relevant, is not determinative. Prejudice in the residual category of cases is better conceptualized as an act tending to undermine society's expectations of fairness in the administration of justice:

see *Nixon*, at para. 41. The residual category is one of the safeguards designed to ensure "that the repression of crime through the conviction of the guilty is done in a way which reflects our fundamental values as a society": *Rothman v. The Queen*, [1981] 1 S.C.R. 640, at p. 689.

***Prosecutorial Discretion***

[36] In the case of *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, at paras. 25-49, the Supreme Court of Canada reviewed the history of prosecutorial discretion in Canada. In summary, the court held that the Crown has a broad discretion to make decisions as to the initiation, management, and termination of prosecutions. That decision-making power is to be exercised independent of any partisan concerns.

[37] In *Krieger*, Iacobucci and Major JJ., writing for the court, attempted to identify the types of decisions that could be characterized as the exercise of prosecutorial discretion. At para. 43, they wrote:

> "Prosecutorial discretion" is a term of art… Prosecutorial discretion refers to the use of those powers that constitute the core of the Attorney General's office and which are protected from the influence of improper political and other vitiating factors by the principle of independence.

[38] Further, at para. 47 of *Krieger*, the court stated, "prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution" and "the decisions that govern the Crown prosecutor's tactics or conduct before the court do not fall within the scope of prosecutorial discretion."

[39] In *Anderson*, Moldaver J. noted that the use of the word "core" in *Krieger* had led to a narrow definition of prosecutorial discretion. Consequently, at para. 44 of *Anderson*, he wrote, "In an effort to clarify … the term "prosecutorial discretion" is an expansive term that covers all "decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it"". At para. 45, he continued, "In sum, prosecutorial discretion applies to a wide range of prosecutorial decision making."

[40] In *Krieger*, at para. 45, the court confirmed that an exercise of prosecutorial discretion is not subject to interference by other arms of government and therefore any exercise of prosecutorial discretion will be treated with deference by the courts.

[41] In the present case, I find that the decisions made by the Crown to initiate, manage, and terminate the prosecutions, including the decisions to proceed separately or jointly, are decisions that fall within the scope of prosecutorial discretion. As such, I find that these decisions must be treated with deference by this court.

[42] It is important to recognize that the general rule of judicial non-intervention in prosecutorial discretion is not absolute. The exercise of prosecutorial discretion is always reviewable by the courts for abuse of process: see *Krieger*, at paras. 48-49, and *Anderson*, at paras. 36, 50-51. Where there has been an abuse of process, "the actions of the Attorney General will be beyond the scope of his office as protected by constitutional principle, and the justification for such deference will have evaporated": *Krieger*, at para. 49.

[43] Moreover, although exercises of prosecutorial discretion are only reviewable for abuse of process, all Crown decision-making is reviewable for abuse of process: see *Anderson*, at para. 36. Therefore, all decisions made by the Crown in these proceedings are reviewable for abuse of process.

**Compellability of Witnesses**

[44] Section 11(c) of the *Charter* protects an accused from being compelled as a witness in proceedings against himself/herself. However, where the Crown has proceeded separately against two accused persons, one accused is ordinarily compellable by the Crown at the trial of the other accused: see *R. v. Clunas*, [1992] 1 S.C.R. 595, at pp. 607-608, *R. v. V. B.*, 2012 ONSC 6896, [2012] O.J. No. 5792, at para. 18, and *R. v. Naicker*, 2007 BCCA 608, 229 C.C.C. (3d) 187, at para. 44.

[45] There are exceptions to the general rule of compellability. In *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451, a majority of the members of the Supreme Court of Canada held that courts could, in certain circumstances, grant exemptions from compulsion to testify. In particular, a witness may be entitled to an exemption pursuant to s. 7 of the *Charter* if it would be fundamentally unfair to compel the witness to testify.

[46] In the companion case of *British Columbia (Securities Commission) v. Branch*, [1995] 2 S.C.R. 3, the court further developed the "predominant purpose" test for deciding when such exemptions were available. The court, at para. 7, stated that the crucial question is "whether the predominant purpose for seeking the evidence is to obtain incriminating evidence against the person compelled to testify or rather some legitimate public purpose." At para. 8, the court found that to qualify as a valid public purpose, compelled testimony in a criminal prosecution must be "for the purpose of obtaining evidence in furtherance of that prosecution."

[47] In *S. (R.J.)*, at para. 278, L'Heureux-Dubé J. wrote that compulsion of a witness by the Crown will not be for a legitimate public purpose when, by compelling the witness to testify, "it is engaging in a colourable attempt to obtain discovery" from the witness, and, at the same time, is not materially advancing its own valid purposes.

[48] If it is determined that the predominant purpose in compelling the witness to testify is not to obtain evidence in furtherance of the prosecution of the accused, but rather to obtain incriminating evidence against the witness, then the Crown must justify the potential prejudice to the right of the witness against self-incrimination: see *Branch*, at para. 9.

[49] The burden of proof with respect to the predominant purpose of the compelled testimony is on the witness who asserts that it is not sought for a legitimate public purpose. If this is established, the "witness should not be compelled unless the party seeking to compel the witness justifies the compulsion": *Branch*, at para. 11.

[50] The issue of whether compulsion of a witness amounts to a breach of s. 7 of the *Charter* may be raised at two points: when the witness is subpoenaed and when the witness is tried. L'Heureux-Dubé J. emphasized in *S. (R.J.)*, at para. 285, that it will be rare that the protection of s. 7 will be successfully invoked at the subpoena stage.

[51] In my view, decisions regarding which witnesses to call at the preliminary hearing are decisions that are litigation tactics, not exercises of prosecutorial discretion. A decision about the evidence to be called in support of one's case is not unique to the office of the Attorney General; it is a type of discretionary decision-making exercised by all litigators. That being said, as discussed earlier, all decisions made by the Crown in these proceedings are reviewable for abuse of process.

**ANALYSIS**

[52] It is appropriate to analyze these applications by considering each separate decision made by the Crown in the course of the proceedings, and then consider the net effect of all of those decisions on the fairness of the trial and the integrity of the judicial process.

**The Initial Separate Proceedings**

[53] Starting with the initial proceedings in the Ontario Court of Justice, it is acknowledged that the decision to prosecute separately or jointly is entirely open to the Crown: see *Naicker*, at para. 45. Therefore, there is nothing that could be construed as an abuse of process about the Crown's decision to proceed against the three accused separately in the first instance.

**Compelling the Accused to Testify at the Preliminary Hearings**

[54] Regarding the preliminary hearing of Yorke, Yorke's counsel concedes that there was nothing improper about the Crown's conduct at Yorke's preliminary hearing. Further, I find that neither Wallace nor Ainsworth have cause to criticize the Crown's conduct at Yorke's preliminary hearing, as they were not called as witnesses.

[55] The only important part of the narrative arising from Yorke's preliminary hearing was that the Crown decided at that hearing that it would not be tendering Yorke's police statement at her preliminary hearing or at her trial because of issues regarding the voluntariness of the statement, and so informed Yorke's counsel.

[56] Regarding Wallace's preliminary hearing, I accept that Ainsworth and Yorke were compellable as witnesses by the Crown because the Crown was proceeding separately against each of the accused. The court in *Naicker* wrote, at para. 45, that "if the evidence of one participant is required to convict another, the Crown may obtain the evidence by conducting separate trials where the evidence could not be obtained in a joint trial."

[57] I also accept that the procedure set out in s. 540(7) of the *Criminal Code* was available, and that the Crown properly exercised its discretion to engage s. 540(7). As a consequence, counsel for Wallace was entitled to cross-examine Ainsworth and Yorke pursuant to s. 540(9).

[58] I agree with the defence that the cross-examination of Ainsworth and Yorke at Wallace's preliminary hearing should be categorized as evidence that was compelled by the Crown. But for the Crown's decision to enter their statements pursuant to s. 540(7), Ainsworth and Yorke would not have been compelled to take the witness stand and provide sworn testimony.

[59] Regarding the predominant purpose test, I accept that the statements given to police by Ainsworth and Yorke provided incriminating evidence against Wallace. Therefore, their statements formed part of the Crown's case against Wallace at the preliminary hearing stage. Even though Ainsworth and Yorke did not fully adopt their statements during cross-examination, and Yorke provided exculpatory evidence on behalf of herself and Wallace, the Crown still had a proper purpose for serving subpoenas on Ainsworth and Yorke, introducing their statements into evidence, and making Ainsworth and Yorke available for cross-examination.

[60] Accordingly, I find that Ainsworth and Yorke are unable to prove that the Crown's predominant purpose for compelling them to attend at Wallace's preliminary hearing was to obtain evidence to incriminate Ainsworth and Yorke, as opposed to advancing the Crown's case against Wallace. Therefore, the Crown's conduct at Wallace's preliminary hearing does not constitute a breach of the *Charter* or an abuse of process.

[61] Regarding Ainsworth's preliminary hearing, on this application the Crown has offered several reasons for its decision to call Wallace and Yorke as Crown witnesses. In my opinion, despite the Crown's submissions, there are significant concerns about the Crown's predominant purpose for compelling Wallace and Yorke to testify.

[62] With respect to the Crown's purpose for calling Yorke, it is important to understand the context of Yorke's evidence. I note that Yorke had made statements to police that implicated Wallace and Ainsworth in the murder. In particular, Yorke acknowledged to police that something had happened to Robichaud and Smith in the downstairs apartment; that a mallet was used; that Yorke, Wallace and Ainsworth were in the house at the time; that Wallace and Ainsworth went downstairs; and that all three of them drove together to dispose of the bodies.

[63] Then, when Yorke was cross-examined at Wallace's preliminary hearing, Yorke changed her story. She testified that she and Wallace were in Toronto at the relevant time. Yorke also provided incriminating evidence against Ainsworth as she testified that Ainsworth asked Yorke to pawn some personal items that had belonged to Robichaud and Smith, and that Ainsworth came to Toronto with those items to do so.

[64] With this background, the Crown submits that it had two valid purposes for calling Yorke as a witness at Ainsworth's preliminary hearing. The Crown submits that its first purpose for calling Yorke to testify was to introduce Yorke's evidence about Ainsworth's culpability as part of the Crown's case against Ainsworth.

[65] The Crown submits that its second purpose related to the fact that Yorke had changed her evidence. Specifically, the Crown submits that it wanted to have Yorke testify again to determine if she would testify in a way that was consistent with her police statement or consistent with her testimony at Wallace's preliminary hearing. The Crown also wanted to examine Yorke on evidence that was inconsistent with Yorke's testimony at Wallace's preliminary hearing.

[66] Regarding the second stated Crown purpose, counsel for Yorke submits that the Crown had already decided not to introduce Yorke's police statement at trial. Therefore, counsel for Yorke submits that it is not believable that one of the Crown's purposes was to attempt to have Yorke confirm what she had said in her police statement.

[67] I find that the Crown certainly had evidence, admissibility issues aside, by way of Yorke's police statement and her testimony at Wallace's preliminary hearing, that would lead the Crown to believe that Yorke's testimony would tend to incriminate Ainsworth. Consequently, I find that the Crown's first stated purpose, namely to provide evidence that would incriminate Ainsworth, was the Crown's predominant purpose for compelling Yorke to testify. In particular, I find that the Crown's predominant purpose was to further the prosecution of its case against Ainsworth. Therefore, the Crown was entitled to compel Yorke to testify.

[68] I have concerns about the Crown's second stated purpose of calling Yorke to determine

whether she would confirm or deny her earlier evidence. I accept that the Crown had two different versions of events from Yorke, but putting Yorke on the stand just to hear what she might say this time about Ainsworth, or to cross-examine her on inconsistencies, would not, on its own, justify an infringement on her constitutional rights. However, given my findings that the Crown's predominant purpose for compelling Yorke to testify was to further the prosecution against Ainsworth, the Crown's second stated purpose is moot.

[69] Therefore, I find that the Crown's decision to compel Yorke to testify at Ainsworth's preliminary hearing does not constitute a breach of the *Charter* or an abuse of process.

[70] With respect to Wallace, the Crown submits that it also had two valid purposes for calling Wallace as a witness at Ainsworth's preliminary hearing. First, the Crown wished to obtain evidence from Wallace that would implicate Ainsworth in the death of the deceased, and if possible, to confirm certain cell phone numbers that would assist the Crown in understanding Ainsworth's cell phone records.

[71] Second, the Crown submits that it wished to have Wallace give a statement about his non-involvement in the murders so that he could be impeached if he later testified, on Ainsworth's behalf, that he (Wallace) had caused the deaths of the deceased.

[72] In response, Wallace's counsel submits that Wallace was attempting to exercise his right to remain silent. He had not made any statement to the police and he had not given the police any indication that he had any evidence that would support the Crown's case against Ainsworth. As a result, defence counsel submits that it is unclear how the Crown could have reasonably expected his testimony to advance the prosecution. Instead, the defence suggests that the Crown was "fishing" for evidence from Wallace.

[73] Regarding the Crown's first stated purpose, I find that before the Crown called Wallace to testify against Ainsworth, the Crown did not have any information that Wallace had any evidence that would incriminate Ainsworth. At best, the Crown knew that Wallace was an accused person who might know something about these events, and about the roles played by himself, Ainsworth, and Yorke. There was no reasonable expectation that Wallace's evidence would advance the Crown's case against Ainsworth. Thus, the only logical conclusion is that the Crown wanted to compel Wallace to testify solely to find out what Wallace would say.

[74] These same comments apply specifically to the Crown's desire to hear Wallace's testimony about cell phone records. The Crown was not aware of what Wallace knew about the cell phone records. Any proposed testimony from Wallace about cell phone records would not necessarily be incriminating against Ainsworth. Again, I find that the Crown simply wanted to find out if Wallace had any information about these records.

[75] Regarding the Crown's second stated purpose, for Wallace to give a statement about his non-involvement in the murders, I find that this was an overt attempt by the Crown to eliminate Wallace's right to remain silent. The Crown simply wanted Wallace to make a statement.

[76] Therefore, regarding both of the Crown's stated purposes, I find that the Crown's predominant purpose for compelling Wallace to testify was to compel Wallace to make a statement, any statement, about these events. The Crown might have hoped that Wallace would say something to incriminate Ainsworth, but the Crown also hoped that Wallace would provide evidence that would incriminate himself and/or Yorke. Further, even if he did not provide any incriminating evidence, I find that the Crown wanted to force Wallace to commit to a recorded version of events.

[77] In my opinion, the Crown did not have a legitimate public purpose for compelling Wallace to testify as a witness at Ainsworth's preliminary hearing. The Crown's predominant purpose for compelling Wallace to testify was not to further the prosecution of the case against Ainsworth, but to force Wallace to give up his right to remain silent. In essence, by compelling Wallace to testify, the Crown was engaging in a colourable attempt to obtain discovery and was not materially advancing its case against Ainsworth.

[78] Having made that finding, the onus is on the Crown to justify the infringement of Wallace's constitutional rights. In *S. (R. J.)* at para. 326, Sopinka J. provided a list of factors to be considered when a court decides whether there is justification for compelling an accused person to testify. Those factors strongly favour Wallace in this case. Specifically, I find that Wallace's testimony is very important to the Crown's case against Wallace, and that the questions put to Wallace have a close relationship with the issues in Wallace's case. Further, Wallace's testimony effectively disclosed Wallace's defences to the Crown at the pre-trial stage of the proceedings.

[79] Therefore, I find that the Crown is unable to justify the infringement of Wallace's constitutional rights that occurred when the Crown compelled him to testify at Ainsworth's preliminary hearing. The compulsion of Wallace to testify is fundamentally unfair to Wallace and constitutes a breach of s. 7 of the *Charter*.

**Filing the Joint Indictment**

[80] The final contentious decision made by the Crown was to jointly charge the three accused in one single indictment in the Superior Court of Justice. Again, this is a decision that is entirely within the prosecutorial discretion of the Crown, as discussed in the *Naicker* decision at para. 45.

[81] However, the fact that the Crown has the discretion to proceed jointly against these accused, does not mean that the consequences of that decision are free from scrutiny. The decision to jointly charge the accused is reviewable by this court for the purpose of considering an abuse of process claim. I will review the consequences of that decision when I consider the net effect of the Crown's conduct later in this decision.

**Wallace's Committal for Trial**

[82] Counsel for Wallace raises an issue that is unique to Wallace. It is submitted that Wallace was committed to stand trial based entirely on evidence that the Crown cannot adduce at trial as the Crown cannot compel Ainsworth or Yorke to testify. Therefore, counsel submits, Wallace is proceeding to trial based entirely on inadmissible evidence. Counsel contends that this constitutes an abuse of process.

[83] In my view, this submission on its own, does not constitute an abuse of process, because at trial the Crown is not limited to relying solely on the evidence that was tendered at the preliminary hearing. The preliminary hearing and the trial serve two different purposes.

[84] In the case of *R. v. Power*, [1994] 1 S.C.R. 601, the Supreme Court of Canada commented upon the differences between the preliminary hearing and the trial. At p. 630, L'Heureux-Dubé J., for the majority, quoting Judson J. in *Patterson v. R.*, [1970] S.C.R. 409, at p. 412, found that the purpose of a preliminary hearing is "to determine whether there is sufficient evidence to put the accused on trial. It is not a trial and should not be allowed to become a trial."

[85] L'Heureux-Dubé J. then went on to state that "it should also be underlined that evidence adduced at a preliminary inquiry is incomplete… In my view, therefore, the evidence adduced at a preliminary inquiry does not properly reflect the whole of the evidence that will be presented at trial on the merits…": *Power*, at p. 630.

[86] I acknowledge that the only evidence that the Crown introduced at the preliminary hearing that supported Wallace's committal were the statements from Ainsworth and Yorke. However, that does not mean that other evidence will not be available on the date of the trial. In my view, after committal for trial, it is not appropriate for a judge of the Superior Court of Justice to review the Crown's case at some point prior to the trial to determine if the Crown still has enough evidence to justify a trial. That is, I find that this is not a proper time for this court to review the state of the evidence against Wallace.

[87] Nevertheless, the reality that Wallace will be put to trial for murder where there is currently no compellable incriminating evidence against him is one of the results of the Crown's decision-making that I can consider in the context of this abuse of process claim.

**The Net Effect of the Crown's Conduct**

[88] I have just reviewed each of the separate decisions made by the Crown in these proceedings. Most of those decisions, with the exception of the decision to compel Wallace to testify at Ainsworth's preliminary hearing, were proper uses of the Crown's decision-making powers. Regardless of the merits of each individual decision, I must also consider the net effect of all of the Crown's decisions in these proceedings.

[89] I accept the proposition that it is difficult for the court and the parties to appreciate the full impact of any particular Crown decision at the time the decision is made. It is only in hindsight, after events have unfolded, that the cumulative effect of the Crown's conduct on the fairness of the trial for the accused and the integrity of the judicial process can be assessed.

[90] In addition, in this part of my analysis, when I consider the net effect of the Crown's conduct, I find that the distinction between decisions that are exercises of prosecutorial discretion and those that are not is insignificant. That is, all of the Crown's decisions, whether an exercise of prosecutorial discretion or not, are reviewable for abuse of process.

[91] The three accused collectively submit that the net effect of the Crown's conduct is that all three accused were forced to give up their rights to silence when they were compelled to testify at the preliminary hearings. Wallace correctly states that he was compelled to testify for an improper purpose. Ainsworth and Yorke were properly compelled to testify at the preliminary hearings, but this resulted in both of them making involuntary sworn statements.

[92] The accused also submit that the net effect of the Crown's conduct is that the accused have been compelled to testify in their own proceedings, despite the fact that the trial will be conducted in a manner that protects the accused from being compelled to testify. The accused submit that this is fundamentally unfair to the accused and undermines the integrity of the judicial process. Therefore, the accused submit that the Crown's conduct constitutes abuse of process under both the main category and the residual category.

[93] In response, the Crown submits that each of its decisions was a valid exercise of its discretion. Specifically, the Crown submits that calling one accused to testify against another in separate proceedings is a proper established practice. In other court decisions, trial judges have held that this practice does not constitute abuse of process. The Crown relies, *inter alia*, on the decisions in *R. v. V. B.*, and *R. v. Tyldesley*, 2017 ONSC 5800, [2017] O.J. No. 5082.

[94] In addition, the Crown submits that the *Charter* provides significant protection for each of

the accused with respect to their testimony at the preliminary hearings. In particular, s. 13 of the *Charter* reads, "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence." Therefore, if any of the testimony given by an accused as a witness at the preliminary hearings was incriminating to that witness, the Crown correctly submits that s. 13 of the *Charter* provides some immunity for the witness.

[95] Accordingly, the Crown submits that the net effect of the Crown's conduct is not fundamentally unfair to the individual accused and does not undermine the integrity of the judicial process.

[96] The difficulty that I have with the Crown's position is twofold. First, I accept that courts have found that compelling one accused to testify against another in separate proceedings often does not amount to abuse of process. However, in the present case I find that the Crown went much further than in previous cases.

[97] There can be no doubt that when Wallace, Ainsworth, and Yorke were compelled to testify there was at least some encroachment on their respective constitutional rights. That is, even if the Crown's conduct was permissible at the time, there was still some encroachment on their rights to remain silent.

[98] The initial decision to proceed separately provided an advantage for the Crown as the Crown was able to obtain compelled testimony from the three accused. At the same time there was a corresponding disadvantage for the accused persons as there was an encroachment on their constitutional rights. This amounts to a trade-off between the public interest in prosecuting a case and the constitutional rights of the accused. In my opinion, this trade-off may be acceptable in law if the case had continued by way of separate proceedings.

[99] In the present case, the Crown upset the balance of this trade-off. Specifically, the Crown compelled accused persons to testify against another accused at two of the three preliminary hearings. Thus, the Crown gained the advantage of obtaining pre-trial involuntarily discovery from all three of the accused persons.

[100] Furthermore, in this case the Crown had an improper purpose for calling Wallace at Ainsworth's preliminary hearing; that is, not to advance the case against Ainsworth, but to obtain discovery from Wallace in the form of a recorded and sworn statement. Further complicating matters is the fact that Yorke was compelled to give up her right to silence on two occasions.

[101] Then, still further, after obtaining involuntary sworn statements from all of the accused, the Crown decided to proceed jointly in the Superior Court of Justice, thereby making all three accused persons non-compellable as witnesses at trial. Put another way, if the Crown had not delayed its decision to proceed jointly until after the committals for trial, the Crown would not have gained the advantage of obtaining compelled evidence from the accused, and the accused would not have been forced to give up their rights to remain silent.

[102] In hindsight, by proceeding in this way, the Crown has gained one of the advantages of proceeding separately, but the Crown is continuing the proceeding in a way that does not entitle the Crown to that advantage. Moreover, the accused would not have suffered a corresponding disadvantage if the Crown had not proceeded in this way.

[103] When I consider the cumulative effect of the Crown's conduct, I find that the Crown took a modest encroachment on the rights of each accused and exacerbated that encroachment by proceeding in this manner. Thus, the Crown's conduct in this case goes much further than the Crown's conduct in the cited precedents.

[104] The second concern I have relates to s. 13 of the *Charter*. That section protects a witness by giving the witness immunity from the Crown's future use of any of the witness' testimony that is incriminating to the witness. However, I note that the Crown is still entitled to use this earlier testimony to contradict and/or impeach the credibility of the accused in this case if the accused were to testify at the trial: see *R. v. Kuldip*, [1990] 3 S.C.R. 618, at p. 639.

[105] Thus, s. 13 does not provide absolute immunity from the use at trial of the testimony of the accused at the preliminary hearings. The immunity is only for any evidence given on the witness stand that is incriminating to the witness. Therefore, in this case the primary use of the compelled testimony at trial will be to contradict the accused and/or impeach the accused's credibility if the accused should decide to testify. This, in my view, provides a significant limitation on decisions that the defence will have to make about whether the accused testifies at trial.

[106] I agree that the Crown is not required to make an irrevocable election to proceed separately or jointly at the Ontario Court of Justice level. However, once the Crown decides to proceed separately and uses that decision to elicit compelled statements from the accused, the Crown runs the risk of being fundamentally unfair to the accused if the Crown later decides to proceed jointly.

[107] Overall, I find that the Crown's conduct in this case became fundamentally unfair to the individual rights of these three accused at the time the Crown decided to proceed jointly. The net result is that all three accused suffered an infringement of their right to remain

silent; all three accused were compelled to testify in what is now their own proceedings; the Crown obtained pre-trial discovery of the three accused; Wallace was compelled to testify for an improper purpose; the current mode of trial means that in hindsight much of the evidence on which the committals were based is evidence that is not compellable at trial; and the accuseds' decisions to testify at the trial are now restricted or limited.

[108] In summary, I find that the series of decisions made by the Crown results in unfairness to the individual rights of the accused. This falls into the main category of abuse of process.

[109] Regarding the residual category, I find that the conduct of the Crown does not go so far as to undermine the integrity of the judicial process. This was not a plan by the Crown to undermine the rules of law. This was a series of decisions, some of which were individually acceptable, that has resulted in unfairness to the accused. The justice system as a whole is intact. Therefore, I find that the residual category of abuse of process does not apply.

[110] For all of these reasons, I find that the net effect of the Crown's decisions constitutes an abuse of process under the main category, not the residual category, of the *Babos* decision with respect to all three accused.

**REMEDY**

[111] An abuse of process claim is based upon a breach of s. 7 of the *Charter*. Therefore, in determining a remedy for conduct that amounts to abuse of process, the court must consider s. 24(1) of the *Charter*.

[112] In the present case, defence counsel submit that the only appropriate remedy is a stay of the proceedings. The Crown submits that other remedies, short of a stay, would be appropriate to redress the prejudice to the accused.

[113] In *Babos*, at para. 32, the court provided a three-part test to be used to determine whether a stay of proceedings for abuse of process is warranted, as follows:

> 1. There must be prejudice to the integrity of the justice system that will be manifested, perpetuated, or aggravated through the conduct of the trial;
>
> 2. There must be no alternative remedy capable of redressing the prejudice; and
>
> 3. Where there is uncertainty over whether a stay is warranted, the court must balance the interests in favour of granting a stay against the interest that society has in having a final decision on the merits.

[114] I am cognizant of the principle that a stay of proceedings is a remedy of last resort. It should only be granted in the clearest of cases where no other remedy would suffice: see *O'Connor*, at para. 77, and *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 54.

[115] Also, in crafting a remedy in this case my focus is on providing a remedy for the resultant unfairness to the accused persons, not providing a remedy that deals with the judicial process as a whole. That is, I have found that the abuse of process in this case falls under the main category, and not the residual category. Therefore, the remedy must be designed to restore the rights of the accused to a fair trial: see *Babos*, at para. 39.

[116] After careful consideration, I find that a stay of proceedings is not appropriate in the present case. I find that there is another, less drastic, remedy that would be appropriate and would be sufficient to restore the fairness of the trial.

[117] In consideration of the first branch of the *Babos* test, I find that proceeding to trial will not manifest, perpetuate, or aggravate any prejudice to the integrity of the justice system, if the accuseds' rights to a fair trial are restored.

[118] In consideration of the second branch of the *Babos* test, as I have indicated, I find that the prejudice to the accused is the unfairness that arises because the Crown has had the benefit of compelling the sworn testimony of the three accused prior to the trial. I accept that the Crown has been able to use this testimony as a form of pre-trial discovery of the defence cases, but I find that, going forward, the primary prejudice to the accused is the potential use of this pre-trial testimony at the trial. Specifically, although the accused each have some partial immunity pursuant to s. 13 of the *Charter*, the Crown will be able to use this pre-trial testimony to impeach or contradict the accused if they decide to testify at trial.

[119] Therefore, I find that the appropriate way to address this prejudice is to order that all statements made by Wallace, Ainsworth, and Yorke at the preliminary hearings of any of the three accused are inadmissible and cannot be used at trial for any purpose. To be clear, any statement made by an accused as a witness at the preliminary hearings will not be admissible at trial to incriminate, impeach, or contradict that accused. In my view, this remedy is less drastic than a stay of proceedings and is sufficient to address any prejudice suffered by the accused.

[120] I find that this alternate remedy is sufficient for several reasons. In particular, I find that the abuse of process in this case is not at the far end of the unfairness scale; that is, the harm to the accused is modest, not egregious. The improper conduct by the Crown is mitigated by the fact that most of the Crown's individual decisions, standing alone, were permissible, and because s. 13 of the *Charter* provides some immunity for the accused in any event.

[121] Also, I note that in the case of Wallace and Yorke the compelled testimony amounted to alibi evidence. If Wallace and Yorke wish to rely upon an alibi, the alibi must be disclosed by the defence to the Crown at some point prior to trial. I understand that in this case the defence was forced to reveal the alibi defence at a time that was determined by the Crown, not the defence, but the fact that the alibi defence was going to be revealed at some point mitigates the prejudice.

[122] In addition, other than the alibi defence there were no great incriminating revelations made by the accused on the witness stand. I accept that there was some prejudice to the accused because the Crown was able to obtain pre-trial discovery of the defence cases, but I repeat that the primary prejudice to the accused going forward is the potential use of the testimony to impeach or contradict the accused if the accused chooses to testify at trial. In my view, the proposed remedy adequately addresses that prejudice.

[123] Given my findings, it is not necessary to consider the third stage of the *Babos* test, the balancing stage. However, if I were to consider the third stage, I would find that on balance the factors do not favour a stay of proceedings.

[124] In particular, the charges before the court are extremely serious. There has been a double homicide. Two unfortunate citizens have been killed. Three people have been charged. In these circumstances, there is a strong societal interest in having this case heard on its merits.

[125] Further, I find that the Crown's decisions that resulted in unfairness to the accused were not made in bad faith. The series of decisions that resulted in these circumstances was not a result of a plan by the Crown's office to infringe upon any individual's rights or to undermine the judicial process.

[126] On that same point, I have found that most of the Crown's decisions were individually acceptable, but it was the cumulative effect of those decisions that became an abuse of process.

[127] Still further, I have found that the prejudice in this case relates to unfairness to the accused; it does not undermine the integrity of the judicial process.

[128] And finally, the unfairness to the accused is limited somewhat because s. 13 provides some immunity, although that immunity is not absolute in these circumstances.

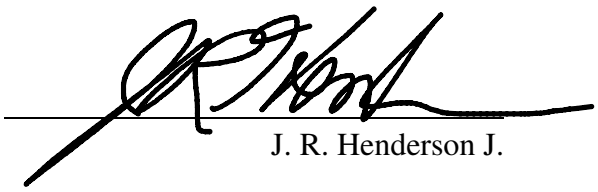
[129] For these reasons, I find that the appropriate way to address any prejudice to the accused is to order that all statements made by Wallace, Ainsworth, and Yorke at the preliminary hearings of any of the three accused are inadmissible and cannot be used at trial for any purpose.

**CONCLUSION**

[130] In summary, I find that most of the Crown's decisions in these proceedings were individually acceptable. However, I find that there was a breach of Wallace's rights under s. 7 of the *Charter* when the Crown compelled Wallace to testify at Ainsworth's preliminary hearing. Overall, I find that the net effect of the Crown's conduct became fundamentally unfair to all of the accused when the Crown decided to file a joint indictment.

[131] I find that the series of decisions made by the Crown has compromised the fairness of the trial for all of the individual accused. Accordingly, the Crown's conduct amounts to abuse of process in the main category as described in the *Babos* decision. I find that there has been no abuse of process that falls into the residual category.

[132] By way of a remedy, I order that all statements made by Wallace, Ainsworth, and Yorke at the preliminary hearings of any of the three accused are inadmissible and cannot be used at trial for any purpose.



J. R. Henderson J.

**Released: April 20, 2020**

**CITATION:** R. v. Wallace, 2020 ONSC 2332
**COURT FILE NO.:** CR-20-340-00MO
**DATE:** 20200420

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Her Majesty The Queen

Prosecution/Respondent

**– and –**

Jesse Wallace, Lindsay Ainsworth, and Alexis Yorke

Accused/Applicants

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**REASONS FOR DECISION ON APPLICATION (ABUSE OF PROCESS)**

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J. R. Henderson J.

**Released: April 20, 2020**