

**SUPREME COURT OF CANADA**

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| **Citation** : R. *v.* Hay, 2010 SCC 54, [2010] 3 S.C.R. 206 | **Date** : 20101118  **Docket** : 33536 |

Between:

Leighton Hay

Applicant/Applicant on motion

and

Her Majesty The Queen

Respondent/Respondent on motion

**Coram** : Binnie, Abella and Cromwell JJ.

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| **Reasons for Judgment** :  (motion for an order to release exhibits)  (paras. 1 to 10) | Cromwell J. (Binnie and Abella JJ. concurring) |

R. *v.* Hay, 2010 SCC 54, [2010] 3 S.C.R. 206

Leighton Hay *Applicant/Applicant on motion*

v.

Her Majesty The Queen *Respondent/Respondent on motion*

**Indexed as:  R. *v.*** Hay

2010 SCC 54

File No.:  33536.

2010:  November 1; 2010:  November 18.

Present:  Binnie, Abella and Cromwell JJ.

MOTION FOR AN ORDER TO RELEASE EXHIBITS

*Courts — Supreme Court of Canada — Jurisdiction — Whether Supreme Court of Canada has jurisdiction to order release of exhibits for forensic testing on a motion ancillary to an application for leave to appeal — If so, whether it is in interests of justice to make such an order.*

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 683(1)(*a*), 694.2(1), (2)(*a*), 695(1).

*Interpretation Act*, R.S.C. 1985, c. I-21, s. 15(2)(*b*).

*Supreme Court Act*, R.S.C. 1985, c. S-26, s. 2(1) “appeal”.

MOTION for an order to release exhibits. Motion allowed.

James Lockyer and *Philip Campbell*, for the applicant/applicant on motion.

Susan L. Reid, for the respondent/respondent on motion.

The judgment of the Court was delivered by

[1] Cromwell J. — The applicant and Gary Eunick were convicted of the first degree murder of Collin Moore and the attempted murder of Roger Moore in a nightclub shooting in the summer of 2002. A joint appeal to the Ontario Court of Appeal was dismissed (*R. v. Hay*, 2009 ONCA 398, 249 O.A.C. 24) and the applicant has applied for leave to appeal to this Court. The applicant wishes to determine whether he should seek to supplement with fresh evidence his pending leave application with respect to his argument that the verdict was unreasonable. For this purpose, he has applied for an order releasing two trial exhibits and their delivery to the Centre of Forensic Sciences for examination. The respondent Crown opposes the application. I agree with the position of counsel for both parties that the Court has jurisdiction to make the order sought. It is also my view that it is in the interests of justice to do so.

[2] Turning first to jurisdiction, I agree with the position of counsel for the respondent that a panel of this Court considering a leave application is authorized by s. 695(1) (read with s. 683(1)(*a*)) of the *Criminal Code*, R.S.C. 1985, c. C-46, to make the order the applicant seeks. That section confers authority on the Court in connection with an “appeal under this Part” to make any order that the Court of Appeal might have made. While there may be some question as to whether this authority extends to the Court considering an application for leave to appeal, three factors combine to convince me that it does.

[3] First, the provisions of the *Criminal Code* conferring appellate jurisdiction on this Court, while headed “Appeals to the Supreme Court of Canada”, set out situations in which appeals may be taken here either as of right or by leave. Moreover, for at least some purposes, the application for leave to appeal and the appeal itself in the event of a successful leave application are treated as two stages of an appeal to this Court. For example, s. 694.2(1), the provision granting the right to an appellant who is in custody to be present “at the hearing of the appeal before the Supreme Court of Canada”, is qualified by s. 694.2(2)(*a*) to make clear that a person in custody who is represented by counsel is not entitled to be present “on an application for leave to appeal”. This qualification would not be necessary if the right to be present at an appeal set out in s. 694.2(1) did not include the right to be present for an oral hearing of an application for leave to appeal.

[4] Second, while the term “appeal” is not a defined term in the *Criminal Code*, it is defined in the *Supreme Court Act* to include “any proceeding to set aside or vary any judgment of the court appealed from”: *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 2(1). This definition is broad enough to include in this context an application for leave to appeal. As provided in s. 15(2)(*b*) of the *Interpretation Act*, R.S.C. 1985, c. I-21, this definition is to be “read and construed . . . as being applicable to all other enactments relating to the same subject-matter unless a contrary intention appears”. The broader definition of “appeal” in the *Supreme Court Act* should therefore be applied to that term as used in the provisions of the *Criminal Code* conferring appellate jurisdiction on this Court absent a contrary intention. I see none.

[5] Finally, as counsel for the respondent pointed out in her oral submissions, a contrary interpretation would leave a potentially significant lacuna in the powers of this Court to fully address leave applications.

[6] I conclude that a panel of the Court considering a leave application has authority to make the order sought. I now turn to why, in my view, it is in the interests of justice that we do so.

[7] There was a significant issue at trial about whether the applicant was the second of two gunmen who participated in the murder. The eyewitness identification at the scene was somewhat equivocal although there was considerable circumstantial evidence tending to link the applicant to the shooting. The Crown at trial argued to the jury that the post-offence conduct of the applicant supported an inference of guilt. It was contended that shortly after the killing he went to his home with the co-accused and changed his appearance by shaving his head. The Crown relied, among other evidence, on hair clippings found wrapped in a newspaper which were found in a garbage can of a washroom adjacent to the applicant’s bedroom and in a hair clipper or razor found in the drawer of a nightstand in the applicant’s bedroom. In its judgment, the Court of Appeal concluded that these clippings, combined with other evidence concerning the applicant’s appearance before the shooting, provided “a powerful inference” that the applicant had shaved his head after the murder to disguise his appearance (para. 36). The Court of Appeal found that this “powerful inference”, coupled with other evidence was enough to put the case over “the unreasonable verdict threshold” (para. 36).

[8] The applicant seeks to have the clippings released for forensic examination to determine whether the hair is facial or scalp hair. The evidence before us on the application is that the Centre of Forensic Sciences has the expertise required to conduct this type of examination and that it can be completed within three weeks of receipt of the items to be tested. This sort of forensic testing was not conducted by the Crown in preparation for trial and was not requested on behalf of the defence until several months after the appeal to the Court of Appeal had been dismissed. Defence counsel at trial indicates in his affidavit that he was unaware that forensic analysis could distinguish between scalp and facial hairs. There is a letter in the record indicating that the applicant’s counsel on the appeal to the Court of Appeal was similarly unaware of the feasibility of such testing. There is no evidence that the Crown was aware of this possibility. Given that it appears that no one requested such testing and the potential importance of the result which might be obtained, I would infer that it simply did not occur to any of the experienced criminal lawyers involved that this testing was available.

[9] Given the importance attached to the head shaving evidence by Crown counsel at trial and the significance of the inference of guilt which the head shaving evidence appears to have had in the Court of Appeal’s conclusion that the verdict of guilty was not unreasonable, it is in my view in the interests of justice that the applicant have access to this information in formulating his application for leave to appeal to this Court. Of course, we are not at the stage of considering an application to adduce fresh evidence which would have to be addressed if and when advanced. At this stage, the applicant wishes simply to explore a possible source of expert evidence that may or may not produce evidence that is capable of laying the basis for such an application.

[10] The motion is allowed and counsel are directed to submit to the Court in draft a supplementary order addressing the precise arrangements to be made for release, transport, testing and return of the exhibits. If counsel cannot agree on a joint draft within 14 days hereof then each party is to submit a proposed draft order within 21 days of the date of this order for the Court’s consideration.

*Motion allowed.*

Solicitors for the applicant/applicant on motion:  Lockyer Campbell Posner, Toronto.

Solicitor for the respondent/respondent on motion:  Attorney General of Ontario, Toronto.