

CANADA / JUDGMENT

Phillion v. R.

[1978] 1 SCR 18

COURT

Supreme Court of Canada

DECIDED

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Report

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Judges

Laskin, Bora; Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; de Grandpré, Louis-Philippe

On appeal from

Ontario

Subjects

Criminal law

Decision Content

Supreme Court of Canada

Phillion v. R., [1978] 1 S.C.R. 18

Date: 1977-03-22

Roméo Phillion (Plaintiff) Appellant;

and

Her Majesty The Queen (Defendant) Respondent.

1976: December 1; 1977: March 22.

Present: Laskin C.J. and Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Criminal law—Hearsay—Accused electing to stand mute—Admissibility of evidence of polygraph expert as to operation of polygraph machine and veracity of accused—Applicability of s. 613 (1)(b) (iii) of Criminal Code.

The appellant P is accused of having murdered R in August, 1967. He was arrested thereafter but released when R's wife, who had seen her husband's assailant immediately before the murder, was unable to identify him from photographs or in person. In 1972, P told a friend that he had stabbed R and subsequently described the course of events to the police. His confession was admitted in evidence as were the opinions of a psychiatrist and a psychologist called by the defence to prove that P had a tendency to invent and to present himself in the worst possible light in order to attract attention. The psychiatrist's opinion was based in part on the results of a polygraph test during which the accused said that he had lied to the police. The accused himself declined to give evidence and called the polygraphist to attest to his veracity at the time of the test, which was some two weeks after the trial began. The trial judge refused to admit the evidence of the polygraphist and the accused was found guilty of non-capital murder. The Court of Appeal for Ontario dismissed his appeal from that verdict and this appeal was brought with leave of the Supreme Court on the following question of law: Did the Ontario Court of Appeal err in holding that the trial judge did not err in refusing to permit the polygraph expert to testify?

Held: The appeal should be dismissed.

Per Laskin C.J. and Spence J.: There may be circumstances where such evidence would be admissible, but in the present case such evidence was certainly inadmissible. If there were any doubt as to its admissibility, it would be proper to apply the provisions of s. 613(1)(b)(iii) of the Criminal Code. The jury rejected the psychological evidence, which was based in part on the results of the polygraph test, and it is therefore not likely that they would have given any weight to the evidence of the polygraph expert alone.

Per Martland, Judson, Ritchie, Pigeon, Dickson, Beetz and de Grandpré JJ.: It is well established that second hand evidence is not admissible when the purpose of introducing it is to establish its truth, although evidence as to statements made to psychological experts is often admitted for the limited purpose of showing the basis for the expert opinion, the polygraph expert however had neither the qualifications nor the opportunity to form a mature opinion of the accused's personality. If the statements had been made to the polygraphist alone they would be clearly inadmissible and the mere presence of a polygraph machine which the polygraphist was experienced in using is not enough to make them admissible. If it were otherwise an accused would be able to elect not to deny his crime under oath and to substitute for his own evidence the

results of a test administered by a mechanical device.

[Subramanian v. D.P.P., [1956] 1 W.L.R. 965 followed; R. v. Dietrich (1970), 1 C.C.C. (2d) 49; State of Arizona v. Bowen, 449 P. 2d 603 (1969) referred to; R. v. Wong, [1977] 1 W.W.R. 1 overruled.]

APPEAL from a judgment of the Court of Appeal for Ontario affirming a judgment of Van Camp J. Appeal dismissed.

D. Crane, Q.C., for the appellant.

J.D. Watt, for the respondent.

The judgment of Laskin C.J. and Spence J. was delivered by

SPENCE J.—I have had the opportunity of perusing with considerable care the reasons for judgment which are being delivered by Mr. Justice Ritchie. Since those reasons contain a detailed analysis of the facts and issues in the present appeal, I need not repeat them.

The polygraph expert John Reid was presented to give evidence on behalf of the accused, who had not testified in his own defence, and to give his opinion that this accused, when examined by him during the course of the trial and with the aid of the polygraph equipment, was telling the truth when he stated that he had lied earlier in his statement to the police. I am ready to agree that such evidence under those circumstances was not admissible. I reserve my view as to whether, under other circumstances, evidence given by an operator of a polygraph apparatus could ever be admissible. There may be circumstances where such evidence should be admitted but certainly the evidence proposed to be given by Mr. Reid in this appeal was hearsay evidence of the worst self-serving type.

Were I in any doubt as to the correctness of the view which I have expressed, I would certainly be of the opinion that it would be proper to apply the provisions of s. 613(1)(b)(iii) of the Criminal Code.

The defence was permitted to adduce the evidence of Dr. Julio Arboleda, a duly qualified medical practitioner specializing in the field of psychiatry. After a lengthy voir dire, Dr. Arboleda was permitted to give his opinion based on two psychiatric interviews he had with the appellant, on certain psychological tests which had been given to the appellant by a Dr. Michael Girodo who also testified for the appellant, and upon the results of the polygraph tests taken by John Reid. Therefore, the result attributed by the expert defence witness to the polygraph tests was already before the jury and, in my view, before that jury in a much more persuasive fashion than it could ever have been put by a non-medical witness. It is very evident that the jury refused to accept the opinions expressed by Dr. Arboleda and Dr. Girodo and one could not therefore have expected them to have had any regard for the polygraph results which were only one of the materials upon which the expert witness Dr. Arboleda based his opinion.

For these reasons, I would dismiss the appeal.

The judgment of Martland, Judson, Ritchie, Pigeon, Dickson, Beetz and de Grandpré JJ. was delivered by

RITCHIE J.—This is an appeal brought with leave of this Court from a judgment of the Court of Appeal for Ontario dismissing an appeal from the verdict of guilty of non-capital murder entered against the appellant after a trial before Madam Justice Van Camp sitting with a jury. Leave was granted on the following question of law:

Did the Ontario Court of Appeal err in holding that the trial judge did not err in refusing, especially in the particular circumstances, to permit the polygraph expert to testify about the operation of the polygraph machine and to give his opinion as to the accused's veracity when he confessed to the murder.

The circumstances giving rise to this prosecution are somewhat singular in that the alleged murder was committed on August 9, 1967, whereas the trial was not held until November, 1972.

The murdered man, Léopold Roy, was the superintendent of an apartment house at 275 Friel Street in Ottawa and was also employed by the City of Ottawa as a fireman. In the afternoon of August 9, 1967, his wife, who had been engaged in housework in the apartment house, observed a suspicious man lurking in the corridor and, as she thought, attempting to enter one of the apartments. She noticed that the man was holding an alligator wallet which raised her suspicion and she called out to her husband who was working in the basement. The prowler appeared to be nervous and didn't move, but when she called out to her husband a second time and could hear him coming upstairs, the man ran through the hallway to the back stairs, jumped over the railings to the landing and Mr. Roy caught him and shoved him back into a corner and called out to his wife "You know what to do". Mrs. Roy then went down to her apartment and left her husband holding the man on the stairway. The next thing she heard was a call from her husband saying: "Don't call the police, call a doctor".

The next person to see Roy was Mr. Herbert, the oil burner serviceman who had come to clean the furnace and who had been talking to Roy when his wife first called out to him. After finishing his work this man found Roy lying on the basement stairs covered with blood and with a knife wound immediately below his heart. Herbert went outside to his truck and radioed his company to send the police but Roy was dead by the time the first policeman arrived.

Shortly after these events, Mrs. Roy, who had seen the prowler's face three times, made several attempts to identify him in "line-ups" where the appellant was present and in photographs, but she was unable to make any positive identification and the appellant was released.

It was not until January, 1972, that the appellant told his friend, Neil Miller, that he had stabbed the superintendent in the apartment house on Friel Street in 1967 with a knife which he had taken from the kitchen of an apartment that he had broken into. Neil Miller took this story to the police and on January 11th and 12th, 1972, the appellant was interviewed by the police, and after having been duly cautioned, made a statement as to his actions on the afternoon of August 9, 1967. The learned trial judge found this confession to be admissible after having conducted a voir

dire concerning the circumstances under which it was made, and it will be seen that the appellant's actions on the afternoon in question as recounted to Miller and to the police, bear a striking resemblance to the actions of the "proowler" in the apartment building as described by Mrs. Roy, as is illustrated by the following brief excerpt from the appellant's confession to the police:

...then I drove around, looking for an apartment that I could go into, to steal. I got into one apartment on Friel Street, looked around inside, in which I did not find any money. I had taken a knife from the kitchen of that apartment. Going down the back stairs, I notice a man and a woman. The man started coming down at me, I stabbed him. From there I ran to my car...

In any event, there is no denial of the fact that the appellant's statements related to the murder at 275 Friel Street on August 9, 1967. The appellant elected to give no evidence, but in lieu thereof expert witnesses were called for the defence, including a psychiatrist and a psychologist whose evidence was directed to showing that the appellant had a deranged personality and particularly that he would have a tendency to invent and attest to circumstances which never happened in order to satisfy his desire to attract attention to himself. These witnesses, together with John Edward Reid, an experienced polygraph examiner, were obviously called to support the contention that the appellant had been lying when he confessed to the police; this was the opinion expressed by the latter at trial on the basis of his interpretation of recordings shown on the polygraph machine when he administered a polygraph test to the appellant and it is this evidence which was excluded by the learned trial judge.

The evidence of Dr. Girodo, a clinical psychologist from the Faculty of Psychology at the University of Ottawa, was to the effect that he had subjected the appellant to a number of standard tests, no one of which is ever 100 per cent reliable, and as a result of these tests he had formed the opinion that the appellant was psychologically unstable and had a tendency to present himself in the worst possible light.

Dr. Arboleda, who is a specialist in psychiatry, based his opinion on two psychiatric interviews which he had personally had with the appellant, in one of which the appellant had been given some sodium amytol, sometimes loosely referred to as a truth drug. The witness also considered the psychological tests administered by Dr. Girodo and the results of the polygraph test. Dr. Arboleda testified that the results of Mr. Reid's test with Mr. Phillion indicated that he had lied to the police when he confessed to the offence in question and he expressed his opinion in the following terms:

From the results of the two tests given him, I would say they support to the idea that he was actually lying to the police. That is all I can. (sic)

The evidence of both these medical witnesses was admitted by the learned trial judge in reliance on such cases as *The Queen v. Lupien*[1], *Wilband v. The Queen*[2], *Toohey v. Metropolitan Police Commissioner*[3], and *R. v. Rosik*[4]. No appeal was asserted from this ruling and any issues which it may raise form no part of the question upon which leave to appeal was granted in the present case.

It is well settled that second hand evidence is not admissible when the object of calling it is to establish its truth. This was clearly stated in the Privy Council in the case of *Subramaniam v. Public Prosecutor*[5], where it was said, at p. 970:

Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

Statements made to psychiatrists and psychologists are sometimes admitted in criminal cases and when this is so it is because they have qualified as experts in diagnosing the behavioural symptoms of individuals and have formed an opinion which the trial judge deems to be relevant to the case, but the statements on which such opinions are based are not admissible in proof of their truth but rather as indicating the basis upon which the medical opinion was formed in accordance with recognized professional procedures.

Entirely different considerations, however, apply to the evidence of Mr. Reid who was neither a psychiatrist nor a psychologist and does not appear to have had any other medical training. The evidence indicates that he only saw the accused on the occasion when he administered the polygraph test which was the day before he gave his evidence. This means that the appellant was subjected to the test on the 3rd of November 1972, during the closing days of his trial for murder which was opened on the 16th of October.

The polygraph evidence which was sought to be introduced is accurately recorded in the judgment of the Court of Appeal as follows:

Q. Mr. Reid, on the basis of your experience and the recordings that you made of Mr. Phillion, during the course of the polygraph test, did you form an opinion as to whether he was telling the truth when he answered no to the relevant questions?

A. I am of the opinion that he is telling the truth when he answered no to the relevant questions.

Among the relevant questions were the following:

‘Did you stab Léopold Roy on August 9th, 1967?

Did you kill Léopold Roy on August 9th, 1967?’

In my view, Mr. Reid had neither the qualifications nor the opportunity to form a mature opinion of the propensity of the man he was subjecting to the test either as to truthfulness or otherwise. His opinion, however, was not based on the statements made by the appellant, but on his own expertise in interpreting the recordings of the machine. If the statements had been made to Mr. Reid alone, there is in my opinion no doubt that they would have been inadmissible as self-serving, second hand evidence tendered in proof of its truth on behalf of an accused who did not see fit to testify and I am not prepared to hold on the evidence of this case that the presence of the polygraph machine or the expertise of its operator made them admissible. The admission of such evidence would mean that any accused person who had made a confession could elect not to deny its truth under oath and substitute for his own evidence the results produced by a mechanical device in the hands of a skilled operator relying exclusively on its efficacy as a test of veracity.

The elementary right of an accused not to give evidence is in no way at issue here, but that right having been exercised, it appears to me to run contrary to the basic rules of evidence to permit the substitution of the opinion of a polygraph technician for the evidence which could have been given by the appellant himself. I do not consider that this view conflicts in any way with that expressed by Gale, C.J.O., in *R. v. Dietrich*[6], at p. 65, but if I thought otherwise I would have to say, with great respect, that that case, was to that extent, wrongly decided.

For these reasons alone I am satisfied that the learned trial judge was correct in excluding the results of the polygraph test.

I should not leave this matter, however, without indicating that I have had an opportunity to read a great many American authorities on the subject of the reliability and hence the admissibility of such answers given in the course of polygraph examinations. I find that in the vast majority of cases the American courts have excluded this type of evidence except in cases where both parties to the proceeding have stipulated that they are prepared to have the answers accepted.

There can be no doubt that improved polygraph techniques have been developed over the years, but this does not appear to have altered the attitude of the American courts. I cite in this regard the case of *State v. Bowen*[7], a decision of the Court of Appeals of Arizona where the then current position with respect to polygraph evidence was characterized at p. 606 in the following terms:

There is no question but that evidence of, or reference to, a polygraph test is inadmissible for any reason. All authorities are in accord. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed 2d 908 (1966); *State v. McGee*, 91 Ariz. 101, 370 P. 2d 261 (1962).

The present attitude of the American courts towards the acceptance of polygraph evidence is discussed in the following passage from the evidence of Mr. Reid:

Well, it has been admitted a number of times over the objection of opposing counsel, but not a great number of times. Now, I have had the experience of possibly three different cases where it was admitted over the objection of opposing counsel, but most times it is done under stipulation by both sides.

And he later said: Well, it appears that the attitude of the Courts of our country is greatly changing. True, up until the present time it was hardly even considered by stipulation. I don't know what number of cases it is accepted at the present time under stipulation, it might be five or six.

These are the opinions expressed by a polygraph examiner from the United States with thirty-two and one half years' experience who was presented to the court as a definitive authority on the operation of the polygraph machine and its reliability and acceptability.

In the comparatively recent case of *U.S. v. Ridling*[8], Mr. Justice Joiner, District Judge of the U.S. District Court of Michigan, wrote a lengthy opinion in which he finally concluded that polygraph evidence should be admitted as an exception to the hearsay rule. In the course of rendering these reasons, the learned judge said (at p. 93):

Judicial opinions pertaining to the admission of polygraph testimony seem all to point toward exclusion.

and he proceeds to cite seventeen cases in support of this statement. Finally, Mr. Justice Joiner deals with the hearsay rule in connection with this kind of evidence and says of the polygraph expert there called:

In another sense, he must report to the jury the statements made by the subject so as to make his opinion relevant to the issue in the case, and as a result of his expertise and the tests conducted he must indicate his opinion of the truthfulness of the statement. In this sense the statements supported by the opinion of the expert appear to be hearsay but since the very purpose of the test is to determine truthfulness, the evidence should be admitted as an exception to the hearsay rule because of its high degree of trustworthiness.

No such exception to the hearsay rule exists in this country and notwithstanding the fact that I have had the benefit of reading the exhaustive reasons for judgment delivered by Mr. Justice Meredith in the case of *R. v. Wong*[9], at p. 1, I am nevertheless unable to agree with the view that polygraph evidence should be admitted. As I am satisfied in the present case that the learned trial judge was not in error in refusing to allow the polygraph expert to give his opinion as to the accused's veracity, it follows that his evidence about the operation of the machine is irrelevant, and was also properly excluded.

For all these reasons I would dismiss this appeal.

Appeal dismissed.

Solicitors for the appellant: O'Connor, Coutts, Crane, Ingram, Toronto.

Solicitors for the respondent: The Ministry of the Attorney General of Ontario, Toronto.

- [1] [1970] S.C.R. 264.
- [2] [1967] S.C.R. 14.
- [3] [1965] A.C. 595.
- [4] (1970), 2 C.C.C. (2d) 351.
- [5] [1956] 1 W.L.R. 965.
- [6] (1970), 1 C.C.C. (2d) 49.
- [7] 449 P. 2d 603 (1969).
- [8] 350 Fed. Supp. 90 (1972).
- [9] [1977] 1 W.W.R. 1.

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