
CANADA / JUDGMENT

R. v. Aitken

2012 BCCA 134

COURT

British Columbia Court of Appeal

DECIDED

2 April 2012

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2012 BCCA 134 R. v. Aitken

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Aitken,

2012 BCCA 134

Date: 20120402

Docket: CA036854

Between:

Regina

Respondent

And

Daniel Christopher Miles Aitken

Appellant

Before:

The Honourable Chief Justice Finch

The Honourable Mr. Justice Hall

The Honourable Mr. Justice Hinkson

On appeal from: Supreme Court of British Columbia, January 25, 2009

(R. v. Aitken, Victoria Registry 135927)

Counsel for the Appellant:

J.M.P. Firestone

Counsel for the Respondent:

M.K. Levitz, Q.C.

Place and Date of Hearing:

Vancouver, British Columbia

January 9 and 10, 2012

Place and Date of Judgment:

Vancouver, British Columbia

April 2, 2012

Written Reasons by:

The Honourable Mr. Justice Hall

Concurred in by:

The Honourable Chief Justice Finch

The Honourable Mr. Justice Hinkson

Reasons for Judgment of the Honourable Mr. Justice Hall:

- [1] On January 25, 2009, the appellant, Daniel Aitken, was convicted by a jury of the first degree murder of Adan Merino, which took place on December 28, 2004. He appeals his conviction. Originally, the indictment contained two counts, one dealing with the Merino homicide and the other with the homicide of Alexander McLean. McLean's body, with two gunshots to the head, was discovered in a park in Esquimalt, B.C., on October 29, 2003. However, severance of the McLean count was ordered and the count involving Merino was tried on its own. Later in 2009, Aitken was tried and convicted of the second degree murder of McLean.
- [2] A considerable proportion of the evidence probative of Aitken's involvement in the Merino murder came from intercepted private communications obtained by police pursuant to a number of authorizations. An initial authorization was granted by Johnston J. on July 12, 2005 based on an affidavit sworn by Constable Sandhu of the RCMP. This affidavit related to the alleged kidnapping and murder of Marilynne Neill, on or about February 17, 2003. If this initial authorization was found to be defective, it could result in the invalidity of subsequent authorizations.

General Background

- [3] A great many of the individuals involved in ongoing police homicide investigations in the vicinity of Victoria, B.C., after February 2003 were involved in the drug culture that then existed in the Victoria area. The three suspected homicides ultimately under investigation in relation to this matter occurred over the period from February 2003 to December 2004: Neill disappeared over the weekend of February 15-17, 2003; McLean was shot to death on or about October 29, 2003 and Merino was shot to death on December 28, 2004.
- [4] As set out in the affidavit sworn in support of the initial wiretap authorization, police involvement with these cases commenced on February 24, 2003 when Neill's mother and aunt attended at the West Shore detachment of the RCMP to report that Neill was missing and had not been heard from since the evening of February 16, 2003. Subsequently on February 26, 2003, the mother and a close friend of Neill, Claudine Pelletier, attended the detachment to furnish further information about Neill's disappearance. The women advised the police that they had been in almost daily contact with Neill up to February 16, but had not seen or heard from her after this date.
- [5] In mid-March of 2003, the mother and Pelletier conducted a media appeal seeking information with respect to Neill's disappearance in mid-February. In early May, a woman named Margaret Giesbrecht, who was part of the Victoria area drug scene, contacted the Victoria police in connection with the missing person investigation of Neill that had earlier been publicized. The Victoria police member who spoke to Margaret Giesbrecht then contacted an RCMP member involved in the Neill investigation.
- [6] The substance of Margaret Giesbrecht's subsequent statement to the RCMP in early May was that she had recently received a telephone call from her older sister, Christina, who was living in Prince Rupert at the time with her partner McLean. They had left Victoria some months earlier fearing possible harm because Christina and McLean, assisted by Margaret, had "ripped off" some drugs from Aitken in the summer or fall of 2002. According to Margaret, her sister Christina had spoken by telephone to Aitken, who stated that he and his associate, Matthew Poole, had killed the witness who was going to testify in a court case against Poole.
- [7] Near the end of May, an RCMP investigator, Constable Ferguson, called Christina Giesbrecht at a number in Prince Rupert. She confirmed speaking to Aitken as described by Margaret. She said that she and McLean had called Aitken and had asked if it would be acceptable for them to come back to Victoria. She said she learned from Aitken that the day before court, he and his associate Michael Povajnik had "scooped" Neill from an area near a Starbucks close to where Neill lived and "got rid of her". In Christina's statement of June 2003, she said that Poole was also on the phone and told her and McLean during the conversation that his girlfriend was going to testify against him and that they made her "gone". In a conversation with police in October 2003, Christina Giesbrecht said she was having difficulty recalling the conversation with Aitken and Poole because it was "so long ago". The police confirmed in

June 2003 that three phone calls had been made from the phone number used by Christina and McLean to the Victoria area during the first week of May 2003.

- [8] On February 17, 2003, Neill was due to attend court with her co-accused Matthew Poole for a trial on charges of possession of drugs for the purpose of trafficking. If convicted, both could anticipate a jail sentence. In the event, Neill did not attend court as scheduled and Poole was acquitted. As noted above, family and friends never saw or heard from Neill after February 16.
- [9] Prior to February 2003, Poole and Neill had been romantically involved but that relationship had cooled, primarily at the instance of Poole. Neill's mother told police she believed that her daughter owed a drug debt in the range of \$30,000 to Poole. Neill was a recovering heroin addict and was on a methadone program at the time of her disappearance.
- [10] Matthew Poole was a long-time close friend of the appellant Aitken. They had at times shared lodgings and were constantly in each other's company. In his evidence, Aitken described Poole as his business partner with whom he had a close association for many years. He testified inter alia that he and Poole had been regular suppliers of drugs to a woman named Tabatha Green, who was in a relationship with the murdered man Merino. Merino and Green had a child together.
- [11] The evidence indicated that Poole and Aitken were significant drug dealers and that Neill was a small time trafficker and addict. McLean had ongoing drug dealings with Aitken and at times did debt collection and enforcement work for him. Merino trafficked in drugs. Tabatha Green in 2003 continued to have a serious addiction problem. Apparently Merino was not pleased with the contact between Green and Aitken, either because of Aitken's role in supplying drugs to her or because of romantic jealousy. Aitken did acknowledge in his evidence that he had some intimate involvement with Green in the year before the Merino shooting.
- [12] As a result of ongoing discussions between Victoria and RCMP police officers in 2004-2005, in the late spring of 2005 it was decided that the two police forces should associate in a type of joint effort to investigate drug-related homicides that had recently occurred in their respective jurisdictions. The affidavit sworn by RCMP Constable Sandhu in July 2005 was prepared with the goal of obtaining a wiretap authorization to further the investigation of the Neill case. An authorization was issued that month to intercept the communications of Aitken, Poole and an associate of theirs named Michael Povajnuik. All three were named targets in the investigation relating to charges of kidnapping and murder with respect to Neill's disappearance in February 2003.

The Merino Homicide

- [13] Around 11:00 p.m. on December 28, 2004, Adan Merino was shot multiple times outside his apartment building, the Chelsea Apartments, in Victoria. Video footage from a security camera showed a man with a concealed face arriving at the front of the apartment building

carrying something that appeared to be covered by a towel. It was later discovered that when Merino emerged from the building he was armed with brass knuckles and a knife. A yellow towel recovered from the scene of the shooting was later found to contain the DNA of Matthew Poole. A number of .45 caliber bullet casings were also found at the scene. Similar ammunition was found by police several months later in a storage facility to which Aitken and Poole had access. The murder weapon, a .45 caliber hand gun, was recovered some blocks from the scene of the murder. Poole could be ruled out as a possible suspect in the shooting, since he was considerably taller than the individual depicted on the security video. Conversely, Aitken was within the same height range as the person who was captured on the video as the shooter.

- [14] At about 4:30 p.m. on the afternoon of December 24, 2004, Tabatha Green and Aitken were together at the Bay Centre mall in Victoria. At this location, they ran into Merino who was there with his long-time friend John Fraser, sometimes known as Jonas Fraser. Fraser was said to be a drug supplier for Merino. Merino had a criminal record and was known to have a violent streak. He was also a considerably larger man than Aitken. An acrimonious verbal exchange ensued between Merino and Aitken. Merino said to Aitken words to the effect of, "what are you doing with my woman?" According to observers, Aitken showed some visible signs of anger or fear and replied, "I'm not touching your woman". The verbal exchange between the two men was sufficiently hostile that Green, afraid that there was going to be a fight, fled from the scene. The circumstances of this unpleasant confrontation between the two men at the mall were later somewhat reluctantly confirmed by Fraser to police officers. The police were able to ascertain from video footage from a security camera located at the mall, that the individuals said to be involved in the altercation had been present in and about the relevant area on the afternoon of December 24.
- [15] The camera at the Chelsea Apartments had captured images of an individual walking about in front of the building around 4:30 a.m. on the morning of the shooting. The individual appeared to be possibly "casing" the premises. This individual was of the same approximate height as the appellant. Later, investigators assembled a series of photographic or video representations that depicted the masked shooter, the "person of interest" seen in front of the apartment building around 4:30 a.m. and video shots of the appellant walking. The police enlisted the services of an English podiatrist, Mr. Haydn Kelly, who reviewed this material for comparison purposes. Mr. Kelly had been previously qualified and had testified as an expert in a number of cases in the U.K. He opined that the appellant demonstrated gait characteristics that bore a strong similarity to the images of the shooter and the person who had been surveying the Chelsea premises around 4:30 a.m. on December 28, 2004. Mr. Kelly was qualified at trial as an expert witness and permitted to give this testimony before the jury.
- [16] At the trial, the appellant took the stand and testified that he was the individual who had been walking about outside the Chelsea Apartments at around 4:30 a.m. on the morning of December 28. He said that his reason for being there was to supply drugs to Tabatha Green.

He said that he had received a phone call from Green just prior to this time saying that she was, "dope sick" and asking him to come to the apartment. However, Green did not appear at the downstairs entrance to meet him and he decided not to ring the suite occupied by her and Merino. In his testimony the appellant denied that he had any particular animus against Merino and said that the earlier confrontation between them at the mall had ended on good terms. He denied that he was the person who shot Merino. He acknowledged that he and Poole had access to the cache of weapons and ammunition discovered by the police at the storage facility. As noted above, this cache contained ammunition of the same type as the bullet casings found at the Merino crime scene.

The Crown Case

- [17] The sole issue in this case was whether or not the Crown was able to prove beyond a reasonable doubt that Aitken was the person who shot Merino. Over the period from July 2005 to June 2006, the police obtained seven wiretap authorizations. At trial, the Crown tendered a considerable number of intercepts as evidence against Aitken. Of course, inevitably these wiretaps indicated that the appellant was heavily involved in the drug culture and was no stranger to violence. The intercepts contained statements by Aitken about drug dealing and about shooting people. In 1995, the appellant had been convicted of manslaughter with respect to the death of a person called Samir (or Sam) Shamoon, and had served two years in prison. The appellant testified that any reference on the intercepts to shooting someone was a reference to the fatal shooting of Shamoon and not a reference to the Merino homicide. However, it was certainly open to the jury to infer that when the appellant made certain comments on the intercepts, he was acknowledging that he had shot Merino.
- [18] The theory of the Crown was that, motivated by animus against Merino as a result of the December 24 incident at the mall, Aitken shot Merino in front of the Chelsea Apartments on the night of December 28, 2004. The Crown argued that, because Poole was such a close associate of Aitken, the towel that was recovered that contained Poole's DNA was an item linking the appellant Aitken to the scene of the homicide. Additionally, there were the telephone intercepts, which certainly could support inculpatory inferences, and the evidence adduced from the podiatrist. There was also evidence, including expert evidence on the subject, indicating that the shooter was in the same height range as Aitken. The Crown argued that Aitken had a motive to kill Merino, as well as easy access to and familiarity with weapons and ammunition.
- [19] As noted above, the Crown tendered in evidence a number of intercepted communications involving the appellant. Some related to post-offence conduct, specifically the appellant's expressions of apprehension about being arrested and the possibility of him and his girlfriend moving to another country. Many intercepts demonstrated his close association with Poole, who was the named lessee of the premises where the weapons and ammunition had been discovered. Further, certain intercepts could be interpreted as admissions of guilt

in the Merino shooting. In one intercept, the appellant indicated that the man he killed could have punched him out. In another intercept he spoke of a person that he shot having "asked for the beef ... and he's the one that's fuckin' responsible for his kid not having a dad. Not me". The Crown submitted to the jury that such comments were clear references to Merino, who had a child with Green and who had initiated the confrontation with Aitken at the mall four days prior to the homicide.

The Appellant's Testimony

- [20] At the end of the Crown case, there was a body of circumstantial and direct evidence probative of the guilt of the appellant. If he failed to take the stand to counter the evidence adduced by the Crown, he certainly ran a strong risk of being convicted. Thus, he took the stand to endeavour to explain away the evidence against him. The appellant sought to distance himself from the towel found at the scene by saying that just prior to the shooting he had furnished this towel to an associate of his, one Dwight Dowding, using the towel to conceal a quantity of ammunition. The ammunition was delivered to Dowding while the men were at Poole's residence. Dowding was said to be from Iraq and was larger than the appellant. He was deceased by the time of trial and was therefore unavailable to testify.
- [21] With respect to any animus he might have had against Merino, the appellant said that the incident at the mall had ended with no hard feelings. Concerning references to shooting someone in the intercepts tendered by the Crown, he said that any such statements related to the homicide of Sam Shamoon in 1995. He acknowledged on cross-examination that he had no basis for believing that Shamoon had any children, but in one of the intercepts he spoke of the person he shot as having a child. While he admitted that he had access to weapons and ammunition, he denied that he was responsible for Merino's death. He freely acknowledged that he (and Poole) had for years been actively involved in the drug trade and used this fact to explain comments in the intercepted communications about his fear of being arrested and his thoughts of leaving the country. He said he was always apprehensive that the police might arrest him because of his drug activities. It appears the jury did not find his testimony convincing and he was convicted of the Merino murder.

Issues on Appeal

- [22] On appeal, counsel for the appellant submits that the judge erred in admitting the wiretap evidence and that she also erred in admitting the evidence about weapons, ammunition and related paraphernalia. It is further submitted that the judge ought to have ruled inadmissible the evidence given by the podiatrist, Mr. Kelly. Counsel for the appellant also asserts that the judge erred in the manner in which she edited certain transcripts of the intercepted communications and that she did not give sufficient limiting instructions about the use of certain evidence of bad character, much of this evidence being contained in the intercepts. Lastly, counsel for the appellant contends that the Crown engaged in an impermissible line of questioning in cross-examining Mr. Aitken.

Wiretap Issues

[23] The appellant submits that the judge erred in refusing to allow what is referred to as amplification evidence on the admissibility of the wiretap evidence and that she further erred in ruling the wiretap evidence admissible. The judge did allow extensive cross-examination of an RCMP officer, Constable Sandhu, and a Victoria police officer, Constable Harper, who swore affidavits to obtain the wiretap authorizations. She said that, in her view, some basis had been shown to permit the cross-examination of these affiants to determine what the police knew about the Giesbrecht sisters and at what point in time the affiants became privy to this information.

[24] With regard to the appellant's request to adduce further evidence regarding the wiretap authorizations, the judge said:

[13] The difficulty I have with this part of the accused's application is counsel's submission that as long as he shows certain facts in the affidavits are inaccurate, even if those inaccuracies were not known nor ought to have been known by the affiant at the time of swearing the affidavit, the paragraphs containing these inaccuracies must be excised from the affidavits. This is the accused's basis for seeking cross-examination of Mr. Munroe, Ms. Kyla Junilla, Ms. Willie, and Ms. Johansen.

[14] Certainly, the evidence of these witnesses may be tested at trial as it pertains to issues of ultimate proof, but this is not the time to check the ultimate veracity of this evidence. As Justice Charron said so eloquently in *Pires and Lising* at paragraph 30:

... [T]he Garofoli review hearing is not intended to test the merits of any of the Crown's allegations in respect of the offence. The truth of the allegations asserted in the affidavit as they relate to the essential elements of the offence remain to be proved by the Crown on the trial proper... . The reviewing judge on a Garofoli hearing only inquires into whether there was any basis upon which the authorizing judge could be satisfied that the relevant statutory preconditions existed... . Even if it is established that information contained within the affidavit is inaccurate, or that a material fact was not disclosed, this will not necessarily detract from the existence of the statutory preconditions. The likelihood that the proposed challenge will have an impact on the admissibility of the evidence will depend on the particular factual context.

[15] A little further on, she says:

... We must not lose sight of the fact that the wiretap authorization is an investigatory tool. At that stage, a reasonable belief in the existence of the requisite statutory grounds will suffice for the granting of an authorization. Upon further investigation, the grounds relied upon in support of the authorization may prove to be false. That fact does not retroactively invalidate what was an otherwise valid authorization.

- [16] In light of those comments, I am of the opinion that it is not reasonably likely that cross-examination of Mr. Munroe, Ms. Kyla Junilla, Ms. Willie, and Ms. Johansen will elicit testimony to discredit the existence of one of the preconditions to granting the wiretap authorizations. Therefore, leave to cross-examine them is refused.
- [17] Similarly, the issues of the Prince Rupert phone call, the identity of the accused's car, the identity of the accused at the Chelsea apartment, and the accuracy of the transcript attached as Exhibit L to Constable Sandhu's third affidavit will all be issues of ultimate proof and I will not allow cross-examination on these areas, nor do I believe that it is reasonably likely that cross-examination of Constable Sandhu about why he re-swore one of his affidavits will elicit discrediting testimony. The reason he did so was self-explanatory from the documents.
- [18] I will, however, allow the accused to bring into evidence on the voir dire the tape of Mr. Fraser's interview, as that may go directly to the reasonableness of the belief of the police and the reliability of Mr. Fraser's information.
- [25] Mr. Munro acted as trial counsel in the drug proceedings involving Poole and Neill. There was some uncertainty about whether a deal was to be made or was on offer for Neill in those proceedings. Ultimately any evidence about a possible deal, and about the pros and cons of Neill testifying, was excised from the affidavit used to obtain the first authorization in July 2005. In view of this excision, it appears to me that any issue about calling evidence from Mr. Munro on a voir dire was rendered academic.
- [26] Ms. Junilla was the other party involved in a largely undecipherable intercepted conversation involving her and the appellant. The poor quality of this recording would of course have been evident to the authorizing judge and I do not consider that anything this proposed witness might have said could have added to the record in a meaningful way.
- [27] The appellant sought to adduce evidence from Ms. Willie about an alleged statement made at the scene by Merino that he had been shot by a man named Sean, characterized as a reference to another member of the Victoria area drug scene, Sean Higgins. That was not the evidence of attending police officers. However, the alternative suspect theory was fully set out in an affidavit by Constable Harper; again, this proposed evidence could not have affected the substance of the affidavit material before the authorizing judge.
- [28] The appellant sought also to adduce evidence from a Starbucks employee who claimed to have seen Neill late in the evening on the day she was supposed to have been kidnapped. However, there was also evidence that the employee was not working that day, so it is difficult to see what particular materiality the employee's evidence could have had. It was abundantly clear that Neill had disappeared on that date and was never heard from thereafter.

- [29] Concerning the evidence sought to be adduced about the Prince Rupert phone call or calls, the various versions of events provided by the Giesbrecht sisters were fairly set out in Constable Sandhu's first affidavit. It would have been apparent to the authorizing judge that there were inconsistencies in what the sisters had said on different occasions about telephone communications with the appellant and Poole, and I fail to see the relevance of any further evidence on this subject.
- [30] In my view, the judge also properly refused to enter upon inquiries relating to the possible identity of the car spotted near the scene of the homicide around the time of the shooting, which was similar to one owned by the appellant. Inquiries in this vein could not have had any practical result on issues properly arising on the voir dire concerning the authorizations. Likewise, to permit cross-examination of the affiant Harper about possible identifications of the shooter made by Green and Fraser could have served no useful purpose at that stage of the proceedings. There was, in my opinion, no error in the evidentiary limitations imposed by the judge on the scope of the voir dire.
- [31] Counsel for the appellant further submitted that it should be inferred that RCMP Constable Sandhu did not give the authorizing judge a full and fair picture of the reliability or unreliability of the Giesbrecht sisters as he did not include in the affidavit to obtain the first authorization certain additional information contained in a later affidavit of Victoria police officer Harper. This information revealed that one sister had worked as an escort and that their father had told a police officer that these women were prone to lying. Counsel seemed to suggest that because this was a joint investigation, everything known to one police force would be known to the other. Constable Sandhu was extensively cross-examined on this issue by counsel and firmly repulsed any suggestion that he knew about, or was hiding, any such information at the time he swore his affidavit in July 2005.
- [32] The judge made a specific finding that "neither of these officers deliberately or specifically omitted or misstated any information in the affidavits". Having reviewed the evidence given by the officers on the voir dire, I do not consider that it would be appropriate for this Court to go behind that credibility finding.
- [33] The judge further said, "In my opinion, the inconsistencies in the evidence given by the Giesbrecht sisters should have been obvious to any judge and did not require any further reiteration by the affiant." Having reviewed the affidavit of Constable Sandhu, dated July 12, 2005, I am in respectful agreement with the conclusion reached by the trial judge and I would not accede to the submission advanced on behalf of the appellant, both at trial and before this Court, that Constable Sandhu failed to properly place before the judge a fair picture of the deficiencies in the information obtained from the Giesbrechts.
- [34] The appellant further submits that in the circumstances of this case, the judge should have required additional corroborative evidence to support the Giesbrechts' evidence regarding Aitken's involvement in the Neill homicide. It is also submitted that corroboration was required for evidence from the allegedly unreliable witnesses Green and Fraser regarding

the December 24th encounter between Aitken and Merino at the mall. Counsel sought to analogize the evidence of such witnesses to the evidence of an untried "tipster" as in the recent case of *R. v. Siniscalchi*, 2010 BCCA 354, 291 B.C.A.C. 14. The appellant also relied upon certain comments made by Martin J.A. in *R. v. Debot* (1986), 30 C.C.C. (3d) 207, 17 O.A.C. 141, concerning the proper analysis of the reliability of "tip" evidence. Sopinka J. dealt with the issue of the weight to be assigned to informant or tipster evidence in *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at 1456-1457:

Although Greffe concerns admissibility under s. 24(2), in my opinion the discussion has a bearing on the sort of information that must be put before a judge issuing an authorization for electronic surveillance. I see no difference between evidence of reliability of an informant tendered to establish reasonable and probable grounds to justify a warrantless search (the issue in the cases cited by Lamer J.) and evidence of reliability of an informant tendered to establish similar grounds in respect of a wiretap authorization. Moreover, I conclude that the following propositions can be regarded as having been accepted by this Court in *Debot* and *Greffe*.

(i) Hearsay statements of an informant can provide reasonable and probable grounds to justify a search. However, evidence of a tip from an informer, by itself, is insufficient to establish reasonable and probable grounds.

(ii) The reliability of the tip is to be assessed by recourse to "the totality of the circumstances". There is no formulaic test as to what this entails. Rather, the court must look to a variety of factors including:

- (a) the degree of detail of the "tip";
- (b) the informer's source of knowledge; and
- (c) indicia of the informer's reliability such as past performance or confirmation from other investigative sources.

(iii) The results of the search cannot, *ex post facto*, provide evidence of reliability of the information.

[35] I am doubtful if the factual circumstances of the present case bear much resemblance to the situations in those cases where the information in possession of investigators originated from confidential informants or unknown tipsters. Most of the individuals in the present case who furnished information to the police were identified and the authorizing judges had a body of information about them that would have enabled them to properly assess the weight of the evidence contained in the affidavit material.

[36] The trial judge was able to discern in the evidence some corroboration of what was said by the sisters:

[39] In any event, the affidavits disclose some corroboration of the evidence provided by the Giesbrecht sisters, including such facts as: McLean was connected with the accused and Poole in the drug trade; there was telephone communication between phones connected with Christina Giesbrecht and the accused and Poole; the accused and Poole were in possession of fire arms; Poole had a rented storage space; and the accused, Poole and Povajnuik were surveilled in company with each other.

Concerning Green and Fraser, each person's statement regarding the mall incident provides a measure of corroboration for the statement made by the other. Further, video footage from the Bay Centre mall on December 24 confirms the attendance of the various participants at the mall area around the time of the alleged acrimonious interchange. There was also video footage of Fraser and Merino leaving Merino's apartment building at a point in time proximate to the incident, and of Fraser, Merino and Green returning to the apartment building about one hour later. Thus, there was in the record evidence corroborative of the information provided by these witnesses, if such corroboration was required.

[37] In the recent case of *R. v. Wilson*, 2011 BCCA 252, 305 B.C.A.C. 254, Frankel J.A. giving the judgment of the Court in a warrant case said:

[37] The test to be applied in determining whether a search warrant (or wiretap authorization) was properly issued is well-known. It is often referred to as the Garofoli test, as it was first articulated by the Supreme Court of Canada in *R. v. Garofoli*, [1990] 2 S.C.R. 1421 at 1452. That test has been affirmed and applied by that Court in a number of cases: e.g., *R. v. Bisson*, [1994] 3 S.C.R. 1097; *R. v. Pires*; *R. v. Lising*, 2005 SCC 66, [2005] 3 S.C.R. 343 at para. 30; *R. v. Morelli*, 2010 SCC 8, [2010] 1 S.C.R. 253 at para. 40. Recently, in *R. v. Bacon*, 2010 BCCA 135, 285 B.C.A.C. 108 at para. 25, leave to appeal ref'd [2010] S.C.C.A. No. 213, Mr. Justice Donald adopted the following as a succinct statement of that test:

The trial judge's role in reviewing the validity of a search warrant is to consider whether the material filed in support of the warrant, as amplified on review, could support the issuance of the warrant. While evidence of fraud, material non-disclosure, or misleading information are all relevant to this enquiry, their sole impact is to determine whether there is a continuing basis to support the warrant: ...

[38] The trial judge permitted cross-examination of the police officer affiants on the issues of the reliability of the Giesbrechts and Fraser, and permitted the tape of Fraser's interview with police to be adduced in evidence on the voir dire regarding the admissibility of the intercepted communications involving the appellant.

[39] The Supreme Court of Canada has made it plain that an inquiry of this type is to be narrowly focused to avoid undue prolixity and unwarranted consumption of judicial time and resources: *Garofoli* and *R. v. Pires*, *R. v. Lising*, 2005 SCC 66, [2005] 3 S.C.R. 343.

- [40] In cross-examination of the police officers in this case, counsel for the appellant sought to advance the suggestion that the police officers knew more about the reliability, or lack thereof, of the Giesbrechts than was disclosed to the initial authorizing judge. It was also suggested that full disclosure had not been made of all interactions between investigators and Merino's associate, Fraser. The judge did not accept these submissions and I consider that she was entitled to do so on the evidence that was before her.
- [41] It was also submitted to the trial judge and in this Court that there existed no sufficient basis for the authorizing judge to be satisfied that Neill had been kidnapped and murdered. Counsel appeared to suggest that the allegations about Neill being the victim of a homicide were something of a ruse by police to get an investigation up and running so that they would have grounds to apply for an authorization in July of 2005.
- [42] The trial judge correctly appreciated the nature of the task before her:
- [27] At this stage of the proceedings, the guilt or innocence of the accused is not the issue. As the Supreme Court of Canada stated in the case of *R. v. Pires and Lising* 2005 SCC 66, [2005] 3 S.C.R. 343 at para. 30:

the Garofoli review hearing is not intended to test the merits of any of the Crown's allegations in respect of the offence. The truth of the allegations asserted in the affidavit as they relate to the essential elements of the offence remain to be proved by the Crown on the trial proper. Rather, the review is simply an evidentiary hearing to determine the admissibility of relevant evidence about the offence obtained pursuant to a presumptively valid court order. (I say "relevant" evidence because, if not relevant, its inadmissibility is easily determined without the need to review the authorization process).

[Emphasis in original.]

- [43] Counsel appeared to suggest that *Pires and Lising*, being a one party consent case, might not be wholly applicable to the present case, a different type of authorization case, but I consider the principles laid down there by the Supreme Court of Canada to be generally applicable to wiretap cases.
- [44] After extensive cross-examination, the trial judge found that the two police officers principally involved in the investigation were credible. She found that a basis existed for their asserted belief that Neill had been murdered. The judge further found that the affidavit of Constable Harper was sufficient to give the authorizing judge a fair picture of police dealings with Fraser. Regarding the information disclosed by Constable Sandhu about the Giesbrechts, the judge found that additional information from later affidavits would not have materially changed the authorizing judge's perception of their character and reliability. The judge did excise a portion of the first Sandhu affidavit that referred to Neill possibly making a plea deal in exchange for testimony against her co-accused Poole.

- [45] In response to the submission that information emanating from the Giesbrechts and Fraser required corroboration, the trial judge distinguished cases dealing with confidential informants and tipsters:
- [38] I do not think that these cases establish a positive duty on the police to corroborate named witnesses in all cases, in the sense that without corroboration the evidence must be automatically expunged. The reliability of the evidence may be boosted or diminished by corroboration or lack thereof, but this is all part of viewing the evidence as a whole to determine whether there was a basis for the authorizing judge to grant the authorization.
- [39] In any event, the affidavits disclose some corroboration of the evidence provided by the Giesbrecht sisters, including such facts as: McLean was connected with the accused and Poole in the drug trade; there was telephone communication between phones connected with Christina Giesbrecht and the accused and Poole; the accused and Poole were in possession of fire arms; Poole had a rented storage space; and the accused, Poole and Povajnuik were surveilled in company with each other.
- [46] The judge went on to find that even if there were deficiencies in the information that came from the Giesbrecht sisters, there was still a sufficient basis in other information set out in the affidavit of Constable Sandhu to underpin a finding that Neill had been murdered, that Aitken and Poole were legitimate suspects in her murder and that there was a sound basis for authorizing the interception of their private communications to further the investigation of the crimes listed in the initial authorization.
- [47] The trial judge indicated that even if she wholly disregarded the information provided by the Giesbrecht sisters, there still existed sufficient factual information to support the issuance of the initial authorization. I am not sure that I could fully subscribe to such a conclusion but I do not find it necessary to decide this particular issue. In my opinion, the information from the Giesbrecht sisters considered in conjunction with the other facts referred to by the trial judge in her ruling sufficed to satisfy the statutory requirements for the issuance of the initial authorization.
- [48] I consider that there was, from all the material set forth in the Sandhu affidavit, a solid basis for believing that Neill had been murdered. As to the involvement of Poole and Aitken in the homicide, there was evidence that Poole was ill disposed towards her because of unpaid drug debts. Further, she was a co-accused and he could have had some doubts about her continuing loyalty to him given the cooled nature of their relationship. Aitken was a partner and close friend of Poole. Around the date of Neill's disappearance, he had rented a car and returned it just before noon on the second day of Poole's trial with over 400 kilometres of mileage on it. He had been faithful in attending Poole's court proceedings prior to February 17, 2003, the first day of trial for the drug charges against Poole and Neill, but he was not present that day. These circumstances could properly be viewed as some measure of corroboration for the information provided by the Giesbrechts regarding Aitken's involvement in the Neill disappearance.

[49] The judge said the following about the validity of the authorizations:

[61] Based on all of the above evidence, I am satisfied that there was credibly based probability that an offence had been committed with respect to Marilyn Neill and there were reasonable and probable grounds that the accused as a target would render evidence of that offense, and the offense of the murder of Merino.

[50] I am in respectful agreement with the conclusions of the trial judge regarding the validity of the authorizations. It follows that I would not accede to the submissions of counsel for the appellant that the intercepts ought to have been ruled inadmissible by reason of deficiencies in the process involved in obtaining the authorizations.

[51] The appellant also submitted in this Court that the judge erred in her editing of certain intercepts. I am not sure that I appreciate what more she could have been expected or required to do. So far as I can see, any excised portions were of lesser relevance and had the capacity to reflect badly on the appellant. I consider it noteworthy that there was no particular submission advanced before the trial judge on this subject. In my view, this submission is without substance and I would not accede to it.

[52] A conversation between the appellant, Poole and others intercepted on August 6, 2005 contains a somewhat cryptic passage. DA is the appellant and MP is Poole:

DA: Yeah, so when was the last time I fucked up? It's been a while. I can't remember.

MP: (Laughs)

DA: Ya tried to say it was Adan ... or you can't catch me. (Laugh)

[53] Counsel submits that this last statement was an "incomplete thought" and that the judge should not have permitted this portion of the wiretap evidence to go to the jury. See *R. v. Ferris*, [1994] 3 S.C.R. 756.

[54] Concerning this intercept, the judge gave a special direction to the jury:

Now, I need to give you a special direction concerning intercept number 1. At line 43 Mr. Aitken asks Mr. Poole, quoting now: [as read in]

Yeah, so when was the last time I fucked up, it's been a while, I can't remember.

End of quote. Mr. Poole laughs and then the transcript shows that Mr. Aitken says, quote: [as read in]

Ya tried to say it was Adan ... or you can't catch me.

End of quote.

We were told by Constable Laidman that the three dots meant that what was said on the tape was indecipherable and couldn't be transcribed.

Before you give any weight to the words "Ya tried to say it was Adan ... or you can't catch me," you must first determine whether these words were a complete thought and admission by Mr. Aitken. If you do not know the words that complete the sentence, it could be meaningless or it could not be. If you decide the utterance was not a complete thought, then you should give it no weight in your deliberations.

[55] In my respectful opinion, this was an appropriate and fair direction to give in relation to this evidence. The wiretap excerpt did have potential relevance if the jurors were minded to interpret the words as a reference to the Merino homicide. The jurors were properly cautioned about how to approach this portion of the evidence; it was made plain that if they found this material ambiguous, they should not consider it. I would not accede to the objection advanced by counsel concerning the admissibility of this evidence.

Evidence Concerning Bad Character

[56] The appellant submits that the trial judge erred in admitting evidence of the discovery of certain weapons, ammunition, and a bullet-proof vest. These items could be linked to Poole, who had rented the storage facility where most of the items were found, and to the appellant. A girlfriend of the appellant said she had been with the appellant at a garage housing such items and had also engaged in target practice with him in a wooded area, on one occasion using a handgun. The type of ammunition found at the storage facility was the same as that used in the Merino homicide but no link existed between the killing and any of the weapons found.

[57] Motive and opportunity were key components of the Crown case in this matter. The appellant's motive was said to arise from the mall incident of December 24. The above mentioned evidence was relevant to the issue of opportunity; it was material for the Crown to establish that the appellant had familiarity with and access to weaponry and ammunition.

[58] In my opinion, evidence of the items found by the police at the storage facility rented by Poole was properly ruled admissible. Most of the evidence was clearly relevant and potentially probative. I might not have been inclined to view the bulletproof vest, which was seized separately around the time of the arrest of Aitken and Poole, as having much materiality. However, in the total scheme of things, this item of evidence is of limited significance. It would have been plain to the jury from a number of mid-trial instructions and from the final instruction given by the trial judge that the jury was to approach this evidence and other evidence of the appellant's unsavoury lifestyle in a properly cautionary manner. I would note that the judge permitted only photos of this material to be put before the jury as opposed to the hardware itself. While I do not consider it dispositive of such an issue, it may not be inapt to note that this jury deliberated over a period of several days. In these circumstances, it seems unlikely that they were moved to an unseemly rush to judgment as a result of a substantial body of evidence in the record disclosing bad conduct on the part of the appellant and his associates.

- [59] This was a case which of necessity had to involve a fair amount of evidence of bad character. Both Merino and Aitken (and Poole) were heavily involved in drug trafficking in the Victoria area. Evidence from witnesses such as Green and Fraser made this fact plain. The wiretap evidence was replete with references to the Victoria drug scene. A possible alternate theory or suggestion about the killing of Merino was that he could have been shot by a man named Higgins because of an earlier drug "rip".
- [60] It would have been obvious throughout the trial that the appellant and many of his friends and associates were engaged in an unorthodox, and at times criminal, lifestyle. The fact that he and his close friend Poole had a cache of weapons was simply another facet of this lifestyle. As is typical of bad character evidence, such evidence could have been used to the disadvantage of the appellant if unfairly considered by the jury.
- [61] The judge made plain to the jury both during the trial and in her closing charge that the jury was not permitted to use this sort of evidence in a prejudicial fashion toward the appellant. In her closing remarks she said:

I am now going to revisit with you the evidence that you heard at trial that was admitted for a limited purpose.

...

So you can use this evidence to put the events in context and to help you understand what happened in this case. But that is all. You can use it for no other purpose.

Why, you ask, can this evidence not be used for any other purpose? Well, ordinarily in a criminal trial the Crown is not allowed to lead evidence of an accused's prior wrongdoing. It is not evidence that the accused committed the crimes with which the accused is presently charged. And the reason the Crown cannot lead this kind of evidence is because judges and juries cannot conclude that because an accused has engaged in prior wrongdoing, he's the kind of person who could have or would have committed the crime with which he is now charged.

We must rely on evidence that an accused committed the crime he was charged with, not evidence that an accused committed some other crime, or did something else that was wrong.

Now, despite that rule, in this case I permitted the evidence about drugs and manslaughter to be heard but for a different purpose, to put the events in context and to help you understand the case.

You may not use this evidence to conclude that Mr. Aitken is a bad person and so is more likely to have committed the offence with which he is charged. Nor may you use the evidence to punish Mr. Aitken for his past misconduct by finding him guilty of the offence with which he is presently charged.

Also during the course of trial the Crown introduced photographs and intercepted communications relating to firearms in the possession of Mr. Aitken. The purpose of allowing this evidence was to prove who had custody and control of the Baxter garage and its contents, including certain ammunition of the same type that killed Mr. Merino.

This is part of Crown's theory that Mr. Aitken is the person who shot Mr. Merino. That was the only purpose for admitting the evidence in the Crown's case.

[62] It is an essential premise of our jury system that jurors can and will heed a judge's instruction about evidence admitted for a limited purpose: *R. v. Corbett*, [1988] 1 S.C.R. 670. As Ryan J.A. observed recently at para. 50 of *R. v. McCotter*, 2012 BCCA 54, citing *R. v. Misir*, 2001 BCCA 202, 153 C.C.C. (3d) 70, a trial judge's ruling on the admissibility of this type of evidence "should be given significant deference in this Court", as it is the trial judge who hears all of the evidence and is alive to the circumstances of the case as it unfolds. I consider that the decision of the judge in the present case on the admissibility of such species of evidence was supportable having regard to the issues raised for decision in this case and I would not be inclined as an appellate judge to interfere with her discretionary rulings on the subject.

Expert Evidence Issues

The Appellant's Position

- [63] The appellant submits that the trial judge erred in ruling admissible the evidence of the podiatrist, Mr. Kelly. Having reviewed security video footage of the shooter and a "person of interest" who was seen in the area around 4:30 a.m. on the day of the shooting, as well as six known video images of Mr. Aitken, Mr. Kelly testified before the jury that there was a "very strong likeness" between Mr. Aitken's gait and that of the shooter, and also between Mr. Aitken's gait and that of the person of interest. Specifically, as summarized by the trial judge on the voir dire, "they all have very abducted left and right feet, and an everted left foot". Abduction results in a turning out of the foot, while eversion results in an inward rolling motion.
- [64] Mr. Kelly's opinion that the footage revealed a "very strong likeness" in gait was based on the extent and magnitude of the identified features of abduction and eversion. His use of the descriptor "very strong" refers to placement on a six-point qualitative scale developed by the Forensic Science Service in the United Kingdom, which identifies the degree of similarity as "none, weak, moderate, strong, very strong or extremely strong".
- [65] Mr. Kelly also testified that he had observed nothing in the material provided that suggested that Mr. Aitken could not have been the person of interest or the shooter. He was not, however, permitted to opine that the gait characteristics observed would be seen in only one percent of the population. The trial judge found that this estimate failed to meet the required threshold for reliability, observing that Mr. Kelly was still working on creating a database that would permit him to conduct a statistical analysis of the degree of prevalence

of identified gait features.

- [66] The appellant challenges the admissibility of Mr. Kelly's evidence on the ground that it lacks the requisite level of reliability for novel science, which must be subjected to special scrutiny after *R. v. Mohan*, [1994] 2 S.C.R. 9 at 25. It is submitted that the forensic gait analysis provided by Mr. Kelly could be properly considered "novel" because this is the first time that such evidence has been advanced in a Canadian court. The relationship between podiatry, clinical gait analysis and forensic gait analysis was described by the trial judge as follows:
- [9] Podiatry is the study, diagnosis and management of conditions affecting the foot. The field of study is an ancient one, stretching back a thousand years. Gait analysis is the analysis of the style or manner in which a person walks, sometimes because of symptoms or troubling pathology. ...
- [10] Forensic gait analysis is the term used to describe the application of gait analysis knowledge to legal problems. ...
- [67] The appellant challenges the reliability of Mr. Kelly's evidence on the following grounds: he has not performed blind testing or established an error rate for his conclusions; his opinions on gait comparison have not been peer reviewed and do not employ a scientific method; and there is no scientific basis for the six-point qualitative scale employed. As part of this last point, the appellant emphasizes that there was no way for Mr. Kelly to establish the prevalence of the identified podiatric features in the Canadian population at the time of the shooting.
- [68] As observed by the respondent, the appellant is essentially arguing that Mr. Kelly's evidence fails to satisfy the factors outlined in *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993), which Binnie J., writing for the Court in *R. v. J.-L.J.*, 2000 SCC 51, [2000] 2 S.C.R. 600, acknowledged could be "helpful in evaluating the soundness of novel science" (para. 33). These factors are: 1) whether the theory or technique can be and has been tested; 2) whether the theory or technique has been subjected to peer review and publication; 3) the known or potential rate of error or the existence of standards; and 4) whether the theory or technique has been generally accepted by the relevant scientific community.
- [69] The appellant further submits that the admission of Mr. Kelly's evidence created an imbalance at trial in that it was difficult for counsel to effectively cross-examine the witness, particularly given Mr. Kelly's use of a scale that lacked an underlying factual or scientific basis. It was also said that it might be difficult to find a qualified person to give competing evidence on the subject. Concerning this, I would note that in the case of *R. v. Dean*, [2004] EWCA Crim 319, expert evidence of this type was adduced from experts called by both the Crown and the defence.

Analysis

[70] In *Mohan* at p. 20, Sopinka J. identified the following criteria for the admissibility of expert opinion evidence:

- 1) Relevance;
- 2) Necessity in assisting the trier of fact;
- 3) The absence of any exclusionary rule; and
- 4) A properly qualified expert.

[71] In *R. v. Abbey*, 2009 ONCA 624, 97 O.R. (3d) 330, Doherty J.A. suggested a two-step process for the assessment of expert evidence that was intended to "facilitate the admissibility analysis and the application of the *Mohan* criteria" (para. 77). This approach, applied in *British Columbia in Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 starting at para. 73, and referred to in *United City Properties Ltd. v. Tong*, 2010 BCSC 111 at para. 66, does not alter the substance of the analysis under *Mohan*. Rather, Doherty J.A.'s approach highlights the cost-benefit analysis that is essential to the application of the *Mohan* test (see p. 20) but perhaps not obvious from the enumerated criteria.

[72] Under the first step of the inquiry as structured in *Abbey*, the trial judge must conduct a "rules-based" analysis to assess compliance with certain "preconditions to admissibility". These preconditions are set out at para. 80:

- the proposed opinion must relate to a subject matter that is properly the subject of expert opinion evidence;
- the witness must be qualified to give the opinion;
- the proposed opinion must not run afoul of any exclusionary rule apart entirely from the expert opinion rule; and
- the proposed opinion must be logically relevant to a material issue.

[73] Of the identified preconditions, it is primarily the requirement for a properly qualified expert that is in issue on this appeal. In her treatment of this criterion, the trial judge identified the proper test, which is set out at p. 25 of *Mohan*: "the evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify". In my opinion, Mr. Kelly's experience and credentials satisfy this test. As summarized by the trial judge, his qualifications are as follows:

[8] Mr. Kelly has a Bachelor of Science Degree in podiatric medicine and has been practising since 1987 in the United Kingdom. He has seen approximately thirty eight thousand patients. In 2002 he became a podiatric surgeon. From 2006 to the present he has been a researcher in forensic gait analysis identification at Barts College, which is part of the

University of London. He has been consulted in approximately one hundred and fifty cases and has rendered over fifty expert opinions. He has testified in the English criminal courts over twenty times.

- [74] In evaluating Mr. Kelly's qualifications as an expert witness, the trial judge rejected the argument that his evidence was novel science. She observed, "Podiatry has been in existence for a thousand years and the expertise of a podiatrist to analyze an individual's gait has long been accepted and practiced in a clinical setting" (para. 34). Implicit in this conclusion is a determination that forensic applications of podiatry and gait analysis do not render the practice "novel" for the purposes of the Mohan test. In my respectful opinion, the trial judge did not err in so holding.
- [75] Mr. Kelly's fitness to give opinion evidence at trial also seems to be questioned on appeal on the grounds that he had a profit motive, charged high fees, engaged in improper billing practices, and was argumentative as a witness and not impartial. I agree with the respondent's submission that these matters were properly considerations for the jury to entertain in assessing Mr. Kelly's credibility. They are, in my view, matters of weight rather than of admissibility. It bears noting that the trial judge instructed the jury to consider whether an expert was impartial in determining what weight to give to the opinion expressed by such person.
- [76] The second step of the analysis as structured in *Abbey* consists of what Doherty J.A. termed "the 'gatekeeper' phase of the admissibility inquiry" (para. 78). In this phase, the trial judge must exercise judicial discretion to determine whether the benefits associated with the evidence outweigh the costs. This determination involves consideration of necessity (para. 93), which is not the central issue here, but which requires that the expert opinion convey information "which is likely to be outside the experience and knowledge of a judge or jury" (*Mohan* at p. 23, citing *R. v. Abbey*, [1982] 2 S.C.R. 24).
- [77] The cost-benefit analysis also requires consideration of the legal relevance of the proposed evidence, meaning that its probative value must outweigh its prejudicial effect (*Mohan* at p. 20). As stated by Doherty J.A., "Evidence that is relevant in the sense that it is logically relevant to a fact in issue survives to the 'gatekeeper' phase where the probative value can be assessed as part of a holistic consideration of the costs and benefits associated with admitting the evidence" (*Abbey*, para. 84).
- [78] Consideration of the probative value of expert opinion evidence requires consideration of its reliability:

When one looks to potential probative value, one must consider the reliability of the evidence. Reliability concerns reach not only the subject matter of the evidence, but also the methodology used by the proposed expert in arriving at his or her opinion, the expert's expertise, and the extent to which the expert is shown to be impartial and objective (*Abbey*, para. 87).

[79] Where the proposed opinion is scientific in nature, the Daubert factors, outlined above, may be applicable. However, *Abbey*, which concerned the evidence of a sociologist who was an expert in urban street gang culture in Canada, makes it clear that the Daubert factors are not essential to the reliability inquiry where the proffered evidence is based on specialized knowledge acquired through training or experience in a particular discipline:

Scientific validity is not a condition precedent to the admissibility of expert opinion evidence. Most expert evidence routinely heard and acted upon in the courts cannot be scientifically validated. For example, psychiatrists testify to the existence of various mental states, doctors testify as to the cause of an injury or death, accident reconstructionists testify to the location or cause of an accident, economists or rehabilitation specialists testify to future employment prospects and future care costs, fire marshals testify about the cause of a fire, professionals from a wide variety of fields testify as to the operative standard of care in their profession or the cause of a particular event. Like Dr. Totten, these experts do not support their opinions by reference to error rates, random samplings or the replication of test results. Rather, they refer to specialized knowledge gained through experience and specialized training in the relevant field. To test the reliability of the opinion of these experts and Dr. Totten using reliability factors referable to scientific validity is to attempt to place the proverbial square peg into the round hole (*Abbey*, para. 109).

[80] In my view, the forensic gait analysis provided by Mr. Kelly in the present case falls into the category of expert opinion evidence based on "specialized knowledge gained through experience and specialized training". In determining the admissibility of Mr. Kelly's evidence, the trial judge did not err in failing to consider indicia of scientific validity such as peer review, rate of error and adherence to a scientific method. These factors have limited relevance in a case like the one at hand where a witness's expertise is gained over a period of years through observation and experience in the professional realm.

[81] *Abbey* indicates that the scope of expert evidence must be appropriately limited to make sure that the proposed opinion does not go directly to the ultimate issue in the case and thus present the jury with a ready-made inference of guilt (paras. 65 and 70). Constraining expert opinion evidence in this fashion responds to the concern identified in *Mohan* that "experts not be permitted to usurp the functions of the trier of fact" (p. 24). As stated by Major J. in *R. v. D.D.*, 2000 SCC 43, [2000] 2 S.C.R. 275, "Faced with an expert's impressive credentials and mastery of scientific jargon, jurors are more likely to abdicate their role as fact-finders and simply attorn to the opinion of the expert in their desire to reach a just result" (para. 53).

[82] Applying this approach, Doherty J.A. stated in *Abbey* that it was inappropriate for the expert sociologist in that case to testify that the tear drop tattoo on the face of the accused was related to the murder of a rival gang member. However, he found it was appropriate for the expert to provide evidence as to the possible meanings of a tear drop tattoo on the face of a young male member of an urban street gang, namely that a fellow gang member or family member had died, that the wearer of the tattoo had served a term in jail, or that the wearer of the tattoo had murdered a rival gang member.

- [83] The appellant, in the case at bar, argues that the trial judge did not go far enough in her role as gatekeeper to prevent the issue of identification from being wholly taken over by Mr. Kelly. Specifically, it is submitted that she erred in allowing Mr. Kelly to express his opinion that there was a "very strong likeness" between the gait of the shooter, the person of interest (who was later admitted to be Mr. Aitken), and the accused. It is submitted that his evidence should have been limited to identifying the notable gait features displayed by the persons in the video footage, so that the jury members could then perform the comparison for themselves and draw their own conclusions regarding the identity of the shooter.
- [84] I consider that Mr. Kelly's evidence that there was a "very strong likeness" in gait between the individuals shown on the video footage was merely a distillation of his factual observations, and that he did not usurp the role of the trier of fact by offering a conclusion on the ultimate issue of the identity of the shooter. I agree with the following observation made by the trial judge: "I do not think that Mr. Kelly offends the ultimate issue rule as he makes no identification or absolute conclusions. He simply offers one more piece of circumstantial evidence that narrows the gap between who could be the shooter, and the person of interest and the accused" (para. 25).
- [85] I consider these comments of Doherty J.A. in *Abbey* to be apposite in the present case:
- ... I doubt that the jury would have difficulty critically evaluating [the expert's] opinion. There was nothing complex or obscure about his methodology, the material he relied on in forming his opinion or the language in which he framed and explained his opinion. As when measuring the benefits flowing from the admission of expert evidence, the trial judge as "gatekeeper" must go beyond truisms about the risks inherent in expert evidence and come to grips with those risks as they apply to the particular circumstances of the individual case (para. 92).
- [86] Writing for the majority in *D.D.*, Major J. observed that a deficiency sometimes found in expert opinions is that they may be based on unsworn material in the form of academic literature and out-of-court interviews. This particular objection is not engaged on the facts of the present case as Mr. Kelly formulated his opinion based on real and demonstrative video evidence that was admitted at trial before the jury and provided to the jury members for their own inspection and consideration. The evidence of the expert was before them to provide assistance in their evaluation of the images, so that they might utilize the knowledge acquired by Mr. Kelly through his training and experience in arriving at their own conclusions regarding the identity of the shooter.

The English Cases

- [87] The case law from England is, in my opinion, supportive of the admission of forensic gait analysis, which has been admitted there to assist with identification. The respondent referred the Court to the decisions of *R. v. Dean*, [2004] EWCA Crim 319, *R. v. Gintar*, [2005] EWCA Crim 3559, and *R. v. Otway*, [2011] EWCA Crim 3. Having regard to what seems to be a pattern of increasing duration for trials, the expansion of the parameters of expert evidence

is not something necessarily to be viewed with unalloyed enthusiasm. However, domestic courts do have to take account of developments in the law in other Commonwealth jurisdictions, and this type of evidence appears to be increasingly accepted in proceedings in England.

- [88] The appellant challenges the applicability of the English cases on the basis that the Mohan test differs in significant ways from the test governing the admissibility of expert evidence in the U.K., which the appellant describes as requiring only relevance and a properly qualified expert. It is asserted that this test lacks consideration of the potential cost of expert evidence, which is an essential part of the "made-in Canada solution" of the Mohan test for admissibility.
- [89] Of the three decisions referred to by the respondent, *Otway*, which was released after the trial judge's decision in the present matter, contains the most fulsome discussion of forensic gait analysis measured against the criteria for the admission of expert evidence. These criteria are set out in *R. v. Luttrell*, [2004] EWCA Crim 1344 at paras. 32-34, cited in *Otway* at para. 17.
- [90] In addition to requiring logical relevance and a properly qualified expert, it is requisite "that study or experience will give a witness's opinion an authority which the opinion of one not so qualified will lack". This condition is made up of two parts. First, it must be determined "whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area" (*Luttrell*, para. 32). This particular requirement is clearly of the same nature as the requirement for necessity under the Mohan test.
- [91] Then it must also be determined "whether the subject matter of the opinion forms part of a body of knowledge or experience which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience" (*Luttrell*, para. 32). This requirement, in my view, speaks to the need for an assessment of reliability. At para. 34, the Court in *Luttrell* rejected the use of scientific indicia of reliability as a general requirement for admissibility: "But a skill or expertise can be recognised and respected, and thus satisfy the conditions for admissible expert evidence, although the discipline is not susceptible to this sort of scientific discipline." This statement appears to be in accord with the analysis set forth in *Abbey* by Doherty J.A.
- [92] Consistent with the requirements under the Mohan test, the decision in *Otway* took account of the potential cost of expert evidence, and specifically the danger that the trier of fact would be overly influenced by the expert's opinion. Having ruled that, in the case of a podiatrist, "it is a necessary condition of admissibility that the witness is able to demonstrate to the court the features of comparison upon which his opinion is formed" (para. 22), the Court held:

... We entertain no doubt that the jury was in a position to follow and assess the value of [the podiatrist's] evidence. There is no danger here that the jury was being invited simply to take Mr Blake's comparison on trust. We agree with Maddison J, however, that Mr Blake's ability safely to express his ultimate conclusion in terms of probability of a match, even probability based on Mr Blake's clinical experience, was insufficiently established. It is important that juries are not misled to an over-valuation of comparison evidence (para. 22).

As in the present case, the expert podiatrist in Otway was not permitted to provide the jury with an estimate of the statistical prevalence of the observed gait characteristics. I consider that it was prudent for the trial judge to so limit the parameters of permitted evidence in the case at bar.

- [93] The criteria for admissibility of expert evidence in the U.K. as outlined and applied in Otway require logical relevance, a properly qualified witness and necessity and reliability. As well, there should be a consideration of the dangers associated with expert evidence in terms of its impact on the trier of fact. These criteria are very similar to the analysis applicable in Canada under Mohan.
- [94] As observed in Otway, each application to adduce expert evidence must be individually assessed in any given case. However, there is a high level of factual similarity between Otway and the present matter, that, in my opinion, makes the reasoning in Otway of assistance here. Based on his review of video footage, the podiatrist in Otway was "permitted to give evidence in which he identified the similarities between the walking gait of the appellant and the walking gait of the suspect" (para. 12). The trial judge permitted the same type of opinion evidence to be adduced before the jury in the instant case.
- [95] The appellant in Otway challenged the admissibility of the podiatrist's evidence on grounds very similar to those raised by counsel in the case at bar. It was asserted that the podiatrist's evidence had not been "tested in field conditions, subjected to peer review and publication, tested for a potential or known rate of error or subjected to verifiable standards" (para. 18). These assertions appear to have been dealt with by reference to the decision in Luttrell, which, as noted above, establishes that recognized skill or expertise in a non-scientific discipline can satisfy the conditions for the admissibility of expert evidence. The Court further held that, based on precedent, the admissibility of the podiatrist's evidence was not dependent upon the existence of a database capable of generating statistical probabilities, and that it was sufficient that his evidence was "the consequence of personal experience" (para. 19).
- [96] Given that the concerns raised by counsel in Otway and in the present case are much the same, I conclude that Otway is persuasive authority supporting the admissibility of forensic gait analysis in the circumstances of the case at bar. Despite the able submissions of counsel for the appellant that this evidence of Mr. Kelly should have been ruled inadmissible, I am in respectful agreement with the reasoning and conclusions of the trial judge in favour of the admissibility of the evidence. I consider that her comments to the jury made plain that it was for them to decide what weight, if any, to give to the evidence of Mr. Kelly.

Cross-Examination of the Appellant

- [97] The appellant also made submissions in this Court that the cross-examination of the appellant by Crown counsel at trial was improper in that it violated the presumption of innocence by suggesting that there was an onus on the appellant to establish the details of an alibi. Counsel says it must be borne in mind that the appellant was testifying some years after the date of the homicide and that it would have been difficult for him to have any clear recollection of what he says was his unremarkable conduct on the evening of December 28, 2004. It is also submitted that the judge's charge to the jury on this issue did not cure the problem caused by the line of questioning pursued by Crown counsel in cross-examination.
- [98] It will be remembered that the towel found at the scene of the murder was found to contain the DNA of Aitken's close friend and associate, Poole. The Crown theory was that since Aitken and Poole were continuously in each other's company, Aitken would have had access to items like Poole's towel. The Crown relied on this item of evidence, *inter alia*, to link Aitken to the scene of the crime.
- [99] When the appellant testified, he was able to be very precise in recalling that he had seen the towel a couple of days before the murder. He said he had used it to conceal ammunition and had then handed over the entire package to his friend Dowding. In contrast to the specificity of his recollections regarding the towel, he was, however, not able to give any particular detail about where he was on the date of the homicide aside from saying that his cell phone records indicated that he was involved in drug dealing that day.
- [100] It became a legitimate subject of inquiry for cross-examination by the Crown to ask why the appellant could be so precise about what he did with Dowding and the ammunition when he could not be at all clear about what he did on the date of the murder soon after. The Crown was suggesting that his story about giving the towel to Dowding was not credible and that he was the shooter. The Crown was entitled to test the appellant's credibility generally and in particular about events close to the time of the homicide. He was asked why, if he believed he might be a suspect in a homicide, he did not take steps to endeavour to ascertain where he was that day. If he could furnish such detail about the towel and ammunition, why was he less able to detail his movements on December 28? The appellant's testimony in chief did afford a legitimate opening for this line of inquiry in cross-examination. Unlike the towel, which only came to be of particular interest when Poole's DNA was discovered on it a couple of years post-homicide, the appellant acknowledged that he had realized he could be a suspect mere days after the murder of Merino. The Crown was entitled to ask these questions to cast doubt on the appellant's explanation about the towel, which could at least be indirectly connected to him.
- [101] The judge made specific reference to this subject in her charge to the jury:

For example, remember Mr. Juk questioning Mr. Aitken why he didn't have an alibi or why he didn't produce the telephone records to the other cell phones that he said he owned back - - he owned back in 2004. Well, there was no obligation for Mr. Aitken to produce anything, because remember, Mr. Aitken doesn't have to prove anything.

[102] Just previous to this passage, the judge reminded the jury about the presumption of innocence, stating that there was no onus on the appellant to prove anything including alibi and whether he did or did not receive certain telephone calls.

[103] In my opinion, the Crown's cross-examination did not exceed permissible bounds, and the comments of the trial judge would have made it clear to the jury that the onus of proof was not reversed. I would therefore not accede to this head of argument advanced on behalf of the appellant.

Conclusion

[104] Counsel for the appellant has advanced comprehensive argument on a number of issues identified as possible errors in the conduct of the trial, but ultimately I am not persuaded that the judge erred as alleged. In my respectful opinion, the judge was very careful in this trial, which involved a considerable amount of evidence of bad character, to repeatedly caution the jury to try the case on the facts and to avoid prejudice. I consider that the appellant had a fair trial and I would dismiss this appeal from conviction.

"The Honourable Mr. Justice Hall"

I agree:

"The Honourable Chief Justice Finch"

I agree:

"The Honourable Mr. Justice Hinkson"

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Prepared on 29 October 2026 · Esheria