

CANADA / JUDGMENT

R. v. Ali

2011 BCSC 1850

COURT

Supreme Court of British Columbia

DECIDED

23 November 2011

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2011 BCSC 1850 R. v. Ali

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Ali,

2011 BCSC 1850

Date: 20111123

Docket: 25187

Registry: Vancouver

Regina

v.

Ibrahim Ali

Malcolm Jamel Drydgen

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Before: The Honourable Mr. Justice Ehrcke

Oral Ruling on Voir Dire

Re Admissibility of Expert Evidence

re Urban Street Jargon of Lower Mainland

Counsel for the Crown:

M.J. Sheardown

Counsel for the Accused Ali:

D.E. Morrison

Place and Date of Trial:

Vancouver, B.C.

November 14-18, 21-23, 2011

Place and Date of Judgment:

Vancouver, B.C.

November 23, 2011

INTRODUCTION

- [1] THE COURT: Mr. Ali is on trial in connection with a December 5, 2008 home invasion robbery, during which it is alleged that two of the assailants produced handguns. One of the issues at the end of this trial will be what role, if any, Mr. Ali played in the alleged home invasion, and in particular whether he used a gun or had knowledge that guns would be used.
- [2] The Crown seeks to lead evidence from Detective Heard as to the meaning of the word "strapped" in urban street jargon in the Lower Mainland of British Columbia.
- [3] The Crown has already led evidence at trial that on December 4, 2008, in a conversation that was intercepted by a surreptitious listening device in a BMW automobile, Mr. Ali used either the word "strap" or "strapped". The actual word used is a matter upon which the Crown and the defence do not agree, but the Crown theory will be that in this conversation Mr. Ali was discussing plans for the home invasion that was soon to take place.
- [4] During the course of Detective Heard's direct-examination, the Crown started to ask about his experience in dealing with gangs and in monitoring wiretaps, and then proposed to ask him if he ever heard people talk of "being strapped" and, if so, what that phrase was being used to mean. The defence objected that such evidence amounts to an opinion which should not be admitted unless the preconditions for the admission of expert opinion evidence have been met.
- [5] I directed that the proposed evidence first be led on a voir dire, following which I would rule on its admissibility.

VOIR DIRE EVIDENCE

- [6] During the voir dire, Detective Heard testified that he has been a police officer since 1999. He worked with the gang squad from 2004 to 2007, during which time he was in regular contact with persons involved in crime, either as suspects, witnesses, or informants. Starting in 2007, he was part of the Combined Forces Unit investigating organized crime, and this involved surveillance and listening to numerous intercepted communications.
- [7] From October 2008 to April 2009, he was the surveillance coordinator for Project Rebellion investigating organized crime. As part of his duties, he regularly had to speak with persons at the street level about criminal activities, and it was important for him to maintain credibility by using the same jargon that they were familiar with.
- [8] In that context, he said he has often heard the word "strapped" used to mean that the person was carrying a gun. He said that it is clear from the context in which such conversations occurred that this meaning is what was understood by the people he was speaking to.
- [9] To illustrate, he gave an example of speaking to an informant who said that a certain person was strapped. Detective Heard would then ask the person a question such as, "Have you seen it?" or "Is it a nine or a 22?" From the person's response to such questions, it was clear that the person was using "strapped" to mean "carrying a gun".
- [10] He said the expression is only used with guns and not with other weapons. He said that this meaning can be confirmed by reference to an Internet site called Urban Dictionary which discusses street jargon.

POSITION OF THE PARTIES

- [11] The Crown contends that the proposed evidence is admissible, not as opinion evidence, but simply as evidence of Detective Heard's own observations and experience. In the alternative, the Crown submits that if the proposed evidence does amount to opinion, then it should be admitted as meeting all the required criteria for the admission of opinion evidence.
- [12] The defence submits that this evidence could only be admitted as expert opinion and the preconditions for the admission of expert evidence have not been met. In addition, the defence submits that since Detective Heard was part of this investigation, he does not have the impartiality necessary to testify as an expert witness.

ANALYSIS

- [13] A similar issue was considered by the Ontario Court of Appeal in *R. v. Abbey*, 2009 ONCA 624. There the Crown proposed to call evidence to explain what it meant when a gang member wore a teardrop tattoo. The proposed evidence fell into three categories: first, the Crown proposed to call an academic, Dr. Totten, who had done extensive research on the topic; second, the Crown wished to have a police officer, Detective Quan, give evidence of the meaning; finally, the Crown wished to elicit from three gang members their

understanding of the meaning of a teardrop tattoo.

- [14] The trial judge excluded all three forms of evidence. On appeal, the Ontario Court of Appeal held that the evidence of Dr. Totten should have been admitted as proper expert opinion and the evidence of the gang members should have been admitted, but not as expert opinion. As to the latter, the Court observed at paras. 159 to 160:
- [159] A.B., C.S. and G.B. were not put forward as experts on the symbolic meanings of tattoos. Their evidence was based on their knowledge gained from living within and being part of a particular group culture. It is hardly surprising that they could not identify with any specificity the source of their knowledge. Virtually any group, be it a gang or a profession, develops a jargon and symbology which is understood by those who live within that milieu. The witness's ability to speak to the common understanding of a symbol comes not from the reliability of any particular source of knowledge but from that witness's day-to-day living within the culture.¹²
- [160] A.B., C.S. and G.B. should have been allowed to testify as to their understanding of the meaning of a teardrop tattoo within the culture in which they and the respondent lived. All could have been cross-examined. No doubt weaknesses in their evidence, including the basis upon which the witnesses formed their belief as to the meaning of the teardrop tattoos, would have been fully explored on cross-examination. It would have been for the jury to decide whether to accept that evidence. If, however, the jury accepted the evidence of these witnesses as to the meaning of a teardrop tattoo, that evidence could connect Dr. Totten's opinion about the meaning of teardrop tattoos within urban street gangs with the specific street gang culture in which the respondent lived and operated. This evidence was, potentially, an important link in the Crown's case.
- [15] In the present case, Crown counsel submits that the proposed evidence of Detective Heard should be admitted on the same basis, without having to qualify him as an expert witness.
- [16] Detective Heard, however, is in a different position from the three lay witnesses in Abbey. The Ontario Court of Appeal admitted their evidence based on the fact that they were members of the very subculture whose symbolic nomenclature was in issue. They were permitted to testify about how they themselves used and understood the symbolic meaning of tattoos within their own milieu.
- [17] Detective Heard is not a member of the criminal or street subculture, although, through his work, he has regular interactions with persons in that subculture. In this respect, the proposed evidence of Detective Heard is similar to the evidence of Detective Quan in the Abbey case. Although the Ontario Court of Appeal did not specifically rule on the admissibility of Detective Quan's evidence, they nevertheless held at para. 173 that its admissibility would have to be determined on the basis that it was an opinion and had to meet the usual preconditions for the admission of opinion evidence:

- [173] If the Crown proposes to lead the opinion evidence of Detective Sergeant Quan at a new trial, it will be for the trial judge to determine its admissibility according to the operative principles and approach set out in these reasons. That trial judge will not be bound by anything said by this trial judge concerning Detective Sergeant Quan's evidence.
- [18] In my view, therefore, the proposed evidence of Detective Heard must be analyzed according to the requirements for the reception of expert opinion evidence. In this regard, the evidence of Detective Heard in the present case is of a similar nature to that which is frequently led as expert evidence in drug cases about the terminology and jargon used in the drug subculture.
- [19] The admission of expert opinion evidence was discussed in *R. v. Mohan*, [1994] 2 S.C.R. 9. At p. 20, the Supreme Court of Canada set out four criteria for the admission of expert evidence:
- (a) relevance;
 - (b) necessity in assisting the trier of fact;
 - (c) the absence of any exclusionary rule;
 - (d) a properly qualified expert.
- [20] At p. 23, the Court explained that necessity means something more than mere helpfulness. While too strict a standard should not be set, in order to satisfy the necessity requirement the information should be of the sort that is likely outside the experience and knowledge of the trier of fact.
- [21] In the present case, the proposed evidence is relevant in that it goes to the possible meaning of the word "strap" or "strapped" used by Mr. Ali in an intercepted conversation that took place less than 24 hours before the alleged home invasion. The evidence relates to the issue of whether Mr. Ali was aware that guns would likely be used.
- [22] The evidence meets the necessity requirement, because the use of the word "strapped" in the manner described by Detective Heard is not within the usual experience of a judge or juror. It is not suggested that there is any exclusionary rule that would be relevant in this case.
- [23] As to qualifications, I note that in an area such as this, practical experience may often be more relevant than academic training. Detective Heard explained his extensive work experience with the criminal and street subculture of the Lower Mainland, and how he gained an understanding of the use of the phrase "strapped" as a result of that practical experience.

- [24] I am satisfied that he has sufficient qualifications, through his practical experience, to give opinion evidence in this matter. His experience is similar to that of other police officers who have been qualified to testify about urban street language or criminal slang: see for example *R. v. Grant*, [2005] O.J. No. 5891 (S.C.J.), *R. v. Barnett*, 2007 ONCJ 550, *R. v. Valentine*, 2009 CarswellOnt. 8872 (S.C.J.), and *R. v. M.(C.)*, 2010 ONSC 4819.
- [25] In *Abbey*, the Ontario Court of Appeal held that even when the Mohan criteria are met, a trial judge should engage in a further cost-benefit analysis in order to fulfil the Court's important gate keeping function.
- [26] I am satisfied that in this case there is no sufficient reason to exclude the evidence. This case is not being heard by a jury, and there is little risk that the evidence will be used improperly or for an impermissible purpose. The evidence will not consume inordinate time or resources, and it is not likely to confuse the issues.
- [27] While there remains an important issue about what the words were that Mr. Ali actually spoke in the intercepted conversation, that is a separate matter to be determined at the end of the trial.
- [28] Finally, I do not accept the defence argument that Detective Heard should be precluded from giving expert evidence on the basis that he was involved in the investigation and therefore cannot be seen as impartial. In this regard, the defence relied on two cases where an investigating police officer was not permitted to give certain opinion evidence: *R. v. Kovats*, 2000 BCPC 176, and *R. v. Van Bree*, 2011 ONSC 4273. Both of those were drug cases, and the opinions sought from the officers approached the ultimate question to be decided by the trier of fact. That is not the case here.
- [29] The Crown does not propose to elicit from Detective Heard an opinion about what he thinks Mr. Ali meant in his conversation in the BMW at 4:15 p.m. on December 4, 2008. Detective Heard will only be permitted to give an opinion about what the word "strapped" sometimes means in the urban street jargon of the Lower Mainland of British Columbia.
- [30] Accordingly, the evidence tendered on the voir dire is admissible as expert opinion evidence. If the parties agree, the evidence already heard on the voir dire may form evidence on the trial without the necessity of its being repeated.
- [31] MR. MORRISON: We agree, My Lord.
- [32] MR. SHEARDOWN: I agree, My Lord.
- [33] THE COURT: All right, so all of the evidence heard on the voir dire will form evidence on the trial.

The Honourable Mr. Justice W.F. Ehrcke

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