

CANADA / JUDGMENT

R. v. Boden

2021 BCSC 79

COURT

Supreme Court of British Columbia

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2021 BCSC 79 R. v. Boden

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Boden,

2021 BCSC 79

Date: 20210120

Docket: 27795

Registry: Vancouver

Regina

v.

Joshua Joseph Boden

Before: The Honourable Mr. Justice Davies

Reasons for Judgment

Voir Dire No. 1 Witness Accommodation

Counsel for the Crown:

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M. Crisp

Counsel for the Accused:

K. Westell

A. Willox

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 29, December 2

and 3, 2020

Place and Date of Judgment:

Vancouver, B.C.

January 20, 2021

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INTRODUCTION

- [1] Joshua Boden is charged with second degree murder in the death of Kimberly Hallgarth on March 15, 2009 in Burnaby, British Columbia.
- [2] The Crown seeks testimonial accommodation for an alleged eyewitness to the killing of Ms. Hallgarth. She is the key Crown witness.
- [3] The witness was in a relationship with Mr. Boden before Ms. Hallgarth was killed as well as in the years following. For parts of the nine years following the killing of Ms. Hallgarth, Mr. Boden and the witness lived together and had two children. The relationship was marked by discord that often involved the police as well as child welfare agencies.

- [4] The children are now in their mother's care and live with her in an undisclosed location. The witness says that she lives in fear of the accused. She says she is afraid for both herself and the children.
- [5] The Crown seeks to have the witness testify by Closed Circuit Television (CCTV) from a different courtroom than the one in the Vancouver Law Courts where Mr. Boden is on trial.
- [6] Mr. Boden does not object to an accommodation that would allow the witness to testify with the aid of a screen but objects to her testifying outside of the courtroom by CCTV.
- [7] The Crown's application is brought pursuant to the provisions of s. 486.2 (1) or alternatively s. 486.2 (2) of the Criminal Code, R.S.C. 1985 c. C-46 [the Code].
- [8] In support of its application the Crown sought to adduce the opinion evidence of a Psychologist, Dr. Bruce Monkhouse, who relied upon documents provided by the Royal Canadian Mounted Police (the RCMP) in 2018 and four interviews of the witness conducted by him in March and April 2018.
- [9] Mr. Boden objected to the admissibility of Dr. Monkhouse's opinion on the basis that Dr. Monkhouse is not qualified to provide the expert opinion sought by the Crown. He also objected to the substance of Dr. Monkhouse's opinion for, among other things, his reliance upon documentation provided by the RCMP and the fact that Dr. Monkhouse relied upon hearsay evidence from the witness in reaching his opinions.
- [10] The accused further relied upon the fact that the Crown did not adduce evidence from the witness herself in submitting that the Crown had failed to establish that accommodation by way of a remote CCTV appearance should be ordered.

ISSUES

- [11] During the bifurcated voir dire I ruled that Dr. Monkhouse is qualified to provide expert opinion evidence as sought by the Crown, with my reasons to follow.
- [12] Dr. Monkhouse then substantively testified about his opinions and I reserved my decision on the Crown's testimonial accommodation application.
- [13] I accordingly now provide my reasons concerning my determination as to why I found Dr. Monkhouse to be qualified to provide expert opinion evidence as sought by the Crown.
- [14] I will then determine whether the testimonial accommodation sought by the Crown should be ordered.
- [15] In doing so I will discuss:
- 1) The provisions of the Code engaged by this application;
 - 2) My reasons for accepting Dr. Monkhouse's qualifications to provide the opinion sought by the Crown; and

- 3) Given the absence of direct evidence from the witness herself whether the totality of the evidence adduced by the Crown through the opinion of Dr. Monkhouse establishes that the specific testimonial accommodation sought should be ordered.

STATUTORY PROVISIONS

[16] There are substantive differences between the two Code provisions under which the Crown seeks testamentary accommodation for the witness.

[17] Section 486.2 (1) provides:

Despite section 650, in any proceedings against an accused, the judge or justice shall, on application of the prosecutor in respect of a witness who is under the age of 18 years or who is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability, or on application of such a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused, unless the judge or justice is of the opinion that the order would interfere with the proper administration of justice.

[18] Section 482.2 (2) provides:

Despite section 650, in any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, order that the witness testify outside the court room or behind a screen or other device that would allow the witness not to see the accused if the judge or justice is of the opinion that the order would facilitate the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice

[19] Also relevant to the determination of the issues raised on this application are ss. 486.2 (3), (4) and (5) which provide:

- (3) In determining whether to make an order under subsection (2), the judge or justice shall consider
- (a) the age of the witness;
 - (b) the witness' mental or physical disabilities, if any;
 - (c) the nature of the offence;
 - (d) the nature of any relationship between the witness and the accused;
 - (e) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
 - (f) whether the order is needed to protect the identity of a peace officer who has acted, is acting or will be acting in an undercover capacity, or of a person who has acted, is acting or will be acting covertly under the direction of a peace officer;

(f.1) whether the order is needed to protect the witness's identity if they have had, have or will have responsibilities relating to national security or intelligence;

(g) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and

(h) any other factor that the judge or justice considers relevant.

(4) If the judge or justice is of the opinion that it is necessary for a witness to testify in order to determine whether an order under subsection (2) should be made in respect of that witness, the judge or justice shall order that the witness testify in accordance with that subsection.

(5) A witness shall not testify outside the court room in accordance with an order made under subsection (1) or (2) unless arrangements are made for the accused, the judge or justice and the jury to watch the testimony of the witness by means of closed-circuit television or otherwise and the accused is permitted to communicate with counsel while watching the testimony.

[20] The fundamental differences between the two provisions under which the Crown has brought this application are that:

1) Under s. 486.2 (1) if a pre-condition to testimonial accommodation (the witness being under 18 years of age or having difficulty in communicating their evidence because of a mental or physical disability) is established, an order for testimonial accommodation is mandatory unless the presiding judge is of the opinion that the accommodation would interfere with the proper administration of justice.

2) Under s. 486.2 (2) an order for testimonial accommodation is discretionary if the presiding judge is of the opinion that the order would facilitate the giving of a full and fair account by the witness or would otherwise be in the interest of the proper administration of justice.

[21] It is also important to note that earlier versions of s. 486.2 (2) required that the testimonial accommodation be "necessary" to obtain a full and candid account from the witness as opposed to whether the accommodation "would facilitate" the giving of a full and candid account by the witness.

[22] In considering those amendments, in *R. v. J.S.*, 2016 YKTC 59, Cozens Terr. Ct J. said at paras. 16-17:

[16] There is a considerable shift in the legal landscape by the use of the phrasing that includes "facilitate" rather than the previous phrasing that required the accommodation to be "necessary". The amended s. 486.2(2) clearly reflects Parliament's intention to lower the threshold required in order to allow a witness to testify from outside the courtroom or behind a screen or other device that would allow the witness not to see the accused.

[17] This was the conclusion reached by the trial judge in *R. v. Jimaleh*, [2016] O.J. NO. 5133 (S.C.)

7 Section 486.2(2) previously required that the order be "necessary to obtain a full and candid account from the witness of the acts complained of." The amended section has lowered the threshold somewhat to that of "would facilitate the giving of a full and candid account..." which indicates an intention to make testifying by closed circuit or behind a screen a more commonplace occurrence.

[23] In *R. v. S.L.C.*, 2020 ABQB 515 [S.L.C.] Mandziuk J. (at para. 67) quoted those observations with approval and went on to say (at paras. 68 and 69) that:

[68] The lower threshold was discussed in *R v Turnbull*, 2017 ONCJ 309. There, the court concluded, referring to Gorman Prov Ct J's analysis in *R v KP*, [2017] NJ No 69 (NLProvCt)] "... that facilitate means, plainly, to make easy or easier ... other jurists have commented that is a "very low threshold" for the issuing of the order; and that the Superior Court in Ontario (*R v Jimaleh*, [2016] OJ No 5133 (SupCt) viewed the lowering of the threshold an indication of "intention to make testifying by closed circuit or behind a screen a more commonplace occurrence"" (at para 34).

[69] Consistent with that lower threshold, I interpret the phrase "outside the courtroom" as being intended to broaden the geographic limitations, as another way of facilitating testimony in addition to the use of a screen. Once a witness is testifying virtually, there is no practical difference in the trial setting arising from where the witness is physically located: same building, same city, another location.

[24] I agree that it was Parliament's intention to lower the threshold for the issuance of a witness accommodation order under s. 486.2 (2) of the Code if and when the court considers that accommodation to be in the interests of the proper administration of justice.

DR. MONKHOUSE'S QUALIFICATIONS

[25] The Crown sought to have Dr. Monkhouse qualified to give expert opinion evidence in the area of the forensic assessment and diagnosis of victim trauma and trauma bonding.

[26] Dr. Monkhouse obtained his Ph. D. in Educational Psychology. He has been a Registered Psychologist in British Columbia since 1992 and before that, from 1983 until 1992, he was a Chartered Psychologist in Alberta. Dr. Monkhouse has previously also been a Board Member as well as the Chair of the Ethics Committee College of Psychologists of British Columbia.

[27] Since 1996 Dr. Monkhouse has been a Forensic Psychologist with the Correctional Service of Canada and since 2007 until his recent retirement he was the Chief of Psychology of the Correctional Service of Canada at a British Columbia Correctional Facility.

- [28] Dr. Monkhouse has, since 2002, also been a Psychological Consultant with the Forensic Psychiatric Services Commission of the Ministry of Health in British Columbia with responsibilities for the provision of sexual offender assessment and treatment. He has also been a Psychological Consultant with various police forces as well as with Work Safe BC concerning psychological issues and employability relating primarily to trauma causing job related experiences.
- [29] Additionally, in his private practice since 2016, Dr. Monkhouse has provided critical interventions to hospital personnel and first responders involved in traumatic situations.
- [30] Dr. Monkhouse's professional experience as a psychologist with both federal and provincial correctional services has involved the assessment of inmates and offenders on parole. He testified that in the neighbourhood of three quarters of the inmates and offenders on probation that he has assessed suffer from some sort of trauma.
- [31] He also testified that with respect to that work experience " the bigger category is trauma, Post Traumatic Stress Disorder (PTSD) fits within that, trauma bonding fits within that etc."
- [32] Dr. Monkhouse further testified that trauma and its origins has become a very important part of assessing violent and sexual offenders and that he has attended workshops on how to assess trauma and PTSD offered by Corrections Canada as well as by the College of Psychologists concerning how to conduct assessments from that perspective. He has also taught psychological assessment to graduate students for 20 years. He says that for the last 10 years PTSD assessment and trauma assessment has been a big part of what he does both in teaching and in his clinical practise.
- [33] Dr. Monkhouse has been qualified to provide expert opinion evidence in the Provinces of British Columbia, Alberta, Saskatchewan and Ontario in the areas of forensic assessment, assessment and treatment of violent offenders and the assessment and treatment of sexual offenders.
- [34] In direct examination, among other things, Dr. Monkhouse testified that:
- 1) His experience dealing with individuals other than inmates and parolees who had experienced certain types of trauma primarily involved hospital staff and to a lesser degree police and fire personnel. Most of his work in the hospital setting involved staff members who had been assaulted by patients or witnessed such assaults.
 - 2) He had diagnosed federal correctional inmates as suffering from PTSD many times.
 - 3) He provides sex offender treatment to individuals who have been convicted and sentenced and are serving sentences in the community.
 - 4) He is familiar with the criteria under the DSM-5 in terms of what is required to diagnose someone with PTSD.
- [35] Under cross-examination, among other things, Dr. Monkhouse testified that:

- 1) Of the 20 to 30 times he had testified in court he has been qualified in forensic assessment of sexual and violent offenders and that 99% of his expert evidence had been with respect to risk assessments for criminal offenders.
 - 2) Most of his work had been in assessing offenders, police and military officers.
 - 3) He had not done much work assessing victims.
 - 4) This case is the first time he had been asked to formally assess and provide expert evidence with respect to a non-offender victim or eyewitness.
 - 5) He previously testified in R. v. Sesay, 2019 BCSC 76 [Sesay] that he is "not an expert per se on PTSD".
 - 6) He does not engage in academic writing and research on PTSD.
 - 7) He is not able to definitively diagnose someone with PTSD.
 - 8) "Trauma bonding" is not a mental disorder or illness but "a dynamic that is present in situations where you see a subject suffering from PTSD or something like that."
 - 9) He further described trauma bonding as "a description of the relationship."
 - 10) His conclusions regarding trauma bonding (concerning the witness in this case) were subsumed within the diagnosis of PTSD he reached in his report.
- [36] Given the reliance placed by Mr. Boden upon Dr. Monkhouse's testimony in Sesay and the court's decision concerning Dr. Monkhouse's qualifications it is important to note that, as stated by Walker J. (at para. 57) in Sesay, Dr. Monkhouse had been tendered by the accused to provide expert opinion evidence as follows:

[57]

- 1) in respect of an accused's psychological assessment;
- 2) to determine psychological factors which contribute to behaviour;
- 3) to assess the relevance and likely existence of a diagnosis of PTSD;
- 4) to determine behaviour which is a manifestation of PTSD;
- 5) to determine the impact of serious traumatic events on psychological development and behaviour; and
- 6) to assess and determine triggering events for [autonomic] responses of persons.

[37] Those opinions were sought to support a defence of self-defence by the accused who was charged with aggravated assault.

[38] In his testimony on a voir dire in Sesay as to his qualifications Dr. Monkhouse stated under cross-examination with respect to the third area in which the defence sought to lead his expert opinion evidence:

A Well, once again -- and I think I alluded to it yesterday, is the fact that one of the issues that has become sort of paramount or at the forefront of risk assessment is now looking at the issue of trauma and the impact of trauma on offender behaviour. And under that general category more specifically is the issue of post traumatic stress disorder. So it has become a focus of training and research and -- and, well, clinical intervention. So it has -- it has become a very important part of what we do now, forensic psychologists.

Q And do you consider yourself an expert in that area?

A The assessment of - of risk, including PTSD, yes. I'm not -- I'm not an expert, per se on PTSD. I'm not -- I'm not -- I'm not stating -- stating that, but I'm stating that trauma -- the assessment of trauma and the assessment of -- of PTSD, yes.

[39] After considering Dr. Monkhouse's qualifications and his testimony on that qualifications voir dire, Walker J. wrote at paras. 59 and 60 in Sesay:

[59] Dr. Monkhouse admitted that he lacks the expertise to diagnose PTSD, which is post traumatic stress disorder. His experience with the disorder, he said, was limited to recognizing some of its symptoms when assessing and treating victims involved with violence. Dr. Monkhouse's expertise is also limited to his clinical experience since he does not conduct research and does not publish. As a result of the limitations on his expertise, which were established both in chief and in cross-examination on his qualifications, I declined to admit Dr. Monkhouse as an expert to provide evidence concerning PTSD as set out in items "3)" and "4)" above. As a further consequence of Dr. Monkhouse's admissions regarding his clinical experience, I agreed with Crown's submission that Dr. Monkhouse lacked the expertise to provide opinions that involved predictions and determinations of the matters dealt with in paras. "2)", "5)", and "6)". Consequently, Dr. Monkhouse was qualified to give opinion evidence concerning the following:

- 1) in respect of an accused's psychological assessment;
- 2) to assess psychological factors which contribute to behaviour;
- 3) to assess the impact of serious traumatic events on psychological development and behaviour; and
- 4) to assess triggering events for automatic [sic] responses of person.

[60] As a further limitation on the scope of his expertise, which was premised on Dr. Monkhouse's evidence concerning his lack of expertise to predict outcomes, his expertise was limited to the potential correlation between symptoms and psychological conditions, but not as to causation.

[40] In his testimony on this voir dire in respect of his testimony in Sesay, Dr. Monkhouse testified in re-examination that:

What I have not done is publish, which is why I indicated in the court previously I didn't consider myself an expert. Because I don't just do that. So from an ethical perspective, that was where I made a - - I did not articulate clearly enough. I did not identify myself as an expert in this area because I don't just focus on it. I don't just - - I'm not able to do research. So from a strictly ethical perspective, I can't consider myself an expert.

But in terms of the amount of work I have done in this area, both clinically as well as teaching, I have a pretty significant body of skill, in my opinion.

Q And you're referring there to, doctor, is your dealings with the rubric of trauma itself, correct?

A Yes.

THE TEST FOR ADMISSIBILITY OF EXPERT OPINION EVIDENCE

[41] The test for the admissibility of expert evidence has been refined in the approximately two decades since it was enunciated by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 S.C.R. 9 [Mohan].

[42] In *White Burgess Langille Inmann v. Abbott and Haliburton Co.*, 2015 SCC 23 [White Burgess] the Court divided the inquiry into the admissibility of expert evidence into two stages.

[43] At the first stage the proponent of the expert evidence must establish the four Mohan threshold requirements to admissibility: relevance; necessity; 'the absence of an exclusionary rule'; and, a properly qualified expert.

[44] At the second stage the judge must perform a discretionary "gatekeeping" inquiry at which the judge balances the potential risk and benefits of admitting the evidence in order to decide whether the potential benefits of the evidence justify the risks.

[45] On this voir dire the focus was upon whether the Crown has met the threshold burden to the admissibility of Dr. Monkhouse's opinion evidence and primarily upon the question of whether he is "properly qualified".

[46] If he is properly qualified, I see no basis upon which to preclude admissibility at the second gatekeeping stage because his evidence would assist rather than detract from or hinder the decision making process engaged on this application for testimonial accommodation.

Relevance

[47] The Mohan criteria of relevance at the threshold stage refers to logical relevance.

- [48] Logical relevance is established by evidence that as a matter of human experience and logic has a tendency to make the existence or non-existence of a fact in issue more or less likely. See: R. v. Abbey, 2009 ONCA 624 [Abbey #1] at para. 82; White Burgess at para. 23.
- [49] The relevance of Dr. Monkhouse's opinion is established on this application by the linkage of his opinion to his observations of the witness in his interviews of her in the context of the background information of her relationship with the accused as it relates to the issue of testimonial accommodation.

Necessity

- [50] Expert evidence is necessary if it provides the trier of fact with knowledge that is likely outside its experience knowledge. See: R. v. Giles, 2008 BCSC 76 [Giles #1] citing Mohan at para. 23.
- [51] Dr. Monkhouse's opinions based upon his specialized knowledge and experience as a forensic psychologist meet the necessity requirement in this inquiry.

A properly qualified witness

- [52] Aside from the issue of the failure of the witness to testify (an issue which I will discuss under the Mohan criteria of the "absence of an exclusionary rule"), the primary objection of the accused to the admissibility of Dr. Monkhouse's opinion at the threshold stage concerns the question of whether he is properly qualified to give the opinions sought concerning the specific testimonial accommodation for the witness that the Crown seeks.
- [53] A secondary objection to his qualifications is grounded upon the proposition that Dr. Monkhouse is not an impartial witness.
- [54] Dr. Monkhouse's opinions that the Crown seeks to lead on this application are:
- [1] In my opinion [the witness] should not have any direct contact with Mr. BODEN in any context. I believe that [the witness] should NOT be in direct contact with BODEN in any upcoming court proceedings. Specifically, I believe Mr. BODEN should not be present in Court when [the witness] provides her testimony. I believe it is imperative that arrangements be made whereby he can be allowed to view the Court proceedings by way of videoconference.
- [2] As opined previously in this report there is a high risk of inflicting additional psychological damage and re-traumatizing [the witness] through the court process. Traumatic reactions would likely be triggered in [the witness] should she be exposed to BODEN in court. There is a further risk that she would be unwilling to continue to be cooperative as a witness to the alleged murder of HALLGARTH due to a heightened fear of harm or death by BODEN. Any court contact could also compromise the validity and completeness of her testimony due to fear.

- [55] The Crown bears the onus of proving that Dr. Monkhouse is a properly qualified witness on a balance of probabilities. See: *R. v. Terceira* (1998), 15 C.R. (5th) 359 (ONCA).
- [56] A properly qualified expert is one "who is shown to have acquired special or peculiar knowledge through study or experience in respect of matters in which he or she undertakes to testify" See: *Mohan* at para. 27.
- [57] After referring to that proposition from *Mohan* at para. 53 in *R. v. Giles*, 2016 BCSC 294 [Giles #2] Ross J. wrote at para. 54:
- [54] While the basic test identified in *Mohan* has not changed, in the intervening years it has become clear that the expert must be qualified to express the specific opinion proffered. The expert must be confined to express opinions within the scope of that qualification. Finally, there must be an evidentiary foundation to support the qualification and scope, see *R. v. Orr*, 2015 BCCA 88.
- [58] At para. 55 citing *R. v. Marquard*, [1993] 4 S.C.R. 223, Ross J. stated "it is well settled law that formal training or certification is not a requirement for qualification as an expert."
- [59] At para. 62 in *Giles* #2 Ross J. went on to record a non-exhaustive list of factors (taken from the decision of Durno J. in *R. v. Pham*, 2013 ONSC 4903 at para. 31) that may assist in the determination of whether a witness is qualified to provide expert opinion evidence. Those factors include:

- o the manner in which the witness acquired the special skill and knowledge upon which the application is based;

- o the witness' formal education (i.e. degrees or certificates);

- o the witness' professional qualifications (i.e. a member of the College of Physicians and Surgeons);

- o the witness' membership and participation in professional associations related to his or her proposed evidence;

- o whether the witness has attended additional courses or seminars related to the areas of evidence in dispute;

- o the witness' experience in the proposed area(s);

- o whether the witness has taught or written in the proposed area(s);

- o whether, after achieving a level of expertise, the witness has kept up with the literature in the field;

- o whether the witness has previously been qualified to give evidence in the proposed area(s), including the number of times and whether the previous evidence was contested;

o whether the witness has not been qualified to give evidence in the proposed area(s) and if so, the reason(s) why; and

o whether previous caselaw or legal texts have identified the contested area as a proper area for expert evidence and if so, who might give the evidence.

[60] Dr. Monkhouse's formal education; professional qualifications; membership and participation in professional organizations in his field of endeavour; attendance at specialized courses concerning criminal behaviour and relationship trauma; his many years of experience in risk assessment primarily as it relates to convicted offenders; his teaching of undergraduates concerning trauma; and, his currency with developments as a practising forensic psychologist and consultant in regard to traumatic events all make him qualified to provide opinion evidence as a forensic psychologist.

[61] The issue taken by the accused with Dr. Monkhouse's qualifications is that his work has for the most part, been concerned with risk assessment of offenders and work within correctional facilities and interventions with first responders in traumatic situations not with victims of crime or witnesses to crimes.

[62] More specifically, the accused relies upon the facts that:

- 1) Dr. Monkhouse has previously been qualified as an expert primarily to provide opinion evidence in respect of risk assessment of offenders.
- 2) Dr. Monkhouse's work experience is centered almost exclusively on the assessment and treatment of convicted violent offenders and sexual offenders, not the assessment or in relation to treatment of victims of criminal offending except in relation to traumatic events involving first responders.
- 3) Dr. Monkhouse was not qualified as an expert in Sesay to provide opinion evidence concerning the relevance and likely evidence of a diagnosis of PTSD related to that accused or the determination of behavior that was a manifestation of PTSD.
- 4) Dr. Monkhouse acknowledged that trauma bonding is not a mental disorder.

[63] Although I recognize the factual validity of those objections to Dr. Monkhouse's qualifications I do not accept that individually or collectively they preclude a determination that he is properly qualified to give the opinions that the Crown seeks.

[64] I am satisfied that the totality of Dr. Monkhouse's education and work experience as a forensic psychologist over many years in the corrections field working with offenders and working to understand the dynamics of relationship trauma as a criminogenic risk factor, also qualify him to offer an expert opinion on the issues of trauma and relationship bonding as it may effect the psychological well-being of the witness for whom the Crown seeks testimonial accommodation.

- [65] I find that it is his understanding and expertise concerning the underlying dynamics of trauma and trauma bonding rather than the manifestation of those dynamics in criminal offending that are at the core of Dr. Monkhouse's ability to assist the court in the determination of the testimonial accommodation issues on this application.
- [66] I am also satisfied that the court's refusal to qualify Dr. Monkhouse in Sesay in specific areas sought by the defence was, in large part, driven by Dr. Monkhouse's own overly rigorous under-assessment of his expertise based upon his conclusion that because he did not do research on PTSD he was ethically precluded from calling himself an expert on PTSD.
- [67] In reaching the conclusion that Dr. Monkhouse is qualified to give the opinion sought by the Crown, I must also observe that although Dr. Monkhouse was not qualified in Sesay as an expert in PTSD "per se" he was qualified to provide expert evidence as to the accused's psychological assessment, to assess psychological factors that contribute to behaviour and to assess the impact of serious traumatic events upon psychological development and behaviour.
- [68] Dr. Monkhouse's qualifications and many years of experience in those areas are directly relevant to the opinions that the Crown seeks to adduce on this application.
- [69] I am additionally satisfied that Dr. Monkhouse is not precluded from testifying as an expert in this case because of alleged impartiality.
- [70] The argument advanced by the accused in respect of partiality centered upon the facts that Dr. Monkhouse was initially retained by the RCMP to assess the witness's ability and willingness to testify against the accused and was provided with information and documentation by members of the RCMP who were investigating Mr. Boden and his alleged involvement in the killing of Ms. Hallgarth.
- [71] The accused also submitted that by having developed a therapeutic relationship with the witness through the interview process Dr. Monkhouse had become an advocate for her cause in seeking testimonial accommodation.
- [72] Concerns with partiality or bias that may result in an otherwise qualified witness from testifying as an expert in a given case center upon such a witness failing to keep an open mind. See: Paciocco "Taking a 'Goudge' out of Bluster and Blame: an Evidence Based approach to Expert Testimony" June, 2009 Crim. L. R. 135.
- [73] The concerns expressed by then Professor Paciocco (now Paciocco J.A. of the Ontario Court of Appeal) were summarized by Molloy J. in R. v. France, 2017 ONSC 2040 at para. 17 as follows:
- [17] Professor Paciocco stresses the importance of the expert maintaining an "open mind to a broad range of possibilities" and notes that bias can often be unconscious. He refers to a number of forms of bias: lack of independence (because of a connection to the party calling the expert); "adversarial" or "selection" bias (where the witness has been selected to fit the

needs of the litigant); "association bias" (the natural bias to do something serviceable for those who employ or remunerate you); professional credibility bias (where an expert has a professional interest in maintaining their own credibility after having taken a position); "noble cause distortion" (the belief that a particular outcome is the right one to achieve); and, a related form of bias, "confirmation bias" (the phenomenon that when a person is attracted to a particular outcome, there is a tendency to search for evidence that supports the desired conclusion or to interpret the evidence in a way that supports it). Confirmation bias was a particular problem identified in the Goudge Report as Dr. Smith and other pathologists and coroners at the time approached their investigations with a "think dirty" policy, an approach "inspired by the noble cause of redressing the long history of inaction in protecting abused children," and designed to "help ferret it out and address it." Unfortunately, as commented on by the Goudge Report and by Professor Paciocco, such an approach raises a serious risk of confirmation bias.

- [74] I am satisfied that neither Dr. Monkhouse's qualifications as an expert nor his professional ethics are compromised by partiality that would preclude him from testifying in this case.
- [75] To the extent that Dr. Monkhouse received information from the police related to the investigation it served only as background information upon which he offers no opinion. To the extent that he is obviously concerned with the witness' well being as an individual with underlying psychological issues, I find that such concerns do not override his objective analysis as an expert who understands his duties of impartiality and open-mindedness.
- [76] The extent to which Dr. Monkhouse adheres to those duties was amply demonstrated by his willingness to agree that testimonial accommodation such as the use of a screen in the same courtroom in which the accused is present could potentially reduce the risks of harm to the witness although not to the extent that he considers necessary for her well-being.
- [77] In result, I find that Dr. Monkhouse is qualified to provide expert opinion evidence in the area of the forensic assessment and diagnosis of victim trauma and trauma bonding.

Absence of an exclusionary rule

- [78] The extent to which Dr. Monkhouse's opinions are admissible does, however, remain subject to consideration of whether some or all of those opinions are precluded from admission because they are subject to an exclusionary rule of evidence.
- [79] In this case, as in most where there is opposition to the admission of expert evidence because of an exclusionary rule, the exclusionary rule engaged relates to the rule against the admission of hearsay evidence.

- [80] In addition to that general exclusionary rule against hearsay as a basis for opposing the admission of Dr. Monkhouse's opinion evidence, Mr. Boden asserted that the Crown has failed to meet the burden of proving that the specific witness accommodation sought of CCTV testimony from another courtroom should be ordered because the witness herself did not provide sworn evidence to support the result sought.
- [81] Given that these two bases of opposition to the admissibility of Dr. Monkhouse's expert opinion evidence and to the making of the order for witness accommodation sought are inextricably linked, I will address both under the rubric of the Mohan threshold "absence of an exclusionary rule" test for admissibility.
- [82] Dr. Monkhouse's opinions are premised to some extent upon hearsay information. That hearsay information includes:
- 1) Information and documentation from the police about the historical involvement of the interaction of the accused and the witness with law enforcement;
 - 2) Investigative information related to the killing of Ms. Hallgarth for which Mr. Boden is charged with second degree murder including the witness' previous statements to the police and others about the killing; and
 - 3) Statements made by the witness to Dr. Monkhouse in the four interviews of her by him about which he testified and considered when reaching his opinions.
- [83] I have concluded that Dr. Monkhouse's reliance upon that hearsay evidence does not render his opinion inadmissible as expert opinion evidence.
- [84] I have also concluded that the Crown's failure to adduce the evidence of the witness to verify her statements to Dr. Monkhouse does not require that the Crown's application for testimonial accommodation for her testimony by CCTV from a courtroom in which the accused is not present be dismissed.
- [85] I reach those conclusions for the following reasons:
- 1) In *White Burgess* at paras. 14 and 15 Cromwell J. explained the rationale for the exception to the general rule against the admission of hearsay evidence when a witness is qualified to provide expert evidence. Writing for the Court he stated:
- [14] To the modern general rule that all relevant evidence is admissible there are many qualifications. One of them relates to opinion evidence, which is the subject of a complicated exclusionary rule. Witnesses are to testify as to the facts which they perceived, not as to the inferences -- that is, the opinions -- that they drew from them. As one great evidence scholar put it long ago, it is "for the jury to form opinions, and draw inferences and conclusions, and not for the witness": J. B. Thayer, *A Preliminary Treatise on Evidence at the Common Law* (1898; reprinted 1969), at p. 524; see also C. Tapper, *Cross and Tapper on Evidence* (12th ed. 2010), at p. 530. While various rationales have been offered for this exclusionary rule, the most convincing is probably that these ready-formed inferences are

not helpful to the trier of fact and might even be misleading: see, e.g., *Graat v. The Queen*, [1982] 2 S.C.R. 819, at p. 836; *Halsbury's Laws of Canada: Evidence* (2014 Reissue), at para. HEV-137 "General rule against opinion evidence".

- [15] Not all opinion evidence is excluded, however. Most relevant for this case is the exception for expert opinion evidence on matters requiring specialized knowledge. As Prof. Tapper put it, "the law recognizes that, so far as matters calling for special knowledge or skill are concerned, judges and jurors are not necessarily equipped to draw true inferences from facts stated by witnesses. A witness is therefore allowed to state his opinion about such matters, provided he is expert in them": p. 530; see also *R. v. Abbey*, [1982] 2 S.C.R. 24, at p. 42.
- 2) In *Giles #2* at paras. 39 to 48 Ross J. considered in detail jurisprudence concerning the general principles related to the law concerning the extent to which otherwise inadmissible hearsay can be admitted into evidence through the opinion of an expert. After doing so she stated at paras. 49 to 51 that:
- [49] Thus, it appears to be settled that an expert is entitled to rely on secondary sources as part of the factual foundation for his or her opinion:
- (a) where there are no other constitutional or legal impediments to preclude the admission; in particular, the right of the accused to make full answer and defence;
 - (b) where such sources are referred to as part of the forms of enquiry and practice accepted within the expertise.
- [50] Where hearsay is admissible in this context, the court must address whether the hearsay is admissible through the expert only as evidence of the foundation of the opinion, such as the statements made to a psychiatrist in *Abbey 1982*, or as evidence of the facts asserted without the need for independent proof, such as the international guidelines in *S.A.B.*
- [51] The critical inquiry in this regard is the question of sufficient circumstantial guarantees of trustworthiness. The extent to which the hearsay represents the product of "general study or accumulated knowledge" as distinct from an assertion relating to a fact at issue in the case will be one important factor in this determination. Another important factor will be the methodological rigour of the process of study and accumulation of knowledge. Finally, in my view, the closer the subject matter of the opinion is to an ultimate issue in the case, the greater scrutiny will be required in making this determination.
- 3) On this application Dr. Monkhouse has opined that the witness should not be present in court when she testifies because traumatic reactions could likely be triggered to her if she were to be exposed to the accused in court and a further risk that she will be unwilling to cooperate as a witness.

- 4) That opinion is primarily based upon his observations of the witness and his clinical experience of many years as a psychologist including his substantial experience with assessing trauma and trauma bonding.
 - 5) Dr. Monkhouse does not opine on the truth of information provided by the police and to the extent that he relies upon statements made to him by the witness he does not do so to conclude that what she told him was true. He only uses those statements together with his professional expertise coupled with his observations of her in reaching his opinion.
 - 6) The statements relied upon by Dr. Monkhouse are not tendered for the proof of the truth of their contents by the Crown on this application.
 - 7) I accordingly find that Dr. Monkhouse's reliance on the witness' out of court statements as a basis for his professional opinion on the specific issue addressed by does not preclude the admission of his opinions as an expert.
- [86] In reaching those conclusions I must also observe that what is in issue on this application is whether the Crown has established on a balance of probabilities that the order for witness accommodation sought should be made under the provisions of the Code.
- [87] The application does not impact the substantive issues in this case and does not impact Mr. Boden's right to make full answer and defence.
- [88] As important as this witness is to the Crown's case the accused does not have a constitutional right to a "face to face" confrontation of the witness. See: R. J.Z.S., 2008 BCCA 401; R. v. George, 2020 BCSC 212 [George].
- [89] As recently stated by MacKenzie J. in George at para. 30:
- [30] the leading case with respect to the truth-seeking process is Levogiannis, and what is central on these types of applications is whether the requested testimonial aid or accommodation will enhance or undermine the truth-seeking function of the criminal trial process. In this regard, s. 486.2 of the Criminal Code is indeed reflective of Parliament's efforts to remove barriers to the truth-seeking process in the criminal justice system.

WAS SWORN TESTIMONY FROM THE WITNESS REQUIRED?

- [90] I am satisfied that the defence submission that in seeking testimonial accommodation for this witness under s. 486.2 (2) of the Code the Crown was required to adduce her sworn viva voce testimony on the application or at least file an affidavit (upon which she may be subject to cross-examination) to verify her statements to Dr. Monkhouse overstates the evidentiary requirements for this procedural application.
- [91] In S.L.C. Mandziuk J. considered the issue of the evidentiary record upon which such applications may proceed. At paras. 8 through 16 he discussed in some detail the differences in approach to the issue taken by the courts of Alberta, Nova Scotia, Newfoundland and Labrador and Ontario. At paras. 17 and 18 he stated:

- [17] In my view, the law in Alberta recognizes that counsel's submissions can provide a sufficient evidentiary basis for the determination of applications under ss 486.1, 486.2 and 714.1. As our Court of Appeal declared in *Smith*, unsworn statements of counsel are "a frequent and necessary evidentiary source" in many proceedings in the criminal justice system. I accept that the better practice is to present affidavit evidence, but the lack of such evidence is not necessarily fatal: see *R v Hinkley*, 2011 ABQB 567, where this Court indicated that the Crown should have presented affidavit evidence (at para 2). Nonetheless, the Court went on to consider the application on its merits based on the Crown's oral description of a witness' anticipated evidence.
- [18] In general, the rules of evidence are less stringent in a pre-trial application where the accused's guilt is not at issue. The application being made in this case is essentially procedural or logistic. Although the Defence alleges that the Crown's submissions are based on hearsay evidence, I note that there does not seem to be a significant dispute over the underlying factual context,
- [92] At para. 19 he then stated:
- [19] I am prepared to accept the Crown's unsworn statements, with the underlying sources referenced in those statements and representations, as a sufficient evidentiary basis for this decision.
- [93] While the decision in *S.L.C.* is not binding upon me I find it to be persuasive and consistent with Parliament's amendments to s. 486.2 (2) that lowered the threshold for the issuance of an order for testimonial accommodation to facilitate the giving of a candid account by a witness when such accommodation is in the interests of the proper administration of justice.
- [94] I also agree with the submission of the Crown in this case that a requirement that a vulnerable witness should be forced to testify twice to be accommodated would serve to undermine Parliament's legislative intent in significantly reducing the requirement for an accommodation from necessity to facilitation.
- [95] I find that the failure of the Crown to adduce testimony from the witness on this application does not preclude the granting of the order sought.

HAS THE CROWN ESTABLISHED THAT THE ACCOMMODATION SOUGHT SHOULD BE ORDERED?

- [96] As I noted at the commencement of these reasons the Crown has applied under s. 486.2 (1) or alternatively s. 486.2 (2) of the Code in seeking an order that the witness testify by CCTV from a courtroom in which the accused is not present.
- [97] I have concluded that the Crown has not met the burden of establishing that the accommodation sought under s. 486.2 (1) must be granted.

- [98] Dr. Monkhouse acknowledged that "trauma bonding" is not a mental disorder or illness but "a dynamic that is present in situations where you see a subject suffering from PTSD or something like that" and further described it as "a description of the relationship".
- [99] Although Dr. Monkhouse linked the trauma bonding from which the witness suffers to a diagnosis of PTSD by another psychologist in her teen years as well as trauma he believed to be PTSD related in her recount of her observations of the killing of Ms. Hallgarth, I am not satisfied that the totality of his evidence is capable of proving on a balance of probabilities that the witness would have difficulty in communicating their evidence because of a mental disability that, under s. 486.2 (1) of the Code, would mandate the accommodation sought.
- [100] I am, however, satisfied that the testimonial accommodation sought under s. 486.2 (2) would facilitate the giving a full and candid account by the witness and would otherwise be in the interests of justice.
- [101] I reach that conclusion after considering the provisions of s. 486.2 (3) including: the nature of the violent offence about which she will testify and the nature of her discordant and at times violent relationship with the accused over many years including her relationship with the accused as the mother of two of their children.
- [102] In so doing, I accept Dr. Monkhouse's opinion that the witness therefore is at risk of suffering additional psychological damage and re-traumatization through the court process if she were to be exposed to Mr. Boden in court.
- [103] I do not accept that those concerns can be adequately facilitated or addressed by use of a screen or other accommodation if the witness were required to testify in the presence of the accused in the same courtroom.
- [104] I am further satisfied that the CCTV accommodation sought would be in the interest of the proper administration of justice because advances in technology and experience with the use of such technology during the COVID-19 pandemic have amply demonstrated that the accused's right to a fair trial will not be adversely impacted by the accommodation sought.
- [105] The accused's right to confront the witness through cross-examination will be preserved and accommodated both visually without delay or interruption and if necessary by using electronic document readers or audio recordings to seek to contradict or impeach the witness with transcribed or recorded prior statements.
- [106] If such technological advances and equipment do not appropriately accommodate the proper administration of justice or if any other aspect of the testimony of the witness by CCTV outside of the presence of the accused does not do so, I will take such steps and make such orders as may be necessary to ensure that the accused's fair trial rights are not prejudiced.

[107] In reaching that conclusion with respect to the possible revisiting of the accommodation now ordered I adopt and will apply what was said by Tamm J. in *R. v. Bell*, 2017 BCSC 2303 at para. 16:

[16] The proposed testimonial accommodation may lead to some trial inefficiency and inconvenience, but it will not interfere with the proper administration of justice. The use of closed-circuit television will not render the trial unfair, nor will it impede the truth-seeking function of the trial. If unforeseen difficulties arise during the course of the trial either because of technological problems or otherwise, I will re-evaluate the impact of the use of CCTV on the overall trial process.

[108] I accordingly order that the testimonial accommodation sought by the Crown for this witness be allowed.

"Davies J."

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