
CANADA / JUDGMENT

R. v. D.R.

2018 BCSC 1555

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DECIDED

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2018 BCSC 1555 R. v. D.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. D.R.,

2018 BCSC 1555

Date: 20180802

Docket: 27425

Registry: Vancouver

Regina

v.

D.R.

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Before: The Honourable Madam Justice MacNaughton

Oral Ruling on Voir Dire # 2

Scope of Expert Evidence

Counsel for the Crown:

A. Ip

Counsel for the Accused:

R. Peck, Q.C.

M. Shah

Place and Date of Hearing:

Vancouver, B.C.

August 1, 2018

Place and Date of Judgment:

Vancouver, B.C.

August 2, 2018

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The Issue

[1] The Crown seeks to tender Dr. Laurie Logan, the medical doctor who examined the complainant on December 12, 2015, as an expert to give opinion evidence as a Sexual Assault Service examiner and a family practice physician in the following areas:

- forensic examination process;
- physical and forensic examination of individuals;
- recognition and documentation of injuries;
- determination of mechanism of injury; and
- preservation and chain of custody of evidence.

[2] The Crown has indicated that it does not intend to ask Dr. Logan to give evidence about whether the complainant's injuries were consistent with consensual or non-consensual sexual activity. During submissions, the Crown also advised that it will not rely on Dr. Logan's report, or the history contained in it, which contains a description of the alleged sexual assault that was different from the complainant's testimony at trial and is hearsay.

- [3] D.R. objects to some of the proposed opinion evidence from Dr. Logan. I declared a voir dire to address D.R.'s objections in respect of the admissibility of Dr. Logan's opinion evidence, and Dr. Logan testified about her qualifications and background in the voir dire. As Dr. Logan had prepared a report, her proposed opinions were set out in it and in the submissions filed by the Crown.
- [4] The specific evidence objected to by D.R. was narrowed during submissions based on the Crown's explanation of what evidence it wished to introduce through Dr. Logan. Specifically, those objections were as follows:
- (a) Dr. Logan's opinion that the cluster of bruising she observed on the complainant's right forearm above the wrist and right upper thigh is characteristic of "fingertip bruising, where the force of restraint leaves marks on the skin". I will refer to this as the fingertip bruising concern;
 - (b) Dr. Logan's opinion that the injury located under the complainant's jaw/neck area is unlikely and uncommonly to be self-inflicted or caused by accident and that it was unusual for someone to be tender in that area. I will refer to this as the self-infliction concern;
 - (c) any opinion from Dr. Logan that the complainant's injuries are more or less consistent with a hypothetical proposed to be put to her by the Crown based on the complainant's trial evidence. I will refer to this as the hypothetical concern;
 - (d) Dr. Logan's opinion that the complainant's physical and genital injuries were significant because they were uncommon. I will refer to this as the significance concern; and
 - (e) Dr. Logan's observation of bruises on areas of the complainant's body where there was no evidence from the complainant that D.R. had applied pressure or force to those areas. I will refer to this as the extent of injury concern.
- [5] D.R. objects on the basis that Dr. Logan is not qualified to give this opinion evidence or that it is unnecessary. Finally, D.R. argues that the prejudicial effect of some of the proposed evidence outweighs its probative value.

Applicable Legal Principles and Analysis

- [6] There is no dispute that expert opinion evidence on matters requiring specialized knowledge is permissible as an exception to the usual exclusion of opinion evidence. As the Supreme Court of Canada said in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 15, citing *C. Tapper, Cross and Tapper on Evidence* (12th ed. 2010) at 530:
- [15] "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"

- [7] As explained in *R. v. Mohan*, [1994] 2 S.C.R. 9 at paras. 22-23, for expert opinion evidence to be admissible, it must be necessary in the sense that it provides information which is likely to be outside the experience of a judge or jury. If on the proven facts, a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary. In *Mohan*, the Supreme Court of Canada confirmed that the admission of expert evidence depends on the consideration of four threshold requirements: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; and (d) a properly qualified expert.
- [8] The onus is on the Crown, as the proponent of Dr. Logan's evidence, to establish the four threshold requirements.
- [9] Once the threshold requirements are met, the trial judge must engage in a second stage analysis of balancing the potential risk and benefits of admitting the expert evidence to determine whether the benefits justify the risk: *White Burgess*. The second stage analysis has been referred to as a "gatekeeping" function. A trial judge must be vigilant in the gatekeeping function, particularly in the case of a jury trial: *R. v. Sekhon*, 2014 SCC 15 at para. 46.
- [10] I propose to deal with the defence concerns in the order in which they were argued.

The Extent of Injury Concern

- [11] D.R. argues that Dr. Logan's observations of bruising on the complainant's right wrist, right thigh, shins, and left ankle should not be admitted because that evidence does not meet the relevance threshold.
- [12] He argues that the complainant did not testify that, in the course of the alleged sexual assault, D.R. applied force or pressure to those areas. As a result, he contends that there is no evidentiary foundation from which the jury could infer that the bruises relate to the incident that gave rise to the charges in this case.
- [13] In response, the Crown submits that Dr. Logan should be permitted to report on all of the injuries she observed on the complainant's body and that it should be left to the jury to decide what to do with those observations.
- [14] In this case, the complainant's evidence was unequivocal. She testified that D.R. used his right hand to hold down her left wrist. She testified that he did so with sufficient force that she was unable to sit up. She did not allege that D.R. applied force or pressure to her right wrist, right thigh, shins, or ankle.
- [15] In the absence of an evidentiary basis, Dr. Logan's observations of other bruises are not probative of an issue in this case.

- [16] In addition, her observations are potentially prejudicial as they may lead the jury to speculate as to the cause of the other injuries Dr. Logan observed. In the circumstances of this case, the jury may be asked to draw a negative inference based on the lack of bruising, and they should not be invited to speculate about other injuries.
- [17] For these reasons, I conclude that Dr. Logan should not be permitted to testify about the presence of bruises on the complainant's body in areas about which there was no evidence of the application of force or pressure.

The Significance Concern

- [18] D.R. objects to Dr. Logan's opinion that the findings of tenderness, tearing, and a bruise at the vaginal opening are significant since genital injury, especially in conjunction with other multiple and extensive physical injuries, is relatively uncommon.
- [19] D.R.'s objection is based on Dr. Logan's assumption that the complainant's genital injuries, and the other injuries she found, are related to the incident.
- [20] Having determined that the other bruising observed by Dr. Logan is not relevant because the complainant did not allege force or trauma to those areas, I also conclude that Dr. Logan's opinion about the significance of the combination of injuries should not be admitted.
- [21] When Dr. Logan uses the term "significant" in her report, she is opining that the injuries are corroborative of the events as described by the complainant. However, during her evidence, the complainant did not describe events to support extensive physical injuries to other parts of her body. Allowing Dr. Logan to present this opinion, which is based, in part, on an erroneous factual picture, would be unduly prejudicial to D.R.
- [22] To the extent that Dr. Logan's conclusion about "significance" is based on her experience as a family physician and her work at the Options for Sexual Health Clinic at BC Women's Hospital (the "Options Clinic"), I agree with D.R. that permitting her to give this evidence raises similar concerns to those raised about the police officer's testimony in Sekhon. There, the police officer testified that he had never encountered a drug courier who was blind to the fact that they were transporting drugs. At para. 49, the Supreme Court of Canada concluded that the officer's testimony was not relevant or necessary in determining whether the accused in that case knew about the cocaine he was transporting.
- [23] In this case, Dr. Logan's experience with other patients, either as a sexual assault examiner, in her family practice, or at the Options Clinic, is not probative and potentially prejudicial. What she observed in other examinations is not probative of the live issues in this case. It only becomes relevant if the Crown seeks that an inference be drawn that this must have been a sexual assault as Dr. Logan rarely observes these injuries except in cases of sexual assault. Such evidence would unfairly tip the balance in the Crown's favour.

The Fingertip Bruising, Self-Infliction, and Hypothetical Concerns

[24] With respect to each of these concerns, D.R. argues that they require Dr. Logan to give evidence as to the mechanism of injury, which she is not qualified to give.

[25] In respect of her qualifications to give general opinion evidence about the specific mechanism of injury, the defence relies on *R. v. Giles*, 2016 BCSC 294 at para. 62, where this Court adopted the non-exhaustive list of factors set out in *R. v. Pham*, 2013 ONSC 4903 at para. 31, to assist in deciding whether a proposed witness is a "properly qualified expert". The Pham factors were also considered in *R. v. Mehl*, 2017 BCSC 1845 at para. 22, a case relied on by the Crown. Those factors are:

- the manner in which the witness acquired the special skill and knowledge upon which the application is based;
- the witness' formal education (i.e. degrees or certificates);
- the witness' professional qualifications (i.e. a member of the College of Physicians and Surgeons);
- the witness' membership and participation in professional associations related to her proposed evidence;
- whether the witness has attended additional courses or seminars related to the areas of evidence in dispute;
- the witness's experience in the proposed area(s);
- whether the witness has taught or written in the proposed area(s);
- whether, after achieving a level of expertise, the witness has kept up with the literature in the field;
- 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;
- whether the witness has not been qualified to give evidence in the proposed area(s) and if so, the reason(s) why; and
- whether previous case law or legal texts have identified the contested area as a proper area for expert evidence and if so, who might give the evidence.

[26] Not all of the factors will be applicable in a given case, and no one factor is determinative.

[27] There is some disagreement in the cases about the consideration of the manner of acquiring expertise but, in light of Dr. Logan's qualifications set out below, I accept that her expertise was acquired in a number of different ways over her lengthy medical career and in her role as a sexual assault examiner.

- [28] I will consider the factors as they apply to Dr. Logan, based on her evidence during this voir dire and her curriculum vitae, which was marked as Exhibit A.
- [29] Dr. Logan is a family physician who obtained her medical degree in 1982. She has been a continuing member of the College of Family Physicians of Canada since 1984 and a Fellow of the College since 1996. She has been an examiner for Simulated Office Oral examinations for certification with the College since 1995.
- [30] Dr. Logan has been an examiner for the Sexual Assault Service at BC Women's Hospital ("SAS") since 1992. She was trained in sexual assault examination and treatment by the SAS, which is run by a forensic medicine specialist. She has attended medical conferences on Women's Health and Sexual Assault Medicine. Since 1992, in her work with the SAS, she has seen approximately twenty sexual assault cases a year for a total of 480 cases.
- [31] Over the past five years, Dr. Logan has seen 157 sexual assault cases, of which 18 have included strangulation. On November 20, 2013, she attended a one-day workshop on strangulation. She has engaged in self-study on medical topics pertaining to sexual assault and forensic medicine in preparation for attendance at court.
- [32] Dr. Logan's curriculum vitae also indicates that she has been engaged in family practice since 1984 and that she has performed approximately 330 pelvic examinations a year in that role. Since 1996, she has performed approximately 50 pelvic examinations a year in her work at the Options Clinic.
- [33] Dr. Logan has had privileges at Vancouver General Hospital since 1993, BC Women's and Children's Hospital since 1996, St. Paul's Hospital since 2005, and UBC Hospital since 2016. She has been a clinical instructor for the UBC Department of Family Medicine since 1997, including supervising Family Practice Residents at the Options Clinic.
- [34] Between 1994 and 2018, Dr. Logan has been qualified as an expert witness in the assessment, examination, and treatment of sexual assault complainants on four occasions in the Provincial Court and on seven occasions in the Supreme Court.
- [35] I am satisfied that Dr. Logan is qualified to give opinion evidence as an expert in the assessment, examination, and treatment of sexual assault complainants. In the circumstances of this case, she is qualified to give evidence about the general causation of bruises, petechiae, and vaginal tearing or bruising. She may also testify about the forensic examination process, the physical and forensic examination of individuals, her recognition and documentation of injuries generally and specifically with respect to the complainant's relevant injuries as set out in this decision, and the preservation and chain of custody of evidence.

- [36] However, she is not qualified to give evidence about the specific mechanism of injury. She is a specialist in family medicine, not forensic medicine or pathology. She has not had specialized training in the specific mechanism of injury. The SAS has brought in pathologists and forensic medicine specialists to lecture in this area on some occasions. Dr. Logan had little specific recall of the topics covered. She has not taught or published in the area of specific mechanism of injury.
- [37] In *R. v. Akumu*, 2017 BCSC 383 at para. 21, Justice Fisher, when a member of this Court, commented on the evidence of sexual assault examiners. She said:
- [21] A Mohan voir dire in respect of the admissibility of a Sexual Assault Nurse Examiner is unusual in sexual assault trials. However, in most cases, the witness' evidence includes an opinion as to whether the complainant's injuries were consistent with the allegations of non-consensual sexual activity. Such evidence has its rather obvious controversy, particularly in jury trials. I agree with the Crown's prudent approach in seeking to qualify Ms. Evans in the narrower manner proposed.
- [38] In my gatekeeping function in this case, I am persuaded that a cautious approach should be taken with respect to Dr. Logan's evidence.
- [39] Further, specifically with respect to the fingertip bruising concern, during the voir dire, Dr. Logan testified about the importance of the history provided by a patient in determining what happened. She said that the history given by a patient is at the back of her mind during the examination.
- [40] She gave as an example a patient who has been grabbed but does not provide her with that information. The location, size, and line up of bruises she observes is consistent with the index, third, and fourth fingers on someone's hand. However, she is unable to reach a conclusion because she does not know that they had been grabbed. By contrast, if she was told by a patient, while taking their history, that they had been grabbed, and she saw that collection of bruises, she would be able to opine that the bruises were consistent with grabbing.
- [41] In this case, the complainant told Dr. Logan that she was held down by both wrists. That was not the complainant's evidence at trial. It is possible that Dr. Logan would not have opined that the bruising she observed was characteristic of fingertip bruising, where the force of restraint leaves marks on the skin, if she had not been examining the complainant with the history she had given in mind. While this could be dealt with in cross-examination, and in the final instructions to the jury, in my view, the prejudicial effect of her evidence on this issue outweighs its probative value.

- [42] With respect to the hypothetical concern, in my view, it is not appropriate to put the complainant's trial evidence to Dr. Logan in a hypothetical and have her opine on whether the injuries she observed are more or less consistent with the hypothetical. Doing so comes perilously close to having her opine on one of the central issues in this case, the credibility of the complainant's evidence. This is particularly of concern in this case where D.R. is facing charges of both sexual assault and overcoming resistance.
- [43] I am concerned that the effect of the hypothetical would be to cloak the complainant's evidence with the authority of an expert confirming it. Doing so is unnecessary in this case as the jury will be able to assess whether the injuries are consistent with the complainant's evidence without Dr. Logan opining on the hypothetical.
- [44] I am also of the view that it is unnecessary for Dr. Logan to opine that tenderness in the neck is associated with being held down by the neck. If the jury accepts the complainant's version of her interaction with D.R., they will be able to draw that inference based on the presence of tenderness in her neck.

"MacNaughton J."

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