
CANADA / JUDGMENT

R. v. Feeney

2001 BCCA 113

COURT

British Columbia Court of Appeal

DECIDED

21 February 2001

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Citation:

R. v. Feeney

Date: 20010221

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Docket:

CA025619

Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

REGINA

RESPONDENT

AND:

MICHAEL FEENEY

APPELLANT

Before:

The Honourable Chief Justice McEachern

The Honourable Mr. Justice Donald

The Honourable Mr. Justice Low

Russell W. Cornett

Counsel for the Appellant

William F. Ehrcke, Q.C.

and Ursula Botz

Counsel for the Respondent

Attorney General of British Columbia

S. David Frankel, Q.C.

Counsel for the Intervenor

Attorney General of Canada

Place and Date of Hearing:

Vancouver, British Columbia

January 18 and 19, 2001

Place and Date of Judgment:

Vancouver, British Columbia

February 21, 2001

Written Reasons by:

The Honourable Mr. Justice Donald

Concurred in by:

The Honourable Chief Justice McEachern

The Honourable Mr. Justice Low Reasons for Judgment of the Honourable Mr. Justice Donald:

- [1] This case concerns the killing of Frank Boyle, an 85 year old man, in his home at Likely, British Columbia, on 8 June 1991. He died from brain trauma after being struck at least five times in the head with a crow bar. His mobile home was robbed of money, Sportsman cigarettes and beer. His truck was taken and found in a ditch at an S curve in the road not far from the appellant's home. A bloody crow bar was found by the truck. The blood on the crow bar matched the deceased's blood type.
- [2] In a cabin on the lower part of the deceased's property the police found the deceased's empty wallet and the butt of a Sportsman cigarette. The Crown's theory was that the killer went to the cabin after the attack, rifled through the wallet and smoked one of the stolen cigarettes. The cigarette butt yielded a DNA sample that on analysis was found to match the DNA of a blood sample taken from the appellant pursuant to a warrant.

- [3] The police found a fingerprint on the door of a refrigerator in the deceased's home and another fingerprint on a beer can in the cab of the deceased's truck. They matched the appellant's fingerprints.
- [4] Several witnesses saw the appellant walking away from the location of the deceased's truck towards his home in the early morning of the day in question. Earlier that same night the appellant had taken his brother-in-law's truck and put it in the ditch at the same curve in the road where the deceased's truck was found.
- [5] The appellant lived in a small trailer on property rented by his sister, Angela Russell. She saw him arrive home on foot that morning and testified that she saw blood spots on his shirt.
- [6] Witnesses who partied with the appellant on the night of the killing testified that he was cadging drinks and cigarettes because he had no money.
- [7] The appellant was tried twice and convicted both times on a charge of second degree murder. This appeal is taken from the conviction recorded at the second trial before Mr. Justice Oppal and a jury in Vancouver on 5 February 1999.
- [8] The Supreme Court of Canada set aside the verdict of guilty on the first trial and ordered a new trial on the basis that important evidence admitted in the trial was obtained contrary to s. 8 of the Charter and ought to have been excluded under s. 24(2): [1997] 2 S.C.R. 13; 115 C.C.C. (3d) 129. Sopinka J. for the majority identified as the principal defect in the evidence adduced by the Crown in the first trial the warrantless search of the appellant's dwelling on the morning of the killing. In the course of the arrest the police seized a blood-spattered T-shirt.
- [9] Sopinka J. held that the forcible entry by the police into the appellant's trailer while he was sleeping and their seizure of his T-shirt without a prior judicial warrant violated the appellant's Charter right to be secure against unreasonable search or seizure. A second search of the trailer was also said to violate s. 8 because, although it was conducted under the authority of a warrant, the warrant was obtained on information resulting from the initial entry. As a result several more incriminating items seized from the trailer in the second search were also held to be inadmissible.
- [10] The majority also found that the police had arrested the appellant without reasonable and probable grounds. After his arrest, the appellant was taken to the RCMP detachment at Williams Lake where he was fingerprinted pursuant to the Identification of Criminals Act. Since the arrest was unlawful the appellant's fingerprints were obtained in violation of the Charter and therefore inadmissible. Thus the evidence at trial matching the appellant's known prints with the prints lifted from the deceased's refrigerator and from the beer can found in the deceased's truck was not properly before the jury.
- [11] The appellant was also given a breathalyzer test, under compulsion, when he arrived at the Williams Lake detachment. At the first trial the judge ruled the result of the breath analysis inadmissible (as well as two inculpatory statements by the appellant) on the finding that the

evidence was obtained without the appellant having an opportunity to exercise his right to obtain counsel under s. 10(b) of the Charter. That ruling was not challenged on appeal. Evidence of the observations of the officers as to the appellant's sobriety were held to be inadmissible by the Supreme Court of Canada because they were made in the course of an unlawful arrest and detention. At the second trial counsel for the appellant wanted to adduce the breathalyzer result in support of a drunkenness defence but elected not to do so upon receiving an advance ruling by Oppal J. that if the blood alcohol reading was introduced the Crown would be allowed to lead the evidence of the officers' observations of the appellant's sobriety after the arrest.

- [12] After the decision of the Supreme Court of Canada the RCMP set about to assemble other evidence in support of the murder charge. That decision affected both the manner in which the police conducted this new investigation and the scope of the evidence at the second trial. The cigarette butt found in the cabin on the victim's property was analyzed in the hope that it would provide a DNA match and a warrant was obtained pursuant to s. 487.05 of the Criminal Code to have a blood sample taken from the appellant. The two samples were found to have the same genetic profile.
- [13] With knowledge of the appellant's court history gathered in the first investigation, the RCMP obtained a set of his fingerprints from the Calgary Police Department who had fingerprinted the appellant in connection with a breaking and entering charge a year before the killing. The RCMP also conducted a blind search of the fingerprint data bank known as the B.C. Automated Fingerprint Identification System and recorded a "hit", namely, a match of the latent prints from the crime scene with the appellant's prints on file.
- [14] As part of the second investigation the RCMP re-interviewed Angela Russell, the appellant's sister, who told them she now remembered seeing blood on her brother's shirt on the morning of the killing. In her statement to the police, however, she told them that she was not sure if what she saw was in a dream. At the first trial the Crown had called Ms. Russell to give her observations of the accused on that morning. She had testified that she saw no blood on his shirt. Ms. Russell changed her evidence at the second trial and said that she recalled seeing drops of blood on his shirt. Oppal J. refused a motion after a voir dire to exclude her new evidence, but he gave a strong warning in his charge that it would be dangerous to rely on her testimony.
- [15] On the second day of deliberations the jury asked Oppal J. to define reasonable doubt. In a brief exchange between Oppal J., the foreperson and defence counsel after a re-charge, it emerged that the jury's real question was whether they had to accept all the grounds for finding a reasonable doubt proposed by defence counsel or whether one doubt was sufficient for an acquittal. Oppal J. told the jury that reasonable doubt applied only to essential ingredients of the offence, not to individual pieces of evidence, and with that clarification he said that a single doubt was enough for a not guilty verdict.

- [16] On the third day of deliberations, the trial judge granted an application brought by certain news media to lift the ban on publication of the evidence.
- [17] The jury deliberated a further four days and returned a verdict of guilty.
- [18] The appellant appeals from his conviction on seven grounds:
1. The fingerprint evidence was derived from a Charter breach in the first investigation and was therefore inadmissible. 2. The DNA warrant was defective
 - (a) because it was based in part on inadmissible evidence; and (b) the Crown did not substantiate an assertion in the Information to Obtain the warrant that the sample extracted from the cigarette butt was suitable for DNA analysis as required by s. 487.05(1)(d) of the Code; 3. The DNA warrant provisions of the Code violate ss. 7 and 8 of the Charter, and are not saved by s. 1, in particular because the Code provides that an application for a warrant is to be made ex parte; 4. The evidence of Angela Russell regarding blood on the appellant's shirt ought to have been excluded (a) because it was the product of a dream; and (b) the prejudicial effect of the evidence far outweighed its probative value. 5. The trial judge erred in ruling that the Crown was entitled to lead previously excluded evidence of the appellant's sobriety if the defence adduced the breathalyzer reading because the two were not connected. 6. The trial judge did not respond adequately to the jury question concerning reasonable doubt and should have said that they were not required to agree on the same basis for holding a reasonable doubt in order to reach a unanimous verdict of not guilty. 7. The trial judge erred in lifting the publication ban during deliberations, thereby exposing the jury to media reports of inadmissible evidence.
- [19] I am not persuaded that any of these grounds justifies interfering with the conviction and I would, for the reasons which follow, dismiss the appeal.

DISCUSSION

1. Fingerprint Evidence

- [20] The principal point taken on this ground is that the police in British Columbia found the appellant's prints in Alberta as a result of an illegal arrest in the first investigation and therefore the known prints presented to the jury in the second trial constituted derivative evidence tainted by an earlier Charter breach.
- [21] With respect, the argument proceeds on a false premise, namely, that the RCMP in this Province are a different entity from the Calgary Police Department for purposes of analyzing state action under the Charter. On the view proposed by Mr. Ehrcke, Q.C. for the respondent, with which I agree, the question must be examined on the basis that each law enforcement agency acts in the service of the same Crown with the result that it must be seen that the Crown already had the appellant's fingerprints when the second investigation got underway. The means employed by one agency to locate something the state already possessed elsewhere is therefore beside the point.

- [22] The inquiry then shifts to the test in the language of s. 24(2) of the Charter, whether "evidence [the fingerprints] was obtained [in Calgary one year prior to the killing] in a manner that infringed or denied any rights or freedoms guaranteed by this Charter" It is not suggested that the appellant's Charter rights were infringed or denied by the Calgary police when they took his prints pursuant to the Identification of Criminals Act on a breaking and entering charge. Nothing that occurred after that could taint the evidence.
- [23] It was further argued on behalf of the appellant that the RCMP were not entitled to proceed on the assumption that the fingerprints found in the deceased's residence and on the beer can would match the appellant's. On this argument the RCMP's knowledge that the appellant was a match was tainted by the unlawful arrest and, as a result, they could not use that knowledge in the course of the second investigation. The RCMP were obliged to proceed on the basis that they did not know whose prints would match and run a blind search in order to discover that the appellant was a match. Because they did not discover that the appellant was a match based on knowledge gained independently from the first tainted investigation, the Crown was not entitled to rely on the Calgary prints in the second trial.
- [24] This is answered by the Crown's response that the appellant's prints would have been obtained in any event because, even if he had not been arrested initially, the appellant would have been a person of interest. Therefore, the RCMP would have looked specifically for his prints and would have obtained them from Calgary whether or not they also ran a blind search. By obliging the RCMP to pretend they had no idea whose fingerprints were a match would put them in a worse position than they would have been in had they gone to the trailer to talk to the appellant on the morning of the killing but had not arrested him. It would be artificial to assume that they would not have looked upon him as a suspect and obtained his fingerprints in an attempt to match them with those found in Mr. Boyle's home and truck.
- [25] There is in my opinion no ground for excluding the known prints used in the second trial to connect the appellant with the crime scene.

2. DNA Evidence - Admissibility

- [26] The admissibility of the DNA evidence is attacked firstly on the contention that the issuance of the DNA warrant was based on derivative fingerprint evidence which should have been excluded. For the reasons I have just given in disposing of the first ground, I would reject this argument.
- [27] The second argument alleges that the Information to Obtain the warrant contained an assertion that was unsubstantiated at the time it was made, namely, that the sample extracted from the cigarette butt was suitable for analysis. Mr. Cornett, counsel for the appellant, submitted that the timing of events suggests that the DNA analyst had not yet developed a profile from the sample when the Information was sworn and therefore Constable Fitzpatrick, the informant, could not have truthfully said, as he did at para. 47(f) of the Information, that the latent sample was suitable for analysis:

- (f) David O'KEEFE (B.Sc.Hon.) of the R.C.M.P. Forensic Laboratory in Vancouver, has examined the exhibits provided by Cst. TUCKER and has determined that the cigarette butt originally located at the crime scene contains unidentified human DNA suitable for analysis. He also determined a blood sample existed on the crow bar, and will be analysed to determine its origin. (emphasis added)

[28] This part of the Information addresses the requirement of s-s. (d) of s. 487.05(1) which reads as follows:

487.05 (1) A provincial court judge who on ex parte application is satisfied by information on oath that there are reasonable grounds to believe

- a) that a designated offence has been committed, b) that a bodily substance has been found
- (i) at the place where the offence was committed, (ii) on or within the body of the victim of the offence, ((iii) on anything worn or carried by the victim at the time when the offence was committed, or (iv) on or within the body of any person or thing or at any place associated with the commission of the offence, (c) that a person was a party to the offence, and (d) that forensic DNA analysis of a bodily substance from the person will provide evidence about whether the bodily substance referred to in paragraph (b) was from that person

and who is satisfied that it is in the best interests of the administration of justice to do so may issue a warrant in writing authorizing a peace officer to obtain, or cause to be obtained under the direction of the peace officer, a bodily substance from that person, by means of an investigative procedure described in subsection 487.06(1), for the purpose of forensic DNA analysis. (emphasis added)

[29] The evidence discloses that the extraction of the sample from the cigarette butt occurred on 25 August 1997 and the Information was sworn on 15 September 1997, but the process for determining the profile from the sample was not completed until 22 September 1997. On this sequence of events, the appellant argues that the informant could not have truthfully said that the sample was suitable for analysis because it appears that suitability had not yet been determined when he swore the Information, and the Crown did not call the analyst to confirm the truth of what he told the informant.

[30] While I am doubtful that an overstatement of this kind (assuming it to be an overstatement, which has not been established) would vitiate the warrant in circumstances where the latent sample ultimately produced a profile, I think the remaining question of admissibility can be answered on a simpler basis. The informant was only required to show a reasonable ground for believing that the latent sample was suitable. The fact that he was so informed by a reliable source, the analyst, is enough to satisfy the Code requirement and it was unnecessary for the Crown to go further in responding to this aspect of the challenge to the warrant and produce the analyst to attest to what he told the informant. Reasonable grounds can be based on hearsay: *R. v. Collins*, [1987] 1 S.C.R. 265 at 279. I do not accept the argument that the Information to Obtain the DNA warrant was defective.

3. Constitutional Validity of the DNA Warrant Provisions: ss. 487.04 to 487.09 [31] The appellant filed in this Court a Notice of Constitutional Question regarding the DNA warrant sections of the Code on 3 May 2000 and duly served the Attorneys General of Canada and British Columbia. The Notice lists 10 points to be argued. They appear to raise the same issues as were debated in the Ontario case of *R. v. F.(S.)* (1997), 120 C.C.C. (3d) 260 (Ont.Ct.Gen.Div.); (2000), 141 C.C.C. (3d) 225 (Ont.C.A.). The judgments at both levels were fully reasoned; Mr. Justice Hill's decision in the General Division was 63 pages in the law report, Mr. Justice Finlayson's judgment for the Court of Appeal was 20 pages.
- [32] On this appeal Mr. Cornett adopted what I consider to be a most unsatisfactory expedient in referring to the argument made on behalf of the accused in *R. v. F.(S.)* without further elaboration and developed only one of the issues in his factum and oral argument.
- [33] Mr. Cornett's factum puts the argument on the constitutional challenge into a single paragraph which reads:
60. The trial judge erred in upholding the constitutional validity of the DNA warrant legislation set out in the Criminal Code of Canada. This legislation offends s.7 of the Charter, including the right to privacy, and cannot be saved by s. 1. Even if the legislation has a primary "investigative" mandate, it still represents a major incursion into individual freedom and liberty. The ex parte procedure further violates the Charter rights of suspects in custody, who have counsel, who are not given reasonable notice, nor an opportunity to be heard before the Judge issuing the DNA warrant. The appellant adopts and relies upon the arguments and submissions of the accused and appellant in *R. v. F.(S.)*.

In my view, the appellant is only entitled to a resolution of issues that actually come before us. As his counsel made submissions solely on the point that the DNA provisions are unconstitutional because the application for a warrant is made ex parte, my reasons will be confined to that. On the other points in the Notice taken from the decision of *R. v. F.(S.)*, I think it is sufficient to say that the appellant has given us no reason to disagree with the Ontario Court of Appeal.

- [34] In the present case there was neither a legal nor a practical reason why the appellant could not have been given notice of the application for a warrant. Dealing with the legal aspect first, although s. 487.05(1) is worded so as to suggest that ex parte is the conventional mode of proceeding, "A provincial court judge who on ex parte application ...", the language does not exclude a hearing on notice. I respectfully agree with Finlayson J.A. in *R. v. F.(S.)*, supra, at 244, when he said the ex parte procedure is permissive.
- [35] On the practical side, when an accused is in custody, as the appellant was when the application for the warrant was made, there is no risk of flight if notice is given nor is there a danger that the evidence could be altered or destroyed because one's DNA cannot be changed. Appellant's trial counsel could have been notified, (even though it appears his legal aid retainer for the second round had not yet been settled), without jeopardizing the new investigation.

[36] There is, however, an important countervailing factor to consider and that is the need for a criminal investigation to proceed quickly, not only to identify an offender, but also to eliminate suspects through the DNA techniques. In fairness to the appellant, the degree of urgency was probably less in this case than in most, but generally speaking a notice requirement would tend to slow the progress of an investigation. The question is whether these considerations rise to the level of a constitutional determination.

[37] Hill J. said in *R. v. F.(S.)*, supra, at pp. 288-9, that in some cases it would be proper to read down s. 487.05 to require notice where the subject of the warrant was in custody:

Where, for example, in the instance of a DNA warrant, the suspect is in custody serving a sentence or as a result of a denial of bail following arrest for the designated offence, there would appear to be little risk of loss of an opportunity to execute the warrant were notice to be given to the suspect. Despite the statute's apparent call for an ex parte hearing, it may be reasonable, depending on the facts of the particular case, for a hearing, on notice, to be conducted. Such cases would be rare. Counsel for the Attorney General of Canada agreed that such a discretion ought to properly reside in the court. In my view, this element of the statute may, as required, be properly read down to include an ex parte hearing unless a hearing on notice is ordered by the court. In this regard, I note the words of Sopinka J. in *Baron v. Canada* (1993), 78 C.C.C. (3d) 510 at 537, 99 D.L.R. (4th) 350 (S.C.C.):

"Reading down" by amending the clear intent of a statutory provision may be appropriate in some cases. The decision to do so requires a determination that this remedy will constitute the lesser intrusion into the role of the legislature consistent with upholding the values and objectives of the Charter: see *Osborne v. Canada (Treasury Board)* (1991), 82 D.L.R. (4th) 321 at pp. 346-7, [1991] 2 S.C.R. 69, 37 C.C.E.L. 135, and *Schachter v. Canada* (1992), 93 D.L.R. (4th) 1 at pp. 19-20, [1992] 2 S.C.R. 679 ... (emphasis added)

[38] The Ontario Court of Appeal would not go that far. Finlayson J.A. preferred to leave it to the authorizing judge's discretion whether to require notice in the appropriate case. I agree with that approach and with the following rationale expressed by Finlayson J.A. at pp. 244-5:

[38] In the second place, a constitutional overview of the warrant process did not justify the following comment at pp.288-289:

Despite the statute's apparent call for an ex parte hearing, it may be reasonable, depending on the facts of the particular case, for a hearing, on notice, to be conducted ... In my view, this element of the statute may, as required, be properly read down to include an ex parte hearing unless a hearing on notice is ordered by the court. [39] This quotation is preceded by the observation that an ex parte application is generally justified to avoid the risk of the suspect fleeing but that notice might be in order where the suspect is already in custody. Once again, this concern does not raise a constitutional issue as to the competence of the legislative scheme. Both in this court and below, the Crown has stressed the requirement in the DNA regime for authorization by a provincial court judge. This judge is the repository of a discretion as to whether to issue the warrant or not and if he or she is advised, as is proper on an ex parte

application, that the suspect is in custody, the judge may well require that the suspect be served. The respondent seemed to think that because the legislation authorized an *ex parte* application, that this is the only way it could be granted. Clearly, the procedure is permissive. [40] It is important to remember that applications for search warrants and other judicial warrants traditionally have been heard *ex parte* to avoid not only the flight of the suspect but also the destruction of what is sought under the warrant. Even accepting that the destruction or alteration of DNA evidence is not a possibility and that there may be cases where notice might be ordered by the issuing judge, these are not reasons for the court on a constitutional review to start rewriting customary procedures. One must keep in mind that these DNA warrants are an investigative tool. If their use is to be overly restricted by procedural impediments and interlocutory proceedings, the investigation may be frustrated. As Hill J. acknowledges, one of the important justifications for the legislation is that it can serve to protect the innocent. If the police are focussing on the wrong suspect, it is in everyone's interest that he or she is cleared and the search for the true perpetrator continue without delay. These are all considerations properly left to the issuing judge. (emphasis added)

[39] In my judgment the appellant's point on the *ex parte* nature of the process can be put no stronger than this: there are some cases (probably very few) where no harm will likely come to a criminal investigation if notice is given and in such cases the fairness of the warrant process would be enhanced by notice. This proposition does not seem to me to have the compelling force required to strike down legislation on constitutional grounds, especially when an *inter partes* hearing is open on the language of the legislation. It should also be remembered that an accused has other remedies available in the form of a motion to quash the warrant on judicial review and by a Charter application under s. 8 to exclude the evidence at trial.

[40] I would not accede to the constitutional challenge as presented by the appellant.

[41] Counsel for the respondent and the intervenor prepared full argument in their respective factums answering all the points raised in the Notice of Constitutional Question. For the reasons stated I have not found it necessary or appropriate to examine all those points and so I have not referred to the many cogent and well-supported submissions of counsel for the respondent and the intervenor which they presented orally and in writing.

4. Angela Russell's Evidence - the bloodstained shirt

[42] As I have mentioned, Angela Russell, the appellant's sister, changed her evidence from the first trial when she said in the second trial that she remembered seeing spots of blood on the appellant's T-shirt on the morning in question.

[43] The admissibility of her new evidence in this regard was tested in a *voir dire*. The weakness of the evidence became obvious in the process but the trial judge nevertheless ruled that it must go before the jury. He said in his ruling that he would give a strong warning to the jury (and he did):

My ruling is while I have concerns about the weight that should be given to Ms. Russell's testimony and while I am concerned about the inconsistencies in her evidence, those are all matters that go to weight and not to admissibility. I know of no rule of law that states that where the evidence of a witness is gravely and seriously inconsistent with the evidence given on prior occasions, that the evidence ought to be held inadmissible. There is no rule of evidence that states that. I will give you fuller reasons tomorrow. I will deal with the other issues that were raised by defence counsel. At the same time I plan to tell the jury that they ought to be extremely careful in assessing this evidence of this witness and I plan to caution the jury about her evidence in light of the inconsistencies that have already been referred to. But these are all matters for the trier of fact and not matters for the trial judge to consider.

[44] In the course of the trial proper defence counsel drew from Ms. Russell an answer which suggested that she had little faith in her recollection of the blood stain:

MR. LUGOSI:

Q Given the fact that you're not sure in your own mind whether or not the police officer gave you the idea you saw blood on Michael's shirt or whether you, in fact, saw blood on his shirt, would you want the jury to rely on your evidence? A No.

[45] By this time, of course, her evidence was before the jury. The question of admissibility must be determined by reference to the voir dire and the trial judge's ruling, not according to what later transpired in the trial itself.

[46] In his charge the trial judge gave a warning about Ms. Russell's evidence in the strongest terms. He reminded the jury that the witness told the police on the day of the killing she had not seen any blood stains and repeated that under oath at the first trial. He went on to recount that during a police interview in July 1997, six years after the offence, she said her observation of blood stains "may have come out of a dream". This is what the judge told the jury:

Now, you'll recall that in her examination in chief, she said, that is when the Crown was questioning her, she said she saw a few drops of blood on the front of his shirt. However, you should know that on June 8th, 1991, the day of the incident, she was asked the following question by the police.

Q Did you notice any blood stains on his clothes? A No.

Then at the first trial she said that she saw no blood on his clothes. She was under oath at that time. It was only in July 1997 that she said that she had seen drops of blood on his shirt. She also said that that was important, and that's what she said on June 8th that she did not notice any bloodstains on his clothes. Even though those are prior inconsistent statements, you may consider them for their truth here because she told you under oath here that what she said on those previous occasions, and that she did not see blood, that those statements were true. She also said that her statement to the police in July 1997 that she saw blood "may have come out of a dream" and that the best memory she had was in 1991. She later said that she was not sure about

the blood and then said, "in a way, I was sure". I want to tell you that you must be extremely careful when you deal with her evidence. She was inconsistent. It would be dangerous of you to rely on her to conclude that there was blood on the front of his shirt because she said in cross-examination that what she said earlier was true. I would suggest to you that she is not a reliable witness, and you cannot rely on her, but again, that is a matter for you to decide and that is only my own opinion, and you might well decide something else. Because in this case the defence - while I've told you that she's an unreliable witness, the two counsel have told you to rely on her evidence for different purposes. The Crown says to you that you can rely on her for the blood that's on the front of her [sic] shirt, and Mr. Lugosi says to you, you can rely on her for her opinion on how drunk her brother was. Again, that's a matter entirely for you to decide, matters relating to evidence. (emphasis added)

- [47] On appeal the appellant contends that the evidence was inadmissible on two grounds: it came from a dream and therefore it was not evidence; and, its weight was so trifling and the prejudice so grave that it should have been excluded.
- [48] The authority cited in support of the first ground was a decision of this Court: *R. v. Kliman* (1996), 107 C.C.C. (3d) 549 (B.C.C.A.). In that case the basis of a witness's testimony was a flashback. She had no actual memory of the event. This Court held that since the source of the testimony was not a present recollection it should not have been admitted. Legg J.A. for the Court said at 568:
- [81] The long established rule of evidence is that a witness must assert under oath a present recollection of the facts to which she testifies (Wigmore on Evidence, Chadbourn revision, vol. 2, para.478, pp. 636-639 and vol. 3, para. 725, p. 71). There are several exceptions to this general rule. Unless the Crown, on whom the burden of establishing admissibility lies, can establish that the evidence falls within one of these exceptions, the evidence is inadmissible.
- [49] Legg J.A. went on to find that none of the recognized exceptions to the rule that evidence must be a present recollection applied to the circumstances and held that the trial judge should not have left the evidence with the jury for them to weigh.
- [50] The present case is different from *Kliman* because here the witness had a present recollection although its weight was doubtful. The question whether her evidence originated with a dream was not pursued at the trial; defence counsel's focus was on the suggestion that the police put the bloodstained shirt in her mind during the re-investigation. The only suggestion of a dream occurred in the musing of the witness when interviewed by the police in 1997; thereafter the witness expressed confidence that she really did see a blood stain on her brother's shirt. In those circumstances I think the trial judge was bound to leave the evidence with the jury notwithstanding its many frailties.

[51] The decision whether to exclude evidence on the balancing of probative value and prejudicial effect is a matter of discretion which attracts considerable deference. I cannot say it was unreasonable for the trial judge to admit this evidence, especially when he gave such a strong instruction in his charge about its deficiencies.

5. Breathalyser Evidence

[52] Drunkenness was an available defence on evidence that the appellant drank heavily during the night of the killing. At the second trial the appellant called an expert to say that, based on certain assumptions, the appellant likely had a blood alcohol percentage of .244 at the time of the offence. Defence counsel felt that the case for drunkenness would be strengthened by adducing the actual breathalyser reading taken on arrest and working that reading back to the time of the offence.

[53] Because of the Supreme Court of Canada's decision on the unlawful arrest and the first trial judge's ruling that the breathalyser was taken in violation of the appellant's Charter right to counsel under s. 10(b), neither the evidence of the breath analysis nor the officer's observations of the appellant as to sobriety could be led by the Crown in the second trial. The defence, however, was not so limited and could waive the Charter breach. However, because of the possibility that the Crown might be permitted to answer the breathalyser reading with the policeman's observations, which might weaken the case for drunkenness, defence counsel pursued the question in a voir dire.

[54] In a brief ruling, the trial judge said that if the defence put in the breathalyser evidence, in fairness, the Crown should be able to respond with the officers' observations:

THE COURT: All right. My feeling here is that that evidence was held to be inadmissible in fairness to the accused, because it was his Charter right under s. 10(b) that was being breached, and, given that fact, that it is open for the accused to call that evidence at this trial. It would be unfair to prevent that evidence - which goes to drunkenness, which is a real issue in this trial - from being called. Having said that, if that is the case, then the issue of drunkenness, which is obviously and apparently before this jury, then the Crown, in fairness, ought to be able to illicit [sic] evidence from the police officers as to what their observations were.

[55] Defence counsel decided not to lead the evidence.

[56] It is not argued on appeal that the Crown could never lead the evidence because of the Charter breach; rather the principal point was that there was no link between the two areas of evidence. Furthermore, it was contended that if the officers' observations were admitted in the defence would find it very difficult to avoid bringing out other inadmissible evidence in the course of challenging the police officers' testimony.

[57] With respect, I think that the link between the blood alcohol reading and the appellant's apparent condition is obvious and compelling. The trial judge was quite right, in my respectful view, in saying that the jury must see a balanced picture. The appellant cannot insist on a selective presentation merely because cross-examination might involve some risk to the defence.

[58] This is an area where the trial judge's view of the case is of crucial importance. I would not interfere with his judgment on this evidentiary question.

5. Re-Charge on Reasonable Doubt

[59] The argument on this ground is that the trial judge failed to come to grips with the real problem troubling the jury on a question relating to reasonable doubt.

[60] On the second day of deliberations the jury asked for some evidence to be read back and delivered a note to the trial judge which said:

We would like to hear after lunch, also, your definition of reasonable doubt.

[61] The trial judge repeated the instruction he gave earlier on reasonable doubt and then he opened a discussion which led to a narrowing of the jury's concern:

THE COURT: Now, has that explanation satisfied you? You are all nodding affirmatively. THE FOREPERSON: May we tell you specifically what's

bothering us or is - THE COURT: No, go ahead. Does anybody have any objections to that? As long as you do not tell us what is part of your deliberations. Your deliberations have to be secret, but if you have another question, I have no difficulty in hearing what your concern is. THE FOREPERSON: So reasonable doubt has to be present in all aspects of evidence? THE COURT: No. I should tell you that - THE FOREPERSON: Just in one aspect? THE COURT: The Crown has to prove each ingredient of the charge beyond a reasonable doubt. That is to say, they have to prove identity beyond a reasonable doubt, they have to prove the date beyond a reasonable doubt, they have to prove that it took place at or near Likely, British Columbia beyond a reasonable doubt, and of course they have to prove that it was the accused, that is, identity. When I say identity, I mean it is the accused. They do not have to prove each individual item of evidence beyond a reasonable doubt. In other words, they do not have to prove that the accused was walking around the street at 6:30 beyond a reasonable doubt. They do not have to prove that Mr. Feeney was with Mr. Boyle on a prior occasion beyond a reasonable doubt. Those are individual pieces of evidence. You must assess the evidence as a whole and the principle of reasonable doubt applies to the whole of the evidence. Since you are all nodding affirmatively, we will then hear - is there any comment? I do not want any argument here in front of the jury, but if there is anything - MR. LUGOSI: There's no argument, My Lord. I thought it might be useful for you to instruct the jury whether or not a single reasonable doubt is sufficient or do they have to have more than one reasonable doubt. If you could clarify that, because I think that was the question that was asked. That's what the foreman asked, My Lord, was whether - how many reasonable doubts do you need, if one is sufficient. THE COURT: I do not understand that question, whether one reasonable

doubt. THE FOREPERSON: That really is our question. THE COURT: Oh, I see. All right. THE FOREPERSON: It hits it on the nail - nail on the head. THE COURT: All right. THE FOREPERSON: Is one hole in the box, to use Mr. Lugosi's analogy, sufficient to create reasonable doubt, or does it have to be - THE COURT: If that hole goes to an essential element of the Crown's case. If you have a reasonable doubt that the accused entered that residence and inflicted that damage upon Mr. Boyle, if you have a reasonable doubt on that then obviously your verdict would be not guilty, because the Crown did not prove identification beyond a reasonable doubt. The Crown must prove identification, they must prove that it took place at that location in Likely, they have to prove that it took place on a particular day. They have to prove also that he had the intent. I told you, when I gave you the ingredients of the offence of murder, the elements of murder, they have to prove each and every one of those. THE FOREPERSON: So to reiterate then, we just have to have one hole in the box, to use Mr. Lugosi's - THE COURT: Yes, if the hole in the box goes to an essential ingredient of the Crown's case. THE FOREPERSON: Like identity? THE COURT: Yes. But you must examine the whole of the case in order to assess and determine the question of identity, together with the lawyers' arguments and the law that I gave to you. All right. (emphasis added)

[62] The hole in the box refers to a metaphor employed by defence counsel in his address to the jury in which he pictured a mouse in a box with several holes, each providing a means of escape in the same way a reasonable doubt would provide a way to reach a verdict favourable to the appellant.

[63] When the jury retired to continue their deliberations, defence counsel expressed some dissatisfaction with the re-charge but did not suggest that the judge missed the point of the jury's question. In the course of his remarks defence counsel said:

MR. LUGOSI: Yes, My Lord. How I understood the

foreman's question was, how many reasonable doubts do we need in order to acquit, and I think the answer is a simple one: one reasonable doubt.

[64] Mr. Cornett submitted in this appeal that the jury wanted to know whether they all had to agree on the same doubt in order to reach a verdict of not guilty. He said the trial judge's discussion about the doctrine of reasonable doubt applying only to essential ingredients was confusing and distracting and the trial judge should have seen that an issue of consensus lay beneath the surface and that was the real problem.

[65] While it would have done no harm for the trial judge to have elaborated in this direction, I do not see in the record any implication that the consensus issue as framed by Mr. Cornett was on the jury's mind.

[66] In my opinion, the trial judge correctly understood the problem posed by the jury and satisfactorily addressed it.

7. Publication Ban

- [67] The appellant says that when the trial judge lifted the publication ban the jury were potentially exposed to news reports of evidence ruled inadmissible at various stages of the case including confessions and other incriminating material.
- [68] There is no question that extensive publicity followed the lifting of the ban in this notorious case.
- [69] The difficulty with this ground, however, is that it is unsupported by any evidence that the jury had access to publicity about the case while they were sequestered. Mr. Cornett said we could take judicial notice of the fact that the jurors had operating TV's and radios in their hotel rooms. I am not prepared to take that as a well known fact. My own experience leads me to assume that the deputy sheriffs would be careful to shield the jury from publicity during sequestration and I am surprised to hear it suggested otherwise.
- [70] I find no merit in this ground and I would reject it.

DISPOSITION

- [71] I would dismiss the appeal for the foregoing reasons.

"The Honourable Mr. Justice Donald"

I AGREE:

"The Honourable Chief Justice McEachern"

I AGREE:

"The Honourable Mr. Justice Low"

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