

CANADA / JUDGMENT

R. v. Handlen

2018 BCSC 2123

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Supreme Court of British Columbia

DECIDED

15 October 2018

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Handlen,

2018 BCSC 2123

Date: 20181015

Docket: 26757-23

Registry: Vancouver

Regina

v.

Garry Taylor Handlen

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Before: The Honourable Mr. Justice Cullen

Oral Ruling re Editing of Statements Made to Undercover Officers

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Place and Date of Hearing:

Vancouver, B.C.

October 10, 2018

Place and Date of Judgment:

Vancouver, B.C.

October 15, 2018

- [1] THE COURT: I will be giving two judgments this morning. The first one is in relation to the clip editing.
- [2] This is an application by both Crown and defence to determine whether portions of the utterances and interactions between the accused and undercover officers engaged in a Mr. Big operation leading to a confession by the accused should be edited. The Crown and defence have agreed to significant editing of the evidence and I have been asked to deal with what remains that they cannot agree upon.
- [3] After a lengthy voir dire (indexed as 2018 BCSC 1330), I ruled that the Crown's application to adduce the accused's confession to killing Monica Jack on May 6, 1978 should be allowed, subject to further applications with respect to individual items of evidence. At paras. 735 to 739 of my reasons for judgment, I ruled as follows:
- [735] The final issue to be determined under the Hart regime is whether the probative value of the Jack Homicide confession exceeds its prejudicial effect.
- [736] As noted earlier, the prejudice to the accused in Mr. Big scenarios is two-fold. It gives rise to moral prejudice based on the accused's willingness to join a criminal organization and to commit simulated crimes he believed to be real. It also gives rise to reasoning prejudice based on the need for an accused to repudiate his confession by claiming he was lying when he made it, and that he lied in order to maintain his position in the criminal organization.

[737] That prejudice to some degree or another infuses all Mr. Big cases. As noted in Hart at para. 108:

[108] In the end, trial judges must weigh the probative value and the prejudicial effect of the confession at issue and decide whether the Crown has met its burden. In practice, the potential for prejudice is a fairly constant variable in this context. Mr. Big operations are cut from the same cloth, and the concerns about prejudice are likely to be similar from case to case. As a result, trial judges will expend much of their analytical energy assessing the reliability of the confessions these operations generate.

[738] As noted above, the Supreme Court of Canada in Hart emphasized at para. 109 that the exercise is an inexact one requiring judges "to lean on their judicial experience to decide whether the value of a confession exceeds its cost."

[739] There is thus really no prescription for making the ultimate determination called for in Hart save for the need to weigh the reliability of the evidence and compare it to the potential for prejudice that its admission would perforce bring.

[4] It is clear that, although I found that the evidence of the accused's confession in the present case met the test for admissibility set out in *R. v. Hart*, 2014 SCC 52, in that its probative value outweighed its prejudicial effect, that does not gainsay the prospect that there will be some lingering prejudicial effects resulting from the admission of the evidence.

[DISCUSSION RE ACCUSED'S ABILITY TO HEAR]

[5] THE COURT: In para. 740 of my reasons for judgment, I held as follows:

The Court in Hart noted that trial judges, in performing the exercise, can take account of the possibility that prejudice can be mitigated by "excluding certain pieces of particularly prejudicial evidence that are unessential to the narrative", and, as well, by giving the jury limiting instructions: Hart at para. 107.

[6] In my view, while the Supreme Court of Canada's decision in Hart represented a ground shift in determining the admissibility of Mr. Big statements, it did not similarly overhaul the common law with respect to the admission of bad character evidence as contended by counsel for the accused.

[7] In Hart, in discussing how prejudicial evidence is measured, at para. 107 the Court held as follows:

On the other hand, the risk of prejudice can be mitigated by excluding certain pieces of particularly prejudicial evidence that are unessential to the narrative. Moreover, trial judges must bear in mind that limiting instructions to the jury may be capable of attenuating the prejudicial effect of this evidence. [Emphasis added.]

[8] The concept that "particularly prejudicial evidence" which is "unessential to the narrative" can be excluded is entirely in keeping with the manner in which the law regulating the admission of bad character evidence had developed prior to *R. v. Hart*. It is not a change in approach or direction.

[9] In *R. v. Bonisteel*, 2008 BCCA 344, the Court held at para. 45, in part, as follows:

Where a statement of the accused contains "evidence that may be irrelevant or unnecessarily prejudicial to the accused", "a very heavy duty lies upon a trial judge" to edit out those portions "yet insure that the remaining portions will retain their proper meaning in relation to the whole".

[10] As to the use of a prophylactic warning, a limiting instruction to remove the effect of the prejudice, the Court in *Bonisteel* held as follows at para. 50:

The decision whether a prophylactic warning will be effective to remove the effect of the prejudice is part of the balancing of the probative value and prejudicial effect of the evidence, starting, as the trial judge did, with the premise that the jury will obey the trial judge's instructions. The trial judge made very clear the principles on which he was relying to make his decision, and that he had considered all of the relevant questions. "Whether relevant evidence should be excluded on the ground that its prejudicial effect outweighs its probative value is a discretionary decision for the trial judge to which this Court should afford considerable deference": Redd at para. 38; see also Sims at para. 18. The appellant has not shown that in exercising his discretion the trial judge made any error of principle nor that his decision to admit the evidence was plainly unreasonable.

[11] In the case of *R. v. James*, 2012 BCCA 162, Mr. Justice Donald, sitting in chambers on a post-conviction judicial interim release application, summarized the law concerning the admission of prejudicial evidence in paras. 20 to 22 as follows:

[20] There is ample authority supporting the admission of evidence like this in Mr. Big scenarios. While it shows bad character it is nevertheless important for the jury to hear it for context and reliability of the ultimate confession: see for example, *R. v. Bonisteel*, 2008 BCCA 344 at paras. 41 and 45, 236 C.C.C. (3d) 170.

[21] The jury needs to be warned not to use the evidence for the forbidden purpose of propensity. The judge gave a clear instruction on the permissible and impermissible uses to which the evidence may be put.

[22] I am unable to appreciate why the relevance of such statements depends on their connection with the crime charged. The point of their admission was not to prove the appellant murdered the victim but to evaluate the reliability of her confession. Was it procured by fear or intimidation, or was it freely given? What was her relationship with the other players in the scenario? Was she terrorized by the prospect of violence within the organization or comfortable with it? These are some of the questions that the impugned statements could assist the jury in answering.

- [12] In the case before Mr. Justice Donald, the evidence put before the jury, which he found ample authority in support for the admission of, was far more prejudicial than anything sought to be admitted by the Crown in the present case. That evidence was described by Donald J.A. at para. 18 as follows:
- [18] In the course of the Mr. Big operation, the appellant was brought along to witness a simulated kidnapping and beating of someone who owed the gang \$300,000 and needed to be taught a lesson. Far from being horrified at this display of violence, the appellant made comments to the participants in this event that the victim got off easy. I quote from Mr. Hira's memorandum of argument where he describes the comments he submits should have been redacted:
20. ... Such statements included such phrases as: she said that she would curl his dick with a curling iron; she said that she would cut his knackers off; she suggested that they give him the date rape drug and cut his fingers off; she said that if murder was legal she would have taken care of somebody this week; and she said that she would put raw meat on his crotch and let the dogs at him.
- [13] In the present case, the bad character evidence woven into the interaction between the accused and the undercover officers at issue is comparatively less flagrant. It involves so-called high-impact scenarios in which the undercover officers in the accused's presence demonstrate a willingness to intimidate "clients" of the criminal organization using simulated threats or actions falling short of the simulation of actual violence. The accused demonstrated a willingness to participate in the scenarios and evidenced relish or enthusiasm in recounting to other members of the organization the details of those encounters, in some cases with some apparent embellishment.
- [14] In the present case, the focus of the defence objection relates to three separate areas of evidence involving these so-called high-impact scenarios. Scenario 66 concerned the simulation seizure of a Lexus vehicle from a woman played by Cst. H. The defence does not object to evidence being called about the circumstances of the event which involved the accused and Sgt. D. engaged in a protracted search for the character played by Cst. H., the Lexus and the circumstances of the eventual recovery of the Lexus.
- [15] The Crown has agreed to omit evidence that during and following the seizure of the Lexus, the accused made unsolicited utterances reflecting an intention or a willingness to act violently towards Cst. H.'s character. The defence only opposes a portion of clip 78.1 being put before the jury. During that clip, Mr. Handlen recounted the incident involving Cst. H. and the seizure of the Lexus to Cst. B. The defence takes objection to the latter portion of the clip in which the accused referred to Cst. H.'s character as a hooker and recounted how her purse was dumped out all over including "cock rings" and said, "That will teach her from running away from us" among other things.

- [16] Defence also objects to other clips in which the accused recounted the incident with some enthusiasm to other undercover operator members of the organization.
- [17] Scenarios 53 and 74 involved a simulated debt collection from a character played by Sgt. G. who owned a pizza restaurant. The defence does not oppose the Crown leading evidence through Sgt. D. about threatening Sgt. G. outside the restaurant, but opposes the playing of all clips from the scenario as 74 (except 74.2) in which D. and Handlen engage in the simulated enforcement of the debt by forcing G. to provide them with his debit machine. During that scenario, the accused initiated an interaction with the G. character in which he showed some aggression attempting to force G. to eat the pizza he was told to bring for Handlen and D., along with the debit machine.
- [18] Other clips objected to by the accused concerning the G. interaction involve the accused recounting the incident to other members of the organization.
- [19] The defence objects to all the references to scenario 78 which involve the accused and Cst. B. engaged in a dramatic car stop of a supposed notary public, played by Cst. B.R., whose debt had been taken over by the organization. The accused participated in the interaction during which B. purported to threaten B.R., and the accused again initiated some activities that he intended to cause the notary public to become intimidated or uncomfortable. Following the incident, the accused recounted the scenario to other organization members evidencing some enthusiasm and possibly embellishing the interaction to some extent. The defence opposes the admission of all the evidence related to the B.R. scenario including those clips which reveal the accused recounting the interaction to other members of the organization.
- [20] In my view, the passages and clips objected to by the defence are neither irrelevant nor unnecessarily or particularly prejudicial evidence. It is clear from the Supreme Court of Canada's decision in *R. v. Mack*, 2014 SCC 58, decided at the same time as Hart, that the same factors that were at play in the voir dire in assessing the threshold reliability of the confessions, are equally at play before the jury which is charged with the responsibility of determining their ultimate reliability. In Mack, the Court held as follows at para. 52:

With respect to the reliability concerns raised by a Mr. Big confession, the trial judge should tell the jury that the reliability of the accused's confession is a question for them. The trial judge should then review with the jury the factors relevant to the confessions and the evidence surrounding it. As explained in Hart, the reliability of a Mr. Big confession is affected by the circumstances in which the confession was made and by the details contained in the confession itself. Thus, the trial judge should alert the jury to "the length of the operation, the number of interactions between the police and the accused, the nature of the relationship between the undercover officers and the accused, the nature and extent of the inducements offered, the presence of any threats, the conduct of the interrogation itself, and the personality of the accused" -- all of which play a role in assessing the confession's reliability (see Hart at para. 102).

- [21] As I see it, the exchanges between the accused and the undercover officers objected to by the defence are a not insignificant part of "the circumstances in which the confession was made", and provide evidence of "the nature of the relationship between the undercover officers and the accused" as well as of the accused's personality. In particular, the evidence of the accused's involvement in the high-impact scenarios, and his apparently eager participation in them, demonstrates the extent to which he was comfortable with and even adopted the ethos of the organization.
- [22] The ethos of the organization included the idea of using intimidation as a tool against outsiders while protecting its members from external threats arising from bad acts so long as the members needing protection were honest about what they needed protection from. The evidence also tends to demonstrate that the accused had a confident demeanour with his colleagues and was not put off or intimidated by intimations of violence against those outside the organization.
- [23] The Crown has agreed to excise the alleged utterances of the accused relating to visiting violence on Cst. H.'s character as well as his claims to have been involved in past acts of violence. What is left consists primarily of his participation in and reaction to the activities of the organization and to his acceptance of its supposed ethos. That participation and even his apparent embellishment of it is part of the context in which the jury must judge the reliability of his confession to killing Monica Jack. To deprive the jury of that context would lessen its ability to assess the nature of the accused's relationship with the undercover officers, his personality and whether the theme of violence may compromise the reliability of his confession. That there may be some prejudice woven into his actions and utterances is not a reason to deprive the jury of that evidence.

[24] As noted in *R. v. Mack* at para. 55:

With respect to the bad character evidence that accompanies a Mr. Big confession, the challenge is a more familiar one. The trial judge must instruct the jury that this sort of evidence has been admitted for the limited purpose of providing context for the confession. The jury should be instructed that it cannot rely on that evidence in determining whether the accused is guilty. Moreover, the trial judge should remind the jury that the simulated criminal activity -- even that which the accused may have eagerly participated in -- was fabricated and encouraged by agents of the state.

- [25] In *Mack*, the Supreme Court approved of the judge's charge that the jury had to "carefully consider whether the themes of violence and the level of inducements may have compromised the reliability" of the appellant's confessions. Given that aspect of the jury's mandate, it seems to me, how the accused contemporaneously reacted to and subsequently viewed the simulated threats and threatening acts of the organization is relevant to the jury's assessment of the reliability of the accused's confession.

[26] I thus would not give effect to the accused's application to excise the clips or portions of the clips including 74.1, 74.3, 74.4, 74.5, 74.6, 78.1, 78.2, 78.3, 78.4.1, 78.5, 78.7, 78.8, 79.6, 79.8, 83.8, 85.1, 88.2 and 91.1.

[27] The second series of excisions sought by the defence and opposed by the Crown, and sought by the Crown and opposed by the defence, are found in clip 94.2 in which the accused confessed the Jack killing to Mr. Big, R/Cst. D.

[28] The first issue is raised on page 14 of clip 94.2 in the following exchange at lines 320 to 322.

320 GH: I don't tell a lot of people about my past. I told you I had a past.

321 MD: Well, I'm not even talking about that, I'm just talking about in general.

322 GH: Oh, whatever. I tell people only what I want 'em to know.

[29] Both Crown and defence agree that lines 320 and 321 should be excised as well as the first two words of line 322. The Crown seeks to admit the phrase "I tell people only what I want 'em to know." The defence opposes it on the basis that it is without context and may attract a distorted view of its meaning. In my view, the statement is not distorted by a lack of context and is revealing of the accused's personality and attitude towards sharing information. It fits with his assertion on another occasion that he views himself as "cagey". I conclude that utterance should be kept in the clip.

[30] The next issue is at page 33, lines 821 to 825 which read as follows:

820 MD This fuckin' DNA. This is something he sent me what he found on the file.

821 That's a picture of a, that's a composite sketch of who they saw.

822 GH It certainly ain't me.

823 MD Well, I don't know about that, 'cause that's you, right?

824 GH That looks like me.

825 MD Yeah, pretty good likeness.

[31] Both Crown and defence agree that in line 821, the words "of who they saw", should be excised as well as all of lines 823 and 824 and 825. The Crown submits, however, that the exchange: "MD There's a picture of a, that's a composite sketch", and GH responding, "It certainly ain't me", should be left in as it demonstrates that the accused, although confessing to R/Cst. D., was not simply going along with what was put to him, but resisted certain suggestions. The Crown says that is relevant to the veracity of the statement.

[32] The composite sketch being referred to was ruled inadmissible during the hypnosis voir dire for want of reliability. I conclude that the reference which the Crown seeks to admit should be excised. It is not the only example of the accused disagreeing with suggestions put to him by R/Cst. D. and it would be more confusing to the jury than helpful if the statement were

made without showing them the composite drawing, while showing them the composite drawing would be using inadmissible unreliable evidence to buttress the case against the accused.

[33] The third issue between the Crown and defence is at page 38 in the context of an exchange involving a picture. The full exchange at issue is from lines 932 to 945 as follows:

932 GH Never even seen the paper, picture.

933 MD Oh, I can show you a picture. I've got some of them here.

934 GH I don't even remember this picture.

935 MD Well it looks probably from what I saw, it's like y-, you were having

936 a few brushes with the law back then so.

937 GH Yeah. They must've taken this picture. The only reason I think it's

938 me is that scar.

939 MD What's the scar from?

940 GH I had s-, surgery on my neck. Another thing that gets me, this big

941 bunch of, oh that might not be, looks like a bunch of hair right

942 there. Like have grew here.

943 MD Yeah.

944 GH I've never been able to grow it there. I think that's probably just a

945 screw up.

[34] The defence submits line 933 should be included. The Crown says it should be excised. The parties agree that apart from that, lines 932 to 945 should be excised. The accused's argument is that when R/Cst. D. refers to a picture and then says, "I've got some of them here", it is open to interpretation that he is referring, at least in part, to a picture of Monica Jack.

[35] In my view, to leave in only line 933 would be, at best, confusing to the jury and, at worst, misleading. It appears clear that from the full context of the exchange, that the picture R/Cst. D. showed to the accused after that comment was a booking photograph of the accused. In those circumstances, any argument that what was referred to was a photograph of Monica Jack would be based upon an incomplete and possibly misleading premise.

[36] In a later exchange at lines 1043 to 1047, R/Cst. D. appears to show the accused a picture of Monica Jack. I do not see how the earlier exchange, as redacted, would or could contribute to the jury's understanding of that later exchange.

[37] The next exchange at issue between the Crown and defence relates to further discussion about the composite picture at lines 1182 to 1188. For the same reasons why I excluded the exchange at lines 823 to 825, I would exclude that reference as well.

[38] The next exchange at issue occurs at lines 1203 to 1211, which reads as follows:

1203 MD 'Cause if I, if I deal with this, and spend all this money -

1204 GH Yeah.

1205 MD -and for, they do the same thing on those other ones.

1206 GH Who says they can't plant DNA?

1207 MD Well, you know what? I'm not gonna get into that, like fuck,

1208 whatever, right?

1209 GH I don't know, but, no I don't, I don't know anything. If I did, I'd

1210 say, I already told you about this.

1211 MD I know, that's, well, I'm just being doubly sure 'cause it's, I'm sure

1212 it's hard to talk about.

[39] The parties agree that, because that passage is referring to other homicides which the accused was suspected of having committed, the passage, except for R/Cst. D.'s comment at lines 1211 to 1212, "I'm sure it's hard to talk about", should be excised. The defence, however, submitted that the accused's comment at line 1206, "Who says they can't plant DNA", should be left in because it could be interpreted as him questioning the authenticity of the DNA linking him to the Monica Jack killing.

[40] In my view, leaving in that line alone, and without its context, would significantly alter the likely meaning of the accused's utterance. In the lead-up to that exchange, Mr. Handlen told R/Cst. D. that the police were "after him for others" meaning other homicides, and R/Cst. D. raised the issue of the Herbert homicide and told the accused they - that is, the police - think he did that.

[41] The exchange at issue which would be excluded, reasonably interpreted, involves R/Cst. D. telling the accused that if he spent money to clear up the Monica Jack investigation, he would not want the police to do the same thing on those other ones with respect to establishing DNA linkages. To excise all the surrounding context and leave in only the line "Who says they can't plant DNA" would leave the jury with the false impression that the only context of that comment was the Monica Jack homicide, and it could only have related to the accused questioning the authenticity of that DNA link. In those circumstances, I conclude that the entirety of the passage from lines 1203 to 1211 (except for the last comment by R/Cst. D.), should be excised.

[42] The final issue of editing between Crown and defence is at lines 1527 to 1532 which read as follows:

1527 MD Yeah, you did, and I gave you the chance and you did, so, you just saved

1528 your fuckin' life, you know that?

1529 GH Mm-hm.

1530 MD 'Cause I don't think you wanna spend the next uh, the last whatever,

1531 however long you're gonna live in fuckin' jail. I know I wouldn't.

1532 GH I wouldn't. I think I'd end it. (INDECIPHERABLE).

[43] Crown and defence agree the first comment by R/Cst. D., "Yeah, you did, and I gave you the chance and you did", should be excised. The Crown says the remainder should be redacted; however, the defence says it should be included.

[44] In my view, it should be included even though the exchange comes at the end of a lengthy discussion between the accused and R/Cst. D. about the Herbert homicide. A reasonable interpretation is that the particular exchange concerns the accused's willingness to confess to the Jack homicide and being "saved" from the consequences of the impending investigation.

The Honourable Mr. Justice A.F. Cullen

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Prepared on 29 October 2026 · Esheria