
CANADA / JUDGMENT

R. v. James

2018 BCSC 1114

COURT

Supreme Court of British Columbia

DECIDED

5 July 2018

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2018 BCSC 1114 R. v. James

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. James,

2018 BCSC 1114

Date: 20180705

Docket: X079843-2

Registry: New Westminster

Regina

v.

Victor Junior James and

Stephen Smith

Before: The Honourable Mr. Justice Riley

Ruling on Application for Remedies re: Timing of Disclosure and Alleged Non-Compliance with
Expert Notice Provisions

Counsel for the Crown:

S.D. Smith

C.M. Karlsson

Counsel for Accused James:

C. Bauman

Counsel for Accused Smith:

M.J. Swartz

Place and Date of Trial/Hearing:

New Westminster, B.C.

May 2, 2018

Place and Date of Judgment:

New Westminster, B.C.

July 5, 2018

Table of Contents

Introduction. 3

Factual Background. 3

The Material in Issue in this Application. 4

Additional Body of Material Informing the Context of this Application. 5

Analysis. 6

(a) Footwear Impression Evidence. 6

(b) Phone Records from VPD Investigation and Report from VPD Technology Expert 13

(c) DNA Materials and Expert Reports. 16

Conclusion. 18

Introduction

[1] This is a ruling on an application by the accused Mr. Smith for various forms of relief in connection with alleged failure of the Crown to make timely disclosure, and alleged failure to comply with the expert evidence notice requirements found in s. 657.3 of the Criminal Code, R.S.C., 1985, c. C-46 [Code]. Mr. Smith's notice of application lists multiple forms of relief, specifically exclusion of evidence, adjournment of the trial, an order severing the two accused, or an order granting judicial interim release. As this application was argued on what was to be the first day of a scheduled 15 day jury trial, I gave my ruling immediately, with reasons to follow. These are the reasons.

Factual Background

[2] By way of background, the two accused Mr. James and Mr. Smith are charged with a series of offences arising out of an alleged home invasion that occurred in the early morning hours of 6 July 2016. The victim, Mr. Innes, was asleep in the master bedroom of his house on Queen's Avenue in New Westminster. There was no one else home. He was awoken by one or

more assailants who came into his room and proceeded to threaten and then beat him. Mr. Innes gave a statement indicating that one of the men demanded his bank card and PIN numbers, and then demanded that he reveal the whereabouts of his safe; Mr. Innis did not have a safe. He was brutally beaten by at least one man. The assailant(s) stole Mr. Innis's wallet, bank cards, several cameras and watches, and a television. They left and Mr. Innis called 911.

- [3] Mr. Innis suffered significant injuries and has little memory of the home invasion. He made an in-dock identification of the accused Mr. Smith at the preliminary inquiry, but he was unable to identify either accused in a photo pack identification procedure conducted several weeks after the event.
- [4] There is circumstantial evidence linking three individuals to the home invasion, those being the accused Mr. James, the accused Mr. Smith, and a former co-accused, Mr. Navarro. This circumstantial evidence indicates that the three men were together in Mr. Navarro's vehicle in the hours after the home invasion. There is CCTV video of a man who the Crown says is Mr. Smith trying to use Mr. Innis's bank card at a convenience store in New Westminster and at a gas station in Surrey, both within a few hours of the home invasion. There is evidence that Mr. James sold a camera stolen from Mr. Innis's house at a pawn shop in Surrey, and Mr. Navarro sold some jewellery stolen from Mr. Innis's house at a pawn shop in Vancouver. Finally, there is evidence that the police searched the apartment where Mr. James and Mr. Smith had been staying, seizing property stolen from Mr. Innis's house, and a pair of jeans with blood stains containing DNA matching Mr. Innis's DNA profile.
- [5] Mr. Smith was arrested one day after the home invasion. In a pre-trial ruling, I found that his Charter rights had been breached in the course of that arrest. I ruled the evidence seized during the arrest, including evidence about the clothes and shoes he was wearing, inadmissible under s. 24(2) of the Charter. Mr. Smith has been in custody since his initial arrest.
- [6] Mr. James was arrested about one week after the home invasion. He has been in custody since his arrest.
- [7] Mr. Navarro was also arrested about one week after the home invasion. He was initially charged together with Mr. James and Mr. Smith. However, about two months before the first trial date, the Crown stayed the charges against Mr. Navarro and announced an intention to call him as a witness against Mr. James and Mr. Smith.

The Material in Issue in this Application

- [8] The material which gives rise to this application falls into three categories:

- a) Materials produced by a proposed Crown expert, Sgt. Raymond, about footwear impressions taken from the crime scene, together with materials pertaining to a recently executed general warrant under which measurements were taken to obtain evidence of the accused Mr. Smith's foot size.
- b) Materials with respect to phone records of Mr. Navarro, obtained by the Vancouver Police Department ("VPD") in a separate investigation, and subsequently made available to the Crown. These phone records are the basis of an expert opinion of a proposed computer forensics expert, Cst. Merriott of the VPD.
- c) Materials with respect to DNA analysis of blood stains recovered from the jeans allegedly tied to the accused Mr. Smith, by two proposed DNA experts, Ms. Lyons, and Ms. Gandham. The Crown provided expert notice with respect to Ms. Lyons some time ago, and the material which has recently been provided is her working file. More recently, the Crown provided expert notice with respect to Ms. Gandham, but only out of an abundance of caution, as I understand the evidence to be elicited from Ms. Gandham is really just fact evidence with respect to the characteristics of the blood stains on the jeans in question.

Additional Body of Material Informing the Context of this Application

- [9] There is an additional body of newly disclosed material that informs the current defence application. That newly disclosed material relates to a VPD investigation of a separate home invasion incident, which occurred several days before the New Westminster home invasion leading to the charges against Mr. James and Mr. Smith. The VPD brought this material to the Crown's attention shortly before the first trial date in this matter, which was scheduled to commence on 2 February 2018. The VPD brought this material to the Crown's attention because there is at least some evidence linking Mr. Navarro, who the Crown may call as a witness in the present matter, to the Vancouver home invasion. The bulk of the VPD investigation material was disclosed on or about 20 April 2018, ten days before the second trial date in this case, following a consent disclosure order made by the Court in early April 2018.
- [10] The VPD investigation material is not the subject of the present defence application. However, it informs the defence application, because it was recently disclosed to the defence, and one would expect that defence counsel have had to devote a fair amount of their time and energy to reviewing and assessing it in the last ten days leading up to the trial.

Analysis

- (a) Footwear Impression Evidence

- [11] By way of background on this issue, I note the following.

- [12] Cst. Stengert is the crime scene analyst who examined Mr. Innis's house the day after the home invasion. A number of points emerged from Cst. Stengert's crime scene examination and subsequent analysis of the footprint impressions. First, Cst. Stengert identified a total of 14 footwear impressions, designated as F1 to F14. Some of these were on the main floor, and some were in the bedroom and ensuite bathroom where Mr. Innis was assaulted. Second, Cst. Stengert determined that there were two identifiable sets of tread patterns (a "herring bone" pattern, and a "circular" pattern with "horizontal bars"). The implication of this point is that it suggests there were least two assailants involved in the home invasion. Third, Cst. Stengert noted a number of footwear impressions, in blood, in the ensuite bathroom where Mr. Innis was assaulted. All of these appeared to have the same "circular" pattern with "horizontal bars", indicating that they were made by the same pair of shoes. Fourth, Cst. Stengert determined the "circular" patterned impressions were made by shoes with a "Sole Mate 11" tread. This tread is found on a number of different brands of shoes. All of this information was set out in task action reports prepared by Cst. Stengert and disclosed to defence counsel in late 2017.
- [13] In the course of their investigation, the police seized a number of pairs of shoes said to belong to Mr. James, Mr. Smith, and Mr. Navarro, which I will refer to as the "known footwear". Among these were the shoes Mr. Smith was wearing upon his arrest on 7 July 2016, the shoes Mr. James was wearing upon his arrest on 12 July 2016, and the shoes Mr. Navarro was wearing upon his arrest on 15 July 2016. I gather that all of these shoes were seized to determine if they could be forensically linked to Mr. Innis's house. There are three things to be noted about the "known footwear". First, as regards the shoe sizes of the suspects, the "known footwear" would suggest that Mr. James wears size 11 shoes, Mr. Smith wears size 13 shoes, and Mr. Navarro wears size 10 shoes. Second, as noted above, I previously ruled all of the evidence seized in the course of the arrest and search of Mr. Smith inadmissible under s. 24(2) of the Charter. Thus, the evidence about Mr. Smith's shoes, including his shoe size and the make and model of shoes he was wearing, would not be admissible if tendered by the Crown. Third, it appears that none of the "known footwear" samples matched the "Sole Mate 11" tread pattern identified by Cst. Stengert. This suggests that none of the shoes seized from the suspects were worn at the crime scene. This raises an interesting point about whether my previous ruling that admission of evidence by the Crown would bring the administration of justice into disrepute under s. 24(2) of the Charter could bar the defence from adducing that same evidence if it is helpful to the defence position at trial.
- [14] On 5 January 2018, about four weeks before the first trial date, the Crown gave notice under s. 657.3 of the Code that Cst. Stengert would be called as an expert witness in the area of crime scene examination, including footwear impression analysis. Enclosed with the notice were copies of Cst. Stengert's statement of qualifications, and a copy of Cst. Stengert's fingerprint reports.

- [15] At some point after 5 January 2018, counsel for one of the accused informed Crown counsel that the defence may challenge Cst. Stengert's qualifications as an expert in relation to footwear impression analysis. As a result, the Crown secured the assistance of a second forensics officer, Sgt. Raymond, who had more experience and training in the field of footwear impression analysis than Cst. Stengert.
- [16] On 22 January 2018, Crown counsel gave notice under s. 657.3 of an intention to call Sgt. Raymond (apparently in place of Cst. Stengert) as an expert in relation to footwear impression analysis. The notice indicated that Sgt. Raymond's c.v. (statement of qualifications) was attached, and that his expert report was "to be provided". Crown counsel's covering email to defence counsel stated that Sgt. Raymond was "currently reviewing the evidence and drafting a report in this matter".
- [17] On 30 January 2018, six days before the first trial date, the trial was adjourned due to disclosure and privilege issues pertaining to the VPD investigation. In a nutshell, Crown counsel advised counsel for the two accused that the Crown had been made aware of information that was potentially relevant to the case against Mr. James and Mr. Smith, but the Crown was unable to make disclosure of the material because it was privileged. At the time, the Crown was unable to state the nature of its privilege claim in open court. In these circumstances, I was satisfied that the trial could not proceed, and I adjourned it. As it turned out, the Crown's privilege claim was a claim of public interest privilege on the basis that the VPD was conducting an ongoing investigation of the Vancouver home invasion in which Mr. Navarro had been identified as a suspect. Eventually, a new trial date was set for 30 April 2018. As noted above, the bulk of the VPD investigation material was disclosed on or about 20 April 2018, ten days before the second trial, following a consent disclosure order made by the Court in early April 2018.
- [18] Meanwhile, there were a number of developments in relation to the footwear impression evidence.
- [19] On 13 April 2018, some two and one-half weeks before the second trial date, Crown counsel provided an updated disclosure package. In the covering letter, Crown counsel stated that "[n]ew disclosure includes reports by Sgt. Raymond regarding the shoe impressions and footwear". There were three significant points in Sgt. Raymond's report, arising from his review of the footwear impressions. First, Sgt. Raymond conclusively determined that none of the "known footwear" seized from the suspects was the source of the footwear impressions left at the crime scene. Second, in his review of Cst. Stengert's scene photographs, Cst. Stengert noted that there appeared to be three separate sets of footwear impressions. The significance of this point is that there may have been three assailants inside Mr. Innis's house. Third, Sgt. Raymond made a preliminary effort to determine the size of the shoes that made the "circular patterned" footwear impressions, but concluded that no such determination could be made "without further study of the suitable impressions and comparison to the specific sizes of exemplar footwear".

- [20] On 24 April 2018, six days before the second trial date, Crown counsel sent an email advising the defence that in an updated expert report, Sgt. Raymond provided an opinion that "the footprint in blood on the closet door was made by a shoe that is larger than size 11". This opinion would tend to exclude Mr. James (whose "known footwear" is size 11) and Mr. Navarro (whose "known footwear" is size 10) as the individuals responsible for leaving the bulk of the footwear impressions in the ensuite bathroom, where Mr. Innis was beaten. The Crown's interpretation of Sgt. Raymond's report, as set out in the covering email to defence counsel, was that, "The footprint evidence will now, in the Crown's submission, point to Mr. Smith, rather than Mr. James". (It appears from this statement that up until this point the Crown had assumed that Cst. Stengert's reference to "Sole Mate 11" shoes was a reference to shoes that were size 11, and thus implicated Mr. James. Crown counsel has since come to realize that "Sole Mate 11" is a particular make or style of sole, not a reference to size 11 shoes). Finally, Crown counsel's email further stated that "given Mr. Smith's shoe size cannot be inferred from the inadmissible shoes, the police are presently seeking a warrant to measure / size Mr. Smith's foot".
- [21] On 25 April 2018 (five days before the trial), the Crown provided a supplementary report from Sgt. Raymond indicating that in his review of Cst. Stengert's scene photographs, Cst. Stengert noted at least one additional footwear impression in the ensuite bathroom, not previously identified or designated by Cst. Stengert. Sgt. Raymond pointed out features of this footwear impression that were "different from all of the other impressions". The significance of this point is that it suggested there were two separate assailants in the ensuite bedroom where Mr. Innis was beaten.
- [22] On 27 April 2018 (the last business day before the trial), the police executed a search warrant to seize Mr. Smith's shoes and a general warrant to size Mr. Smith's foot, at the institution where he was remanded in custody pending trial. The information to obtain the search warrant was sealed and has not been disclosed as of the date of this ruling. I am told by Crown counsel that it was sealed "as a matter of course", which is a somewhat vexing assertion in light of the open courts principle. The results of the search have been disclosed to defence counsel.
- [23] It is against this backdrop that counsel for Mr. Smith has brought the present application, arguing that the Crown has failed to make timely disclosure of the footwear impression evidence, and that the Crown has failed to comply with the expert evidence notice requirements in s. 657.3 of the Code.
- [24] With regard to the issue of disclosure, I am not satisfied that the Crown has failed to provide timely disclosure of any material pertaining to the footwear impression evidence. The Crown's disclosure obligations only apply to material that is within the possession of the Crown and the investigating agency. It does not apply to material that does not exist. The problem with the footwear impression evidence in this case is not that the Crown failed to disclose any of it in a timely way, but rather that certain parts of the expert analysis were not done until a matter of weeks or days before the trial. In other words, all of the reports were

disclosed in a relatively timely way, and the real problem is that the work was not completed, and the reports themselves were not created in a timely way. Thus, there was no failure to comply with the Crown's disclosure obligations with regard to the footwear impression analysis.

- [25] The real issue here is compliance with the expert notice requirements in s. 657.3 of the Code. The notice requirement has two components. First, s. 657.3(3)(a) requires any party seeking to call an expert witness to give notice, at least 30 days before the commencement of the trial, of the intention to call an expert witness. The notice must include (i) the name of the expert, (ii) a description of the area of expertise, and (iii) a statement of the expert's qualifications. Second, under s. 657.3(3)(b), the Crown is required to provide a copy of the expert's report, or a summary of the expert's opinion, "within a reasonable period before trial".
- [26] In this particular instance, I find that the Crown complied with s. 657.3(3)(a). The Crown gave notice of an intention to call Sgt. Raymond, setting out the expert's name, the area of expertise, and enclosing a statement of qualifications, on 5 January 2018. However, I find that the Crown did not fully comply with the requirement to give reasonable notice of the substance of Sgt. Raymond's opinion under s. 657.3(3)(b). More specifically, the Crown gave reasonable notice with respect to most aspects of Sgt. Raymond's opinion, but failed to give reasonable notice with respect to one aspect of Sgt. Raymond's opinion, as discussed below.
- [27] I am satisfied that the Crown gave reasonable notice of Sgt. Raymond's initial and supplementary reports provided to the defence on 13 April 2018. I find that the Crown gave reasonable notice of the opinion evidence summarized in these reports. Although they were only provided some two and one-half weeks before trial, the gist of Sgt. Raymond's expert opinion in these reports was similar to the gist of Cst. Stengert's opinion, and the defence is in a position to know and respond to the substance of Sgt. Raymond's opinion.
- [28] I am not satisfied that the Crown gave reasonable notice of Sgt. Raymond's opinion regarding footwear sizing analysis of impression F14, located in the ensuite bathroom of Mr. Innis's house. The defence did not receive notice of this opinion until 24 April 2018, six days before the trial. The Crown says this footwear sizing opinion did not represent a significant change to its case because the initial footwear sizing analysis was considered to implicate one of the two accused, and the subsequent footwear sizing analysis implicated the other accused. From the Crown's perspective, this is not a significant change to its overall case. However, from Mr. Smith's perspective, the case against him insofar as the footwear impression evidence is concerned will have changed 180 degrees. As the Crown put in the covering email, "[t]he footprint evidence will now, in the Crown's submission, point to Mr. Smith, rather than Mr. James". As far as Mr. Smith is concerned, this is clearly a significant change, in respect of which he had no real notice until six days before trial. This change in the opinion evidence is compounded by the fact that one business day before the trial, the police executed a search warrant on Mr. Smith, to seize his shoes and size his feet. Of course, Mr. Smith's foot size would be no surprise to him, but the fact that the Crown will

seek to use this as evidence against him is something about which neither Mr. Smith nor his counsel had any notice until less than one week before the trial. In all of the circumstances, I must conclude that the Crown did not provide reasonable notice of Sgt. Raymond's footwear sizing opinion provided to the defence on 24 April 2018.

- [29] To be clear, at this point I am not prepared to find that this conclusion would extend to the additional factual observations reflected in Sgt. Raymond's updated report, dated 25 April 2018. In that updated report, Sgt. Raymond referred to a previously undesignated footwear impression in the ensuite bathroom, with tread features that were visibly different from the tread features on the other footwear impressions identified by Cst. Stengert in the ensuite bathroom. The significance of Sgt. Raymond's observation is that it suggests there were two assailants in the ensuite bathroom where Mr. Innis was assaulted. The Crown's position is that this aspect of Sgt. Raymond's updated report speaks to a factual issue, not an opinion requiring expertise in footwear analysis. The Crown says the evidence to be elicited from Sgt. Raymond on this point would not be an expert opinion, but merely testimony from a witness pointing to certain features of a tread pattern that can be distinguished from the visible features of other tread patterns. In principle, I accept the notion that a witness could testify about such a factual observation without being qualified as an expert. This kind of visual distinction could be drawn by a lay person or even by the trier of fact. It remains to be seen how that would play out in relation to the testimony of Sgt. Raymond. The point at which Sgt. Raymond's testimony on this point would move beyond mere factual observation and into the area of expert opinion is something that would have to be addressed in the course of the evidence.
- [30] Given the Crown's failure to provide reasonable notice under s. 657.3(3) with respect to Sgt. Raymond's footwear sizing opinion, I must consider the remedies listed in s. 657.3(4). These include granting an adjournment to allow for proper cross-examination of the expert, ordering the production of a report or summary of the expert evidence, or ordering the calling or re-calling of any witness.
- [31] Often, a failure to provide reasonable notice can be remedied by granting a brief adjournment, to allow the opposing counsel to properly prepare for cross-examination of the expert. However, in this case a brief adjournment would not suffice. The new footwear sizing opinion of Sgt. Raymond represents a significant change in the forensic evidence against Mr. Smith. The defence received notice of this opinion a mere six days before the trial. By this time, the defence was already contending with the disclosure of a significant volume of material pertaining to the VPD investigation, and would have little time to devote to assessing and responding to Sgt. Raymond's footwear sizing opinion.
- [32] I agree with counsel for Mr. Smith that given the significance of the opinion, and the differing interpretations of the forensic evidence as suggested in the Crown's correspondence, counsel would need a significant amount of out-of-court time to properly assess, investigate, and respond to the new opinion evidence. Counsel for Mr. Smith suggested that in view of the significance of the point, and the apparent change in

interpretation of the forensic evidence, he might be obliged to retain his own forensic footwear impression expert. This is not something that counsel could be expected to do in a matter of days, either before or during the trial.

- [33] I wish to make it clear that I am not ruling Sgt. Raymond's footwear sizing opinion inadmissible. Indeed, s. 657.3(4) does not give the court the authority to rule evidence inadmissible. My ruling is that, to the extent that the Crown chooses to rely on Sgt. Raymond's footwear sizing opinion, the defence would be entitled to an adjournment of the trial. It appears that the next available trial date may be months away, but in my view this is the cost that the Crown would have to bear if it chooses to lead opinion evidence on an important and contentious point in respect of which Mr. Smith has not been given reasonable notice.
- (b) Phone Records from VPD Investigation and Report from VPD Technology Expert
- [34] The New Westminster Police Department ("NWPD") obtained phone records from Mr. Navarro and from a ZTE cell phone seized from Mr. Navarro in the course of the home invasion investigation. The Crown disclosed these phone records to the defence some time ago. The Crown also gave notice of intention to call an expert witness, Sgt. Hooker, to testify about the material obtained from Mr. Navarro's ZTE phone during the home invasion investigation. This material is not the subject of Mr. Smith's application. Rather, Mr. Smith's application focuses on phone records and expert report obtained from the VPD investigation, relating to an examination of another phone seized from Mr. Navarro, an Apple iPhone.
- [35] The VPD materials were apparently not provided to the Crown in connection with this case until some time in April of 2018. This is because the VPD was conducting a separate investigation, of a separate allegation against Mr. Navarro. The Crown initially claimed privilege over the VPD file, to protect the VPD's ongoing investigation of Mr. Navarro. This claim was not resolved until early April of 2018, when the Court made a disclosure order in respect of the VPD investigation. The VPD then provided the Crown with information about its investigation, and the Crown made disclosure to the defence shortly thereafter. Included within that disclosure was the VPD's examination of Mr. Navarro's iPhone, which turned out to contain information relevant to the NWPD home invasion investigation.
- [36] On 19 April 2018, the Crown served the defence with notice of its intention to call an expert witness with respect to the VPD examination of Mr. Navarro's iPhone. The notice set out the name of the officer (Cst. Merriott), the area of expertise (forensic examination analysis of phone data and phone applications), and the expert's qualifications. On 28 April 2018, two days before the trial, the Crown provided the defence with Cst. Merriott's report, which is some 227 pages long. However, all of this must be taken in context. Part of that context is that, as I understand it, the iPhone evidence does not represent a significant part of the case against Mr. Smith. The phone contains a contact for "Biggz" (Mr. Smith's nickname). Apart from this, the data on this phone appear to show contact between Mr. Navarro and Mr.

James, and there is no evidence any contact with Mr. Smith. Counsel for Mr. James has explained that he intends to rely on some of the phone records to support his position, so he does not join in Mr. Smith's application for remedies associated with either untimely disclosure or lack of proper expert notice with respect to these records. Also, while the report is 227 pages, much of it is completely irrelevant and consists of contacts between Mr. Navarro and completely unrelated third parties.

- [37] With regard to the issue of disclosure, I am not satisfied that the Crown has failed to provide timely disclosure of any of the material pertaining to Mr. Navarro's phone obtained from the VPD investigation. The material was not in the possession of the Crown or the investigative agency responsible for this prosecution, the NWPD, until relatively recently. The Crown advised the defence when it became aware of this material, and made disclosure of the material in a timely way, once it had been provided by the VPD in order to comply with a court order.
- [38] Turning to the issue of compliance with the expert notice requirements in s. 657.3 of the Code, the Crown provided notice of intention to call Cst. Merriott on 19 April 2018, which is less than the 30 days before trial required under the statute. The Crown provided Cst. Merriott's report on 28 April 2018, less than one business day before the trial. I therefore conclude that the Crown did not comply with the notice requirements in s. 657.3(3).
- [39] Given the non-compliance with the notice requirements, I must consider the remedies available under s. 657.3(4). In the particular circumstances, I find that the appropriate remedy would be to allow for a brief adjournment, during the trial, to provide defence counsel with an opportunity to prepare for cross-examination of Cst. Merriott. The reason for the late notice is understandable, as the Crown did not receive the VPD material until a matter of weeks before the trial. The records do not appear to be a key feature of the case against Mr. Smith, although they may afford circumstantial evidence against him by showing contact between Mr. Navarro and Mr. James during times when it may be alleged that Mr. Smith is with Mr. James. Finally, having regard to the subject matter of the report, it does not appear to be something requiring a great deal of time to assess, and prepare a proper response. This is not an area where counsel for Mr. Smith suggests any need to conduct independent investigation or retain a defence expert. Counsel for Mr. Smith conceded during the hearing of this application that this is not a matter that would necessitate an adjournment of the entire trial. To the extent that counsel requires time to prepare for cross-examination of Cst. Merriott, a brief adjournment (perhaps half a day, depending on when in the trial this witness is called) will suffice to address any prejudice arising from the failure to comply the notice requirements.

(c) DNA Materials and Expert Reports

- [40] The most significant piece of DNA evidence will be evidence of two blood stains, located on a pair of pants linked to Mr. Smith. These blood stains were found to contain DNA matching the DNA profile of the home invasion victim, Mr. Innis. As I understand it, the DNA evidence

will come from two witnesses. Ms. Lyons is the DNA expert who will testify about the tests done to determine that the blood stains matched the DNA profile of Mr. Innis. Crown counsel informs me that the Crown gave notice of intention to call Ms. Lyons as an expert, along with her c.v. (statement of qualifications) and her report, well in advance of the 30 day requirement set out in s. 657.3(3)(a) of the Code. I do not have the details, but counsel for Mr. Smith does not appear to dispute this assertion.

- [41] There are, as I understand it, two particular categories of DNA material which form part of Mr. Smith's present application.
- [42] The first category of DNA material referred to in Mr. Smith's application is some 445 pages of material from Ms. Lyons. I gather this material was provided to the defence in a disclosure package dated 20 April 2018. The Crown says that while it is a large volume of material, it is not particularly significant because it is simply Ms. Lyons's working file. The Crown says it does not materially alter any of the conclusions set out in Ms. Lyons's expert report, which was disclosed and served on the accused in a timely way, and in compliance with the expert notice requirements. The Crown adds that there will be admissions of fact with respect to the DNA identification, and Ms. Lyons is being called simply to give context to that admitted DNA evidence. Counsel for Mr. Smith did not seriously argue against this suggestion.
- [43] The second category of material referred to in Mr. Smith's application relates to Ms. Gandham. In Ms. Gandham's case, the Crown did not initially provide notice of an intention to call her as an expert. However, on 26 April 2018, the Crown provided the defence with an expert notice, outlining the areas of proposed expertise, and indicating that Ms. Gandham's statement of qualifications and her materials (consisting of a working file) had already been disclosed. In submissions before me, counsel for the Crown stated that the Crown had served this expert notice out of an abundance of caution. As I understand it, Ms. Gandham was the technician responsible for examining the items submitted to the forensic lab, locating material suitable for DNA analysis, and then submitting samples for DNA comparison by Ms. Lyons. In this sense, Ms. Gandham's testimony would really just be fact evidence, and the Crown merely served expert notice to fend off any objection to the admissibility of Ms. Gandham's fact evidence.
- [44] Whatever the reason, the fact is that the Crown's notice of intention to call Ms. Gandham as an expert was not served until 26 April 2018, which was less than 30 days before trial as required under s. 657.3(3)(a). However, in the course of submissions, Crown counsel indicated that if the defence continued to object to the Crown's intention to qualify Ms. Gandham as an expert, then the Crown would not pursue the issue and would simply call Ms. Gandham as a fact witness, to describe the steps she took in identifying, selecting, and submitting samples for DNA analysis. In light of this position, I need not rule on the question of remedy for this non-compliance with the notice requirements in s. 657.3(3) in respect of Ms. Gandham's testimony. As I understand it, if the defence continues to object to the Crown's intention to elicit expert evidence from Ms. Gandham, the Crown will simply lead evidence from Ms. Gandham without qualifying her as an expert.

[45] Without conducting a full analysis on the issue of the appropriate remedy, I note my earlier observation that often a brief adjournment to allow opposing counsel to prepare for cross-examination will suffice. That remedy might well have been appropriate here in view of the limited nature of the opinion evidence, and the fact that the underlying materials had apparently been disclosed in a timely manner. Counsel for Mr. Smith conceded during the hearing of this application that this is not a matter that would necessitate an adjournment of the entire trial. But it is unnecessary for me to rule on the question at this point, because I understand that the Crown now intends to avoid the issue entirely by calling Ms. Gandham as a fact witness, rather than an expert.

Conclusion

[46] My conclusions are:

- [47] With respect to the footwear impression evidence, there has been no breach of the Crown's disclosure obligations. The Crown has partially failed to comply with s. 657.3(3)(b), by failing to give reasonable notice of Sgt. Raymond's footwear sizing opinion. If the Crown intends to lead evidence from Sgt. Raymond on this particular point, then counsel for Smith would be entitled to an adjournment of the trial.
- [48] With respect to the phone records, there has been no breach of the Crown's disclosure obligations. There was a failure to comply with the expert evidence notice requirements in s. 657.3(3) in respect of the proposed opinion evidence of Cst. Merriott. The remedy for this non-compliance is to grant a brief adjournment of the trial proceedings, of perhaps half a day at the appropriate time during the trial, to allow Mr. Smith's counsel to prepare for cross-examination of Cst. Merriott.
- [49] With respect to the DNA evidence, there has been no breach of the Crown's disclosure obligations. There was a failure to comply with the expert evidence notice requirements in s. 657.3(3) in respect of the proposed opinion evidence of Ms. Gandham. However, I need not rule on the question of remedy, since at this point the Crown is prepared to forego any effort to qualify Ms. Gandham as an expert, and will simply lead evidence from her as a fact witness.

"Riley J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/18/11/2018BCSC1114.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-james-2018>

Prepared on 27 October 2026 · Esheria