

CANADA / JUDGMENT

R. v. Khan

2013 BCSC 249

COURT

Supreme Court of British Columbia

DECIDED

18 February 2013

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2013 BCSC 249 R. v. Khan IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Khan, 2013 BCSC 249 Date: 20130218 Docket: X70004 Registry: New Westminster Between: Regina And Amjad Khan and Naim Saghir BAN ON PUBLICATION PURSUANT TO S. 517(1) AND 539(1) OF CRIMINAL CODE Before: The Honourable Mr. Justice Josephson Voir Dire Ruling re: Evidence of Funk Counsel for Crown: D. Ballyk S. Sidhu Counsel for Accused Naim Saghir: S. Buck Counsel for Accused Amjad Khan: R. Claus Place and Date of Hearing: New Westminster, B.C. February 13 - 15, 2013 Place and Date of Judgment: New Westminster, B.C. February 18, 2013

- [1] Mr. Funk gave evidence in a voir dire describing the general workings of cellular technology and provided interpretation of Cell Detail Reports (CDR) that were previously entered into evidence as Ex. 12, 13 and 14. Relying on maps marked on Exhibit C in the voir dire, Mr. Funk also gave evidence as to the general location of a number of cell phones during a period of time relevant to issues in this case. The Crown, at trial's end, hopes to be able to demonstrate that the accuseds were in possession of these cell phones and seeks to admit Mr. Funk's evidence as circumstantial evidence as to the general direction of travel for these phones over a certain period of time.
- [2] There is little issue with the law on this issue. The Crown and defence principally rely on R v. Bartkowski (unreported decision of Macaulay J. dated March 9, 2005), R. v. Hamilton, 2011 ONCA 399 and R. v. Cyr, 2012 ONCA 919. In my view, although there are differences as to the specific types of evidence in question, the cases are consistent in their differentiation between factual evidence and opinion evidence related to cell phone technology and the interpretation of CDR and other factual data.
- [3] The evidence given by the witness identified which cellular sites were engaged by certain cell phones at certain times. The witness testified that fanning out from each site are three pie shaped "sectors", each creating a 120 degree angle from the site. The witness prepared maps of the area which were presented in court using a power point presentation. The map evidence identifies the sector of the cell site engaged by the cell phone in each call or SMS (text message). Mr. Funk testified that he used a protractor to draw the broken sector lines based upon his knowledge of the sector coding and the sector placement (relative to degrees) used by each carrier.

- [4] The defence fairly acknowledges that factual evidence relating to cell phone technology and the interpretation of call records is admissible on the basis of the principles set out in Bartkowski, but submits that the evidence strays into impermissible opinion and hearsay in some areas and seeks exclusion of that evidence.
- [5] One area where the defence argues that the witness transgressed the line into opinion is Ex. B, the synopsis report prepared by the witness. The Crown fairly acknowledges that and no longer seeks to have that exhibit entered into evidence.
- [6] However, I understand that defence also takes issue with the admissibility of Ex. C, or at least certain parts thereof. That exhibit contains maps depicting the locations of various addresses that are of interest in this case, as well as visual representations as to the locations of the cell sites with broken lines illustrating the angle of the sector that was activated for each call record. Defence contends that Exhibit C is essentially a pictorial description of the opinions set out in Exhibit B.
- [7] I disagree. The maps are no more than a demonstrative aid representing the factual evidence which is clearly admissible. As the witness testified, he created the maps first, using the facts available to him, and then formed his opinions which are articulated in his report.
- [8] In Bartkowski, the court did not allow certain illustrative evidence to go before the jury, fearing it might entice the jury to add greater weight to the evidence that would otherwise have been appropriate. There is no such fear in this case. The maps and the related Power Point presentation merely assist the court in understanding the underlying factual evidence. They do not attempt to lead the court into accepting a more particularized location for any of the cell phones than would otherwise have been the case. Exhibit C will be admitted.
- [9] However, the witness was asked to circle the approximate area within which the cell phone would generally have been located at the time of each call or SMS. I accept the defence submission that this encircling is opinion evidence as the CDR records relied upon do not reveal that kind of information. Mr. Funk is not an engineer and is not qualified to provide opinion as to the geographical footprint that is serviced by a given cell site. That evidence will not be admitted. Rather than requiring the Crown to re-submit clean copies of the maps, the parties can rely on me to disabuse my mind of that evidence.
- [10] The defence submits that Mr. Funk cannot offer evidence with respect to the sectors associated with cellular sites belonging to Roger's telecommunications. As mentioned, these sectors are depicted on the maps in Exhibit C. This argument is based on Mr. Funk's evidence that he had been employed by Telus before he formed his consulting business. Defence submits that Mr. Funk is not qualified to offer evidence on the sectors of Rogers' cell sites, as Mr. Funk has never worked for Rogers. In support of this argument, defence relies upon Mr. Funk's evidence that he gathered information regarding these sectors from an individual employed by Rogers, and that he routinely consults with this individual on these matters. Defence contends that any knowledge Mr. Funk has of the positioning of Rogers'

cell site sectors, he assumed to be true based upon what he heard from a Rogers employee, and as such, this evidence amounts to hearsay and is therefore inadmissible.

- [11] Mr. Funk retired many years ago from Telus and has been employed in the consulting business doing exactly this kind of work with respect to all cellular sites, not just those restricted to Telus. He testified that he is on a schedule for this type of consulting work and has, at various times, worked for the police, Crown, and on a few occasions, for the defence. This type of evidence, as noted in Bartkowski (at paras 15-16), must still be offered by a "qualified witness" and it is my respectful view that Mr. Funk is so qualified by the nature of his work and experience with respect to sites belonging to both Telus and Rogers.
- [12] It may be that the weight of his evidence with respect to differing sector locations for Roger's cell sites could be affected at trial's end. The Crown informed the court that it intends to call a qualified Roger's employee in the hopes of adding weight to this aspect of Mr. Funk's evidence.
- [13] Finally, the defence submits that Mr. Funk's evidence that a phone can activate different sectors of a site if close to the border of a sector is opinion evidence and should be excluded. I respectfully disagree. That is a fact and will be a factor that may be considered in determining the weight to be given to this circumstantial evidence at the end of the trial. "Josephson J."

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