

CANADA / JUDGMENT

R. v. Koopmans

2015 BCSC 2501

COURT

Supreme Court of British Columbia

DECIDED

12 March 2015

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2015 BCSC 2501 R. v. Koopmans

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Koopmans,

2015 BCSC 2501

Date: 20150312

Docket: 41337-2

Registry: Penticton

Regina

v.

John Koopmans (also known as John Ike Koopmans)

Restriction on publication: Pursuant to ss. 486.5(2) and 648(2) of the Criminal Code of Canada

Before: The Honourable Madam Justice Maisonville

Oral Ruling re Jury Questioning of Witnesses

Counsel for the Crown:

F.A. Dubenski

S. Currie-Roberts (Articled Student)

Counsel for the Accused:

D.W. Skogstad

R. Okayama

C.F. King

K.J. Lundman

Place and Dates of Trial:

Penticton, B.C.

February 16-20, 23-26,

March 2-6, 9-13, 16-20, 23-27, 30, 31, April 1, 2, 7-11, 2015

Place and Date of Judgment:

Penticton, B.C.

March 12, 2015

- [1] THE COURT: This ruling has arisen in response to events that occurred during the early part of Mr. Koopmans' jury trial, which is in progress and is scheduled to occur over a total of 25 days. It addresses the issue of whether jury members can ask questions of witnesses during the course of a trial. I have ruled that certain questions may be permissible, where those questions meet the requirements and the procedure outlined in this ruling is followed.
- [2] The issue of a jury's ability to question a witness arose during the course of testimony provided by Constable Russell, a witness for the Crown. During a recess, the jury informed the sheriff that they would like more information about parts of Constable Russell's testimony that related to phone records.
- [3] The sheriff came to me for direction. I asked the sheriff to clarify the jury's question by having them write it out, and raised the issue with counsel for the parties after providing them with a copy of the written question.
- [4] It later became clear that the jury's uncertainty related to phone records mentioned by the witness during the course of cross-examination. Constable Russell had testified that those phone records were disclosed pursuant to a production order and included Mr. Koopmans' phone conversations while in custody. The jury asked for clarification of the phone records and who was involved.
- [5] Crown counsel, Mr. Dubenski, had not raised the issue of the phone records in direct examination. Counsel for Mr. Koopmans, Mr. Skogstad, raised the issue in cross-examination, but the questioning mainly concerned which correctional centre was captured by the order.
- [6] The witness clarified that the logs related only to the Kamloops Regional Correctional Centre. That was the extent of counsel's questioning on this topic.
- [7] Counsel for Mr. Koopmans later advised me that that was the only information he wished the jury to consider on this topic.

- [8] Ultimately, admissions were drafted to address this issue.
- [9] Turning to the authorities on the issue of questioning of witnesses by jurors, the Honourable Mr. Justice E.G. Ewaschuk in *Criminal Pleadings & Practice in Canada*, 2d ed. (Aurora: Canada Law Book, 1988) summarizes that a trial judge has the discretion to permit jurors to put questions to witnesses where those questions do not elicit inadmissible evidence.
- [10] In the Honourable Mr. Justice David Watt's *Helping Jurors Understand*, (Toronto: Carswell, 2007), the author canvasses the advantages and disadvantages of questioning of witnesses by jurors. Justice Watt notes that permitting jurors to ask questions makes them more active participants in the trial and, therefore, enhances their understanding and furthers the goal of informed decision-making.
- [11] However, Justice Watt also notes that allowing jurors' questions is controversial, as it could affect counsel's presentation of his or her case, lengthen the trial, introduce the risk that jurors may shift from neutral factfinders to advocates or create an impression that the fact that a question was not permitted speaks to the importance or reliability of the witness's testimony.
- [12] I am not aware of and have not been directed to any British Columbia authority on this point. However, appellate courts in other jurisdictions have accepted questioning of witnesses by jurors, and I find those decisions helpful. I will summarize three of those decisions and note that each has endorsed a procedure that addresses concerns of the type articulated by Justice Watt.
- [13] In *R. v. Andrade* (1985), 18 C.C.C. (3d) 41 (O.N.C.A.), the court upheld the decision to allow a juror to indirectly question the accused by indicating a lack of clarity on a certain point to which defence counsel then directed questions. The court noted at p. 59 that there seems to be no doubt that the trial judge may, in his discretion, permit questions to be put to a witness by a juror. However, of course, the judge should not permit a question which, if answered, would elicit evidence that is inadmissible.
- [14] In *R. v. Gagnon*, 74 C.C.C. (3d) 385 (C.A.), the Quebec court overturned a trial decision in which the jury and judge took on the role of advocate while questioning the accused. In so doing, the court accepted that jury questions are not prohibited. However, it stressed that the jury should be pre-directed as to when those questions are appropriate in light of counsel's adversarial strategies that the judge must act as filter and that the jury should not become a third examining party.
- [15] In *R. v. Druken*, 2002 NFCA 23, the court endorsed those portions of the trial decision in which the judge invited and permitted questions from the jury. The endorsed procedure set out a four-part process:
- (a) the jury was given the opportunity to consider questions at the end of each witness's testimony;

- (b) any questions were then reduced to writing;
 - (c) the judge invited submissions from counsel in the absence of the jury; and
 - (d) the judge ruled on the admissibility of the question accordingly.
- [16] The trial judge's preliminary instruction to the jury stressed that questions should be aimed at clarifying the evidence that is troubling or missing, should normally be very few in number, and would not be permitted where they are inconsistent with admissibility rules.
- [17] Overall, I find that applying this procedure for questioning of witnesses by jurors is consistent with the guidance provided, albeit in another context, by the British Columbia Court of Appeal in *R. v. Thomas*, 20 B.C.L.R. (2d) 241 (C.A.), where the court stated at p. 250:

The judge should give the jury such reasonable assistance as they require and request, subject always to the condition that giving the jury the assistance that they have requested will not jeopardize a fair trial.

- [18] From these authorities I conclude that a trial judge can exercise his or her discretion to allow questioning of witnesses by jurors in the course of a trial. If allowed, the authorities support a procedure where:
- (a) clear preliminary jury instruction is provided;
 - (b) the questions are considered only at the end of a witness's testimony;
 - (c) the questions are reduced to writing;
 - (d) counsel is given the opportunity to make submissions in the absence of the jury, and;
 - (e) the judge considers whether the question is admissible in light of counsel's submissions and the usual rules of admissibility.
- [19] I note that this case does not address the advisability of providing a pre-emptory preliminary instruction on the questioning of witnesses by the jury in every case. Here, the jury raised a question and the court has proceeded accordingly. The issue of when a pre-emptory preliminary instruction should be provided is not before me.
- [20] Turning to the facts of the case at bar, I initially expressed a view that jury questions during the course of this trial could be inappropriate. However, in consideration of submissions from counsel and upon a review of the summarized authority, I determined that setting a procedure to consider the questions was appropriate in this case.
- [21] Accordingly, I instructed the jury as follows [as read in]:

I will now address the matter of questions from the jury. During the course of the trial, some of you may want to ask a question or two of a witness because there is something that's troubling you about the evidence or something that you think is missing. After each witness gives his or her evidence, I will try to remember to ask you if you have a question for the witness.

It will be necessary, if you do have a question, for you to put that question in writing because I would have to have a look at the question, make sure it's a proper one, and give counsel the opportunity of any submissions in that regard. We do have clear rules on what types of questions are permitted, and these rules exist to ensure that the trial is fair, fair to John Koopmans and fair to the Crown, so I want to make sure that any questions, as with questions from counsel, both defence and the Crown, observe all legal and procedural rules necessary.

Any questions from the jury must observe those rules, and I will ensure that the questions respect those rules where they are posed to a witness. The questions should be placed in writing.

In respect of these questions, please bear in mind that counsel, Mr. Dubenski and Mr. Skogstad, well know this case and know the types of matters that should be placed before you in order for you to reach your conclusions on this matter. Because of that, I suggest that you will have very few, if any, questions, but nevertheless, I will give you the opportunity to advise whether you do have any.

If I decide, after hearing from counsel, that the question is appropriate, I will pose the question to the witness on your behalf. Thank you.

[22] From the time of this instruction forward, the jury retired at the conclusion of each witness's testimony to quickly provide any potential questioner the opportunity to put their question in writing and to provide it to the foreperson. This process ensured that the identity of the questioner remained unknown. The jury members were given clear instruction that they were not to deliberate during that time.

[23] The process outlined above then continued for a number of days. The jury generally returned rapidly to advise that there were no questions and the next witness was then called. However, at one point the jury returned with a question that attempted to elicit information beyond the scope of those questions that had been put to the witness by counsel. In particular, the jury asked why a witness returned to town rather than continued home and whether she saw anything of note when she later drove by the scene on her way home.

[24] Based on this event, I determined that a further instruction was required to help the jury understand the scope of appropriate questions. My instruction on this point was based on the guidance provided in *Druken*, and I appreciate that the language used in relation to "missing" information could be interpreted as providing a wide scope for jury questioning. However, that was not my intended meaning.

[25] Providing a wide scope for questions is not consistent with the need to address the potential issues accompanying instances where questioning of witnesses by juries is acceptable. I have determined that, in this case, questions should only be aimed at clarifying information put to the witnesses. This approach ensures that counsel, who know their case best, will remain in the driver's seat. This will also counter concerns that the jury may move into the role of advocate by seeking out further lines of inquiry.

[26] Further, setting a clear limit restricting all questions that seek out further information will prevent juror speculation as to why, later, potentially more expansive questions are not permitted.

[27] Accordingly, I ruled that the second set of questions should not be put to the witness, and I instructed as follows [as read in]:

In this case, you recall that there was some confusion about some evidence that was cleared up this morning, for example. For this reason, we have adopted the procedure of asking questions.

I tell you now that the questions that you have are to be of that nature, and there is a difference between clarification questions and those seeking out further information. You may recall my opening comments to you about not seeking out information. As I instructed you, Crown and defence counsel know this case and will be posing the questions they need to elicit what they think will be relevant to this case.

It may be that information is not always provided, but I tell you now that the nature of your questions should only be to address something that you find confusing that can be cleared up. In this case, you are judges of the facts, not lawyers or investigators.

I must caution you about premature deliberation and premature conclusions, and I caution you that, if I decide a question posed by you will not be answered, you are not to draw any evidentiary conclusions from it.

[28] In conclusion, I have determined that questioning of witnesses by jurors may be appropriate in this case and set out a procedure to consider those questions accordingly. Appropriate questions will be in the nature of clarification rather than with an aim to seek out further information. If such a question arises, its admissibility will be evaluated pursuant to the procedure and criteria in this ruling.

"Maisonville J."

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Prepared on 28 October 2026 · Esheria