

CANADA / JUDGMENT

R. v. Millington

2015 BCSC 1518

COURT

Supreme Court of British Columbia

DECIDED

27 January 2015

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2015 BCSC 1518 R. v. Millington IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Millington, 2015 BCSC 1518 Date: 20150127 Docket: 25752-4 Registry: Vancouver Regina v. Kwesi Millington Before: The Honourable Mr. Justice Ehrcke Oral Ruling re Admission of Voir Dire Transcripts into Evidence Counsel for the Crown: E.V. Gottardi S.K. Fenton Counsel for the Accused: R.R. Hira, Q.C. S.M.R. Conroy Place and Date of Hearing: Vancouver, B.C. January 27, 2015 Place and Date of Judgment: Vancouver, B.C. January 27, 2015

- [1] THE COURT: We have now reached that point in the trial where I have given a ruling on the voir dire, and rather than recall the witnesses to testify on the trial proper, the defence is tendering transcripts of the testimony of the two witnesses on the voir dire but with certain exceptions to comply with the terms of the ruling that I have made on the voir dire. Counsel for the Crown and the defence have gone through the transcripts and have very helpfully worked to reach agreement with respect to the majority of the passages that need to be excluded in order to conform with the ruling that I gave this morning. There are, however, four passages from the transcript that remain in dispute, and I will make a ruling on those four.
- [2] The first is found in the transcript of January 20 from page 26, line 19 to page 27, line 6. This comes in the direct-examination of John McKay on his qualifications. In this passage, Ms. Conroy, counsel for the accused, asks the witness about something mentioned on page 9 of his curriculum vitae where he states that he has been qualified as an expert in the phenomenon "tetanus involuntary clenching related to firearms". He is asked to explain that, and he gives an explanation. Crown counsel submits that this should be excluded on the trial proper on the basis that it is irrelevant. Defence counsel submits that it is simply asking him to explain something that appears on his curriculum vitae and would otherwise remain something of a mystery.
- [3] I am satisfied that this passage should be excluded from the trial. The phenomenon of tetanus involuntary clenching related to firearms has absolutely nothing to do with any of the issues raised on this trial, so it is simply irrelevant.

- [4] Over and above that, it is potentially contrary, as well, to the spirit of the ruling that I gave this morning related to expert evidence on the effects of stress. At page 26, lines 34 to 35, the witness states in relation to this phenomenon of tetanus involuntary clenching related to firearms: "Usually under stress these things occur."
- [5] So there is a specific reference there to the physiological effect of stress on the human body, and I have already ruled that this witness is not to be qualified in areas relating to the effect of stress, so that passage shall be excluded.
- [6] The other passages in dispute are all found in the transcript of January 22, 2015. The first passage is at page 20, lines 39 to 40. In this passage, counsel for the accused is asking Sgt. Fawcett a series of questions about the options open to an officer armed with a Taser if the officer perceives that the deployment of the Taser is not having the requisite effect. The witness answers that there are three possible options that are provided to officers in their training. He states that the second option involves taking some steps with the Taser instrument itself, and then he is asked this question on page 20, line 37: Q The second option, how long does that take? That is, start all over again. He replies, at line 39: A In a relatively low-stress environment, where the only threat is really an ego threat, it's approximately five seconds, My Lord.
- [7] It is the first two lines of that sentence that are objected to, namely, the words "in a relatively low-stress environment, where the only threat is really an ego threat." The Crown does not object to the remainder of the reply to that question.
- [8] It is unclear quite what the witness was trying to express in this passage, but it has the implication that the degree of stress would have an effect on the length of time that it takes to put the second option into operation. He does not say whether it would increase the amount of time or decrease the amount of time, but I think anyone hearing this would naturally interpret it as meaning that it has at least some effect on the amount of time, so again, this is, at least by implication, a comment by the witness to the effect that stress has an effect on human reaction time, and so for that reason, those two lines on page 20, lines 39 to 40, will be excluded from the trial.
- [9] The next passage is on page 21, line 7 to page 22, line 11. In this passage, the witness is being asked about his observations and interpretation of the Pritchard video. It begins with the question at page 21, line 11: Q It's Item 3, clip 3, care post-tas[er]ing. Do you see that? The witness goes on, then, to state that what he observes in the video is: A male wearing a suit approaches and kneels down near the deceased's head . . . The male appears to be checking for carotid pulse. The deceased appears to be lying in a semi-prone recovery position with his left leg bent at the knee. His hands are restrained behind his back.

- [10] There are two points about this. First, the video speaks for itself. The video is a piece of real evidence that were this a jury trial, the jurors would have that video in the jury room and they would be entitled to look at the video and, as triers of fact, form their own conclusions about what is depicted in the video. This is not a matter on which jurors need the assistance of some other person to look at the video and tell the jurors what that person sees on the video.
- [11] There is, however, another point. During the voir dire, when this evidence was tendered, there was an objection by the Crown which proceeded in this way. At line 36 on page 21: MR. FENTON: My Lord, I fail to see how this could have any relevance whatsoever to any issue on this perjury trial. to which counsel for the defence replied: Well, I'll tell you the relevance. One of the things put to Constable Millington was that the note that he made at two -- after Dziekanski passed away after 2:10, the note after 2:10 regarding Corporal Robinson checking his pulse was wrong.
- [12] At the end of this exchange between counsel for the Crown, counsel for the defence, and the Court, he is asked, that is, the witness is asked by defence counsel: Why did you write: The male appears to be checking the carotid pulse? And he replied: I'm simply describing the actions that were visible to me in the video, My Lord.
- [13] In my view, that is not what is happening. If he were simply describing the actions that were visible to him in the video, he would say, "I see a man in the picture. The man places his arm or his hand in a certain position on the body of Mr. Dziekanski. I see him hold his hand there for a certain numbers of seconds and remove his hand," something along those lines, simply a description of what physically he observes in the video. That, however, is not the evidence that was being led from the witness. Rather, the witness testified: "The male appears to be checking for carotid pulse." That is not simply an observation. That is a statement of opinion, and I see no basis for that opinion to be admitted in evidence. The witness was never tendered, let alone qualified, as an expert in medical matters or emergency healthcare practices or anything of that sort.
- [14] Counsel for the defence makes the submission that this is the sort of thing that police officers sometimes testify about, not on the basis of having had formal training in first aid courses or things like that, but simply on the basis of their having attended many crime scenes where people are sometimes injured, and this sort of thing happens, something that he may have observed many, many times in his experience. The difficulty with that submission, in my view, is that in this case, none of that evidence was led. He was never asked about his experience in seeing emergency healthcare personnel or anyone else check for a pulse anywhere on the body, much less the more specific evidence about checking a carotid pulse. So in my view, there is simply no foundation laid for the expression of that opinion, and I agree with Crown counsel that that passage from page 21, line 7 to page 22, line 11 must be excluded from the trial.

- [15] The final contested passage is on page 29 of the January 22 transcript. It is a short passage: page 29, line 30 to line 42. This comes in the context of the officer expressing his opinion based on a lengthy hypothetical question about the use of force by Cst. Millington, and the officer is asked the following question at page 29, line 24: In this case, when you say up to the time a decision is made to use force, what -- are you referring to the analysis up to the first Taser deployment or do you look at each and every deployment and the actions on the ground? And he replies: The whole incident up to the conclusion of the establishing control, -- I will just pause to say, up to that point no objection is taken. It is the next part to which there is objection. He goes on to say: -- although I have to be very mindful of hindsight bias. In other words, if I know the outcome, then that can influence my analysis. Then he is asked: Okay. What do you mean by that? And he goes on to give the following explanation: Well, when we know the outcome -- if you know how the movie ends, My Lord, it's very easy to spot the foreshadowing, and I have to be very mindful of the fact that the actors don't know how the movie is going to end and I don't want that knowledge to unduly influence my analysis of the events as they're laid out in the investigation, My Lord.
- [16] Despite Crown counsel's objection, I am of the view that this passage can form part of the evidence on trial. In the first place, the witness is explaining one of the factors that he took into account or that he was trying to guard himself against in expressing an opinion on the matter at hand, and it was legitimate for him to explain this as part of the basis for his forming his opinion. In any event, as pointed out by learned defence counsel, the proposition that when evaluating the use of force one should guard against hindsight bias is a commonplace. It is something that is well known and certainly, in a jury trial, where the use of force is in issue and where the use of force has had tragic consequences, it would be usual for the trial judge, not on the basis of any expert evidence but simply as a commonplace, to warn the jury that in their reasoning process they should guard against this phenomenon of hindsight bias, so I see nothing objectionable about that passage and it may form part of the evidence at trial.
- [17] So to summarize, the transcripts of the evidence from the voir dire will, with the agreement of both counsel, form evidence on the trial proper without the necessity of recalling the witnesses, with the exception of these passages: January 20, page 52, line 37 to page 66, line 14 will be excluded; January 20, page 26, line 19 to page 27, line 6 will be excluded; the same date, page 31, line 3 to page 34, line 3 will be excluded; the same date, page 35, line 8 to page 36, line 1 will be excluded; page 37, line 43 to page 38, line 18 will be excluded.
- [18] With respect to January 21, page 15, line 11 to page 17, line 18 will be excluded; page 22, lines 27 to 31 will be excluded; page 22, line 39 to page 23, line 38 will be excluded; page 24, line 9 to page 27, line 40 will be excluded; page 30, line 27 to page 31, line 34 will be excluded; page 34, line 19 to page 39, line 14 will be excluded.

- [19] Then, in the transcript of January 22, there is an amendment on page 9, line 11. The word "typical" should read "atypical". On page 15, line 40 to page 20, line 4, that will be excluded. Page 20, lines 39 to 40 will be excluded. Page 21, line 7 to page 22, line 11 will be excluded. Page 22, line 12 to page 27, line 13 will be excluded. Page 31, line 4 to page 50, line 25 will be excluded. Page 69, line 25 to page 71, line 7 will be excluded. And page 72, line 27 to page 75, line 47 will be excluded.
- [20] Finally, the materials that were marked as Exhibits 2, 3, and 5 on the voir dire will form exhibits on the trial. The Honourable Mr. Justice W.F. Ehrcke

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Prepared on 29 October 2026 · Esheria