
CANADA / JUDGMENT

R. v. Moir

2017 BCSC 1006

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Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Moir,

2017 BCSC 1006

Date: 20170221

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Registry: Chilliwack

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v.

Dustin Blue Robert Moir

Ban of Publication made pursuant to s. 486.5(1) and s. 486.5(9) regarding any information identifying police undercover operators. Ban of Publication made pursuant to s. 517(1)(b) and s. 648(1) until the trial has ended.

Before: The Honourable Madam Justice S. Griffin

Voir Dire No. 8 Oral Ruling re

Admissibility of Accused's Prior Statement

Counsel for the Crown:

John D. Hempstead

Michael D.E. Lefebure

Counsel for the Accused:

Thomas M. Arborgast

Place and Date of Trial:

New Westminster, B.C.

Dates ongoing

Place and Date of Ruling:

New Westminster, B.C.

February 21, 2017

- [1] THE COURT: This is a ruling on voir dire #8 concerning the admissibility of a recorded telephone conversation between Dustin Moir and his mother, Sherry Madaris, on March 17, 2007.
- [2] The defence seeks to introduce this evidence of prior statements made by Mr. Moir out of court, even though Mr. Moir has not testified as a witness and might choose not to testify as a witness.
- [3] Mr. Moir is charged with first degree murder of Chelsey Acorn, who was 14 years old at the time of death. The background to this case is summarized in a ruling made in voir dire #1, indexed at 2016 BCSC 1720. That ruling concerned inculpatory statements made by Mr. Moir in the course of an undercover operation to an undercover police officer who was playing the role of a fictitious crime boss. The parties agree that I may consider evidence led on voir dire #1 as well as evidence led so far at trial when considering the present ruling.
- [4] Following the case of *R. v. Hart*, 2014 SCC 52, [Hart], statements made by an accused to undercover police officers posing as members of a criminal organization were considered presumptively inadmissible. These statements in this case were admitted after voir dire #1. However, it is understood in these cases that the jury must be cautioned about the danger of these types of confessions and instructed to consider a whole host of factors to put the confession into context and determine its reliability, including:
- (a) the length of the operation;
 - (b) the number of interactions between the police and the accused;
 - (c) the nature of the relationship between the undercover officers and the accused;
 - (d) the nature and extent of any inducements offered, both financial and social;
 - (e) the presence of any threats;
 - (f) the conduct of the interrogation;
 - (g) the personality of the accused including age, sophistication and mental health; and

- (h) whether the confession contains any indicators of reliability: see Hart at para. 106
- [5] Therefore, to put the inculpatory statements made by the accused to undercover officers into context, the Crown has called some evidence as narrative to put the unfolding of the undercover operation before the jury.
- [6] The key part of the undercover operation took place over four months, from October to November 2006, and involved 32 undercover scenarios plus additional interactions between the undercover operators and Mr. Moir. The culminating interview between Mr. Moir and the fictitious crime boss was on November 25, 2006.
- [7] Mr. Moir was then kept busy for an additional four months while the police targeted his father, Jesse Blue West, who is also implicated in the killing.
- [8] Mr. Moir and Mr. West were arrested on March 16, 2007.
- [9] After arrest, the police recorded a conversation between Mr. Moir and Mr. West in the sheriff van while they were being transported to court on March 19, 2007. There were some statements made about the undercover operation in that recorded conversation.
- [10] The Crown has led evidence at trial before the jury of the course of the undercover operation, the crime boss interview which was recorded by video, and the audio recording of the conversation between Mr. Moir and Mr. West in the sheriff van.
- [11] As well, the Crown has asked questions of police witnesses involved in the undercover operation, and the sheriff who transported Mr. Moir and Mr. West, having to do with what they observed of any interaction between Mr. Moir and Mr. West, amongst other things.
- [12] It can be said, in part, that the Crown is anticipating a possible position may be advanced by Mr. Moir at trial that he was afraid of Mr. West, and so the Crown called some evidence in anticipation of that position.
- [13] The evidence sought to be introduced by the defence occurred on March 17, the day after Mr. Moir's arrest. It was just over a day before Mr. Moir and Mr. West were transported in the sheriff van, which was on March 19. Mr. Moir had seen his lawyer already before the call. He had also already been interrogated over approximately four hours by police, during which time he maintained his right to remain silent. He had also been shown some of the evidence held by police against him.
- [14] The telephone call between Mr. Moir and his mother began at 22:54 hours and was approximately one hour and 22 minutes long.

Defence Position

- [15] The defence position is that Mr. Moir does not wish to put the contents of the call into evidence for the truth of it.

- [16] Rather, the defence submits that the telephone conversation between Mr. Moir and his mother will be used for a non-hearsay purpose, namely, to rebut the contextual or narrative evidence called by the Crown. More specifically, the defence submits that hearing the telephone conversation will "permit the jury to fully appreciate the nature of the conversation in the [sheriff] van as well as Mr. Moir's state of mind throughout the undercover operation".
- [17] In part, the defence submits that the telephone conversation provides circumstantial evidence that Mr. Moir had a fear of his father. The defence submits that the court ought to permit this evidence to be called, in part so that the accused does not need to take the stand. The defence submits that it was recognized in Hart that Mr. Big operations present a difficult dilemma on the part of the accused as to whether or not to testify: see, for example, paras. 75-77 of Hart. The defence submits that there is evidence that Mr. Moir has intellectual limitations, and therefore, the dilemma faced by testifying in this kind of case will be all the more difficult for him to navigate.

Crown Position

- [18] The Crown's position opposes the admissibility of contents of the recorded telephone conversation between Mr. Moir and his mother. In summary, the Crown submits there is no principled basis for Mr. Moir to call evidence of Mr. Moir's prior statements in the absence of him testifying.
- [19] As for evidence of Mr. Moir's state of mind, the Crown submits that the telephone call is evidence of Mr. Moir's state of mind during the telephone call only and is irrelevant to any issue in the case, in addition to being self-serving hearsay.

Contents of the Telephone Call Evidence

- [20] I will briefly review the contents of the telephone conversation as it might relate to Mr. Moir's state of mind which the defence considers part of the narrative.
- [21] In the telephone call, Mr. Moir was often crying. He told his mother that he had been interrogated by the police but had said nothing because his lawyer told him to say nothing. He asked his mother for money to pay his lawyer repeatedly, and she repeatedly told him she does not have the money and he should rely on a legal aid lawyer. Early on in the call, and this is also repeated, Mr. Moir told his mother that they were probably being recorded.
- [22] The contents of the call can be divided roughly into two parts in terms of it reflecting Mr. Moir's state of mind: past state of mind and present state of mind.
- [23] In one part, Mr. Moir talked about the killing of Ms. Acorn and his confession to the boss. These statements can be said to potentially reflect on his past state of mind or past actions. There seems to be a suggestion that he may have told his mother in the past that his boss, i.e. an undercover officer posing as a gangster, was going to help him out.

- [24] In the telephone call, Mr. Moir told his mother that the boss was a cop and they have him on videotape confessing. He told her that he tried to seem like a bigger man than he was and said stuff that was not even true.
- [25] These statements by Mr. Moir may have been attempts by him to try to distance himself from the truthfulness of his confession in the crime boss interview by telling his mother what his state of mind was then, i.e. that he confessed to make himself look big. They are not spontaneous declarations of his state of mind at the time he confessed.
- [26] In addition, several times in the call Mr. Moir blamed his father for what happened. He told his mother that he thought his father was going to kill him, referring to having this fear in the past. Again, this might be some evidence of Mr. Moir trying to disclaim responsibility for the death of Ms. Acorn by saying his past state of mind was that his father was going to kill him. It is not a spontaneous declaration of his state of mind if and when he took part in the death of Ms. Acorn.
- [27] In the other part to the telephone call potentially reflecting on his present state of mind, Mr. Moir spoke about his present fear of his father, and his fear that his father would try to kill him in prison.
- [28] Mr. Moir's demeanour on the telephone call, crying and upset, could reflect his present state of mind on the telephone call, but the question remains, why was he upset and is it probative of any issue in the case? His demeanour could relate to the facts: he had been arrested for murder and the police had a videotaped confession by him; he was without funds to pay a lawyer and he was worried that a legal aid lawyer would not be as good as a privately paid lawyer; he was worried about what his family was going to think of him; and he was worried about his picture in the paper identifying him as a killer. All of these were themes of his statements in the telephone call.

Analysis

- [29] There is abundant case law on when an accused can call evidence of his prior statements. The general principle is that an accused cannot call evidence of his prior statements, but over the years many exceptions have developed.
- [30] The reason for the general rule was explained in the context of exculpatory statements in *R. v. Rojas*, 2008 SCC 56 at para. 36, [Rojas], as follows:

Exculpatory out-of-court statements made by an accused are also subject to the general exclusionary rule against hearsay. Where the accused testifies, such statements are generally inadmissible because they are viewed as self-serving and lacking in probative value. Where the accused does not testify, there is an additional rationale for excluding such statements. McIntyre J. explained it in *R. v. Simpson*, [1988] 1 S.C.R. 3 (S.C.C.), as follows (at p. 22):

As a general rule, the statements of an accused person made outside court -- subject to a finding of voluntariness where the statement is made to one in authority -- are receivable in evidence against him but not for him. This rule is based on the sound proposition that an accused person should not be free to make an unsworn statement and compel its admission into evidence through other witnesses and thus put his defence before the jury without being put on oath and being subjected, as well, to cross-examination.

[31] It is important to emphasize that in the above passage in *Rojas*, the Court identified the additional reason for excluding out-of-court statements of an accused where he does not testify.

[32] In *R. v. Dockerill*, 2013 BCSC 1454, the court summarized the law as follows at para. 45:

Generally, a witness's "prior consistent statement" is not admissible because it is both self-serving (or "oath-helping") and hearsay, and therefore lacking in probative value. Martin J.A. in *R. v. Campbell* (1977), 17 O.R. (2d) 673, [1977] O.J. No. 1684 (Ont. C.A.) explained the rationale for the traditional exclusionary rule as follows:

[44] The refusal of the trial Judge to admit the evidence of other witnesses, whether in cross-examination or otherwise, of previous statements made by the appellant, involves two separate rules of evidence:

I. The rule which precludes an accused from eliciting from witnesses self-serving statements which he has previously made.

II. The rule which provides that a witness, whether a party or not, may not repeat his own previous statements concerning the matter before the Court, made to other persons out of Court, and may not call other persons to testify to those statements.

Statements made by an accused which infringe rule I are excluded as hearsay. The narration by a witness of earlier statements made to other persons out of Court appears to be excluded under rule II, because of the general lack of probative value of such evidence, save in certain circumstances, in support of the credibility of the witness. Each of the above rules is subject to well-recognized exceptions or qualifications, and there is some overlap, both in the rules and in the exceptions to them: see Phipson on Evidence, 12th ed. (1976); Cross on Evidence, 4th ed., at pp. 207-20; Previous Consistent Statements, [1968] Camb. L.J. 64, by R.N. Gooderson.

[33] There are exceptions to where prior exculpatory statements of the accused may be admitted as evidence. In *Rojas*, the Court referred to the "mixed-statement exception" to the rule excluding out-of-court exculpatory statements at para. 37 as follows:

Of course, the general rule that excludes out-of-court exculpatory statements is not without exceptions. One such exception is relevant here -- the mixed statement exception. Just as in England, it has long been established that where the Crown seeks to tender an accused's out-of-court statement which contains both inculpatory and exculpatory parts, it must tender the entire statement, and the exculpatory portions are substantively admissible in favour of the accused: *R.*

v. Hughes, [1942] S.C.R. 517 (S.C.C.), at p. 521. Fairness to the accused is the obvious rationale for the mixed statement exception. The exception is also based on the more pragmatic consideration that it is often difficult to determine which parts of a statement are inculpatory and which parts are exculpatory.

[34] Here, when the Crown led evidence in the case there was no objection that, with respect to statements of the accused led by the Crown, the Crown did not place the whole of the statements before the jury.

[35] Some other circumstances where there may be exceptions to the general rule against an accused calling evidence of prior statements were reviewed in the case of R. v. Edgar, 2010 ONCA 529 at paras. 35-36, [Edgar], including where the statement is relevant to the accused's state of mind at the time of the offence, or to rebut an allegation of a recent fabrication.

[36] I pause to note that in Edgar, the Ontario Court of Appeal posited at para. 24 that:

... spontaneous exculpatory statements made by an accused person upon or shortly after arrest may be admitted ... showing the reaction of the accused when first confronted with the accusation, provided the accused testifies and thereby exposes himself or herself to cross-examination.

This proposition has not been without subsequent debate, and has variously been described as obiter and not settled law in BC: see R. v. Stewart, 2016 BCSC 2490 at paras. 15-17. Regardless, the defence does not rely on the exception identified in Edgar because Mr. Moir seeks to introduce the statements without testifying.

[37] I also note that it seems clear that the statements by Mr. Moir to his mother were made not as a spontaneous reaction when first confronted with an accusation, but in different circumstances, after he had consulted counsel, had been interrogated and been shown some of the evidence against him but maintained his right to remain silent, and when he had quite specific motives in talking to his mother.

[38] I will not review the exceptions to the accused calling evidence of his prior statements in detail because, other than the mixed-statement exception, they are premised on the accused testifying. Where it is determined that there is probative value to the evidence, the fact of the accused testifying minimizes the prejudicial effect of the evidence because the accused can be cross-examined and the inferences the defence seeks to be drawn from the evidence can thus be challenged.

[39] For example, the exception that allows the accused to call evidence of his state of mind appears premised on the accused testifying. From the authorities I was provided by counsel, the closest example to the facts here is the case of R. v. Pattison, 2013 BCCA 246, where the accused had to testify first, but then was allowed to call evidence of a 9-1-1 call he made immediately after the incident which was the basis for the charges against him, to show his state of mind at the time of the call.

- [40] The defence could provide me with no examples in the authorities of any case that provided for an accused to call evidence of his prior statements to show state of mind without testifying where the accused was capable of testifying.
- [41] In my view, the defence mistakenly characterizes Mr. Moir's statements in a telephone call with his mother as evidence not being called for the truth of it, and as evidence of narrative to rebut the Crown calling of narrative evidence as to how the investigation unfolded.
- [42] The concept of narrative is a difficult one, but it is not a catch-all allowing any hearsay evidence to go in so long as the proponent of the evidence states it is not going in for the truth of it. Narrative evidence has been explained as statements necessary to explain the unfolding of events, to assist in understanding events for the purpose of understanding the witness's story: see *R. v. Dinardo*, 2008 SCC 24 at para. 37; *R. v. A.E.R.*, [2001] O.J. No. 3222 at paras. 14 to 15 (Ont. C.A.); and *R. v. Hoffman* (1994), 155 A.R. 275 at para. 13 (Alta. C.A.). Where here, Mr. Moir is not going to testify as a witness, it is difficult to describe the evidence of this telephone call as essential to the narrative of any story he is going to tell.
- [43] The Crown of course is able to call as part of its case evidence of statements made by the accused as an exception to the rule against the admissibility of hearsay. This is premised on the theory that admissions by the accused against interest are more likely true (see *Rojas* at para. 35). Further, this does not compromise trial fairness because the accused has the ability to choose to testify to rebut and deny or explain the prior statements he made.
- [44] The Crown's ability to call prior statements of the accused does not equate to an ability on the part of the defence to explain Mr. Moir's story as to how he perceived events by calling evidence of his prior statements without testifying himself.
- [45] I have paused at some length in considering the question of whether the recording of Mr. Moir's statements in the telephone call concerning his present fear of his father, Mr. West, might be admissible as capturing a demeanour which is at odds with the demeanour he displayed just over a day later in the recording of his conversation with Mr. West in the sheriff van. I have considered whether this situation could be considered analogous to the mixed-statement exception to admissibility of prior statements. That exception requires as a matter of trial fairness that an entire prior statement of an accused be admitted when it contains both inculpatory and exculpatory statements. However, I have concluded the facts of this telephone call, preceding the sheriff van ride over a day later, are not analogous to a mixed statement. The circumstances of Mr. Moir's telephone call to his mother were separate and different than the circumstances of the sheriff van ride with his father. They were not one continuous event and involved changing circumstances and potentially changing motives.

[46] I do not consider that trial fairness requires allowing Mr. Moir to put in his past statements without testifying and subjecting those statements to cross-examination. Trial fairness does not require this self-serving evidence about Mr. Moir's past actions or past state of mind, or state of mind in the phone call, to be admitted without Mr. Moir being subject to cross-examination as to the truthfulness of the evidence. Indeed, it would be unfair to the Crown to admit it when the Crown is unable to challenge it through cross-examination of Mr. Moir.

[47] As for the principled exception to the admissibility of hearsay evidence, here the evidence fails the twin tests of reliability and necessity. There are many concerns about the reliability of the evidence and the inferences that can be drawn from it. I note that there are many reasons why Mr. Moir might wish to lie in a telephone call made to his mother after his arrest:

- the fact she is his mother and he would not want her to think he was a killer;
- the fact that he was pleading with his mother to pull together finances to hire a lawyer for him and would not expect her to be willing to do so if he was guilty;
- the fact that he had already talked to a lawyer;
- the fact that he had seen some of the police evidence in the course of the interrogation;
- he may have understood that the evidence against him was not looking good and his only defence would be to say the confession was untruthful; and
- the fact that he knew he was recorded in the telephone call and might want the police to believe, from listening to the recording, that he took part in the killing only because of fear of his father, or might want his mother to think this.

[48] The assertion by Mr. Moir that he was afraid his father might kill him in prison might be related to Mr. Moir's worry that his confession had implicated his father, and also might be an attempt to manipulate his mother to feel sorry for him so that she will raise money for his defence and not abandon him. It has no probative value as to his state of mind at the time of the death of Ms. Acorn or at the time of the crime boss confession.

[49] Leaving aside concerns about the reliability of the evidence, there is also no necessity for the evidence to go in as hearsay evidence of prior statements as the accused is available to testify.

[50] I am very alive to the concerns the defence raised as to the difficult choices facing Mr. Moir about whether or not to testify. However, that is due to the nature of the evidence, and not due to any procedural unfairness that needs remedying by allowing him to call evidence of his prior statements without testifying.

[51] I conclude that Mr. Moir may not call evidence of his statements to his mother in a telephone conversation in the absence of Mr. Moir testifying. I will not rule on the potential use of Mr. Moir's past statements if he does testify, as I have not been asked to do so.

[52] That concludes my ruling.

"The Honourable Madam Justice S. Griffin"

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