
CANADA / JUDGMENT

R. v. Pompeo

2014 BCCA 317

COURT

British Columbia Court of Appeal

DECIDED

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2014 BCCA 317 R. v. Pompeo

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

R. v. Pompeo,

2014 BCCA 317

Date: 20140808

Docket: CA040646

Between:

Regina

Respondent

And

David A. Pompeo

Appellant

Before:

The Honourable Chief Justice Bauman

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Garson

On appeal from: An order of the Provincial Court of British Colombia, dated February 14, 2013 (R. v. Pompeo, 2013 BCPC 30, Duncan Registry No. 33757)

Counsel for the Appellant:

R.R. Hira, Q.C.

S.M.R. Conroy

Counsel for the Respondent:

J.R.W. Caldwell

Place and Date of Hearing:

Vancouver, British Columbia

February 3 and 4, 2014

Place and Date of Judgment:

Vancouver, British Columbia

August 8, 2014

Written Reasons by:

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Garson

Summary:

The accused police officer was convicted of aggravated assault in connection with the shooting of a suspect. The issue at trial was whether the use of lethal force was within the scope of s. 25 of the Criminal Code, which protects police officers in certain cases. The judge found that while the officer believed that the use of lethal force was necessary for self-preservation, there was no reasonable basis for that belief. The officer appealed his conviction.

Held: Appeal allowed. The judge erred in excluding the evidence of an expert who was of the view that the use of lethal force was in accordance with police protocols and training, and was necessary. Further, the judge went beyond his proper role when he made requests that evidence be tendered and when he engaged in lengthy questioning of witnesses.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

- [1] Constable Pompeo appeals from conviction on one count of aggravated assault arising out of the shooting of William Arthur Gillespie on September 18, 2009. The issue at trial was whether Cst. Pompeo's actions were authorized by s. 25 of the Criminal Code, R.S.C. 1985, c. C-46, which allows peace officers to use lethal force in limited circumstances. The trial judge found the requirements of s. 25 were not fulfilled, and that the shooting was criminal.

- [2] Cst. Pompeo contends that the judge, in finding him guilty of the offence, misapplied the law and misapprehended the evidence. He also says the trial was unfair in two respects: first, because the judge refused to admit certain expert evidence tendered by the defence, and second because the judge interfered in the proceedings by taking an active role in assisting the prosecution of the case.
- [3] I am persuaded that, in the circumstances of this case, the judge's refusal to allow one of the expert witnesses tendered by Cst. Pompeo to testify was prejudicial to the defence, and is a reversible error requiring a new trial. I am also of the view that certain of the judge's interventions raise issues regarding trial fairness.

A. The Events Giving Rise to the Charge

- [4] At the time of the events giving rise to the charge, Cst. Pompeo was posted to the Duncan/North Cowichan detachment of the R.C.M.P., and was assigned to the Street Crime Unit. He had graduated from R.C.M.P. training in November 2005. Cst. Pompeo's partner on the Street Crime Unit was Cst. Birchett, an officer of roughly similar length of service with the R.C.M.P.
- [5] Approximately one week prior to the events giving rise to the charge against Cst. Pompeo, he and Cst. Birchett were in Chemainus investigating a theft. As they drove, they noticed a man on the front steps of a residence staring at them. Cst. Birchett had some familiarity with the man - Mr. Gillespie - from a previous investigation. He understood that Mr. Gillespie was a heavy drug user, and that he trafficked in marijuana. He knew that Mr. Gillespie had a past conviction for robbery involving a firearm, and also believed that he was prohibited from driving as a result of an impaired driving conviction. He related all of this information to Cst. Pompeo. The officers noticed an automobile in the driveway of the residence, and used the computer in their vehicle to verify that Mr. Gillespie's driving prohibition was a subsisting one.
- [6] On September 18, 2009, Cst. Pompeo and Cst. Birchett were again working together in Chemainus. Cst. Pompeo was driving their unmarked police vehicle when they noticed an automobile similar to the one they had seen at the residence. Cst. Birchett recognized Mr. Gillespie as the driver. The officers decided to stop the vehicle based on their belief that Mr. Gillespie was driving while prohibited.
- [7] Cst. Pompeo turned the police vehicle around and followed Mr. Gillespie's car southwest on Henry Road, toward its intersection with Highway 1. As the police caught up to the vehicle, the driver of the vehicle moved into the centre lane and signalled a left turn. It continued going straight for about 750 m. At that point, Cst. Birchett contacted the dispatcher to advise that they were conducting a traffic stop. Cst. Pompeo turned on the flashing lights on the vehicle, and mistakenly also switched on the siren briefly.

- [8] Mr. Gillespie did not immediately bring his vehicle to a stop. He made a left turn onto Juniper Road, and, according to the police officers, accelerated rapidly. The police followed the vehicle down Juniper Road. Mr. Gillespie then made a left turn into a driveway, and came to an abrupt halt. Cst. Pompeo drove the police vehicle into the driveway, and brought it to a stop about 1.5 m behind Mr. Gillespie's vehicle.
- [9] During the brief pursuit, the officers considered Mr. Gillespie's actions to be consistent with an attempt to evade the police. Cst. Pompeo commented to Cst. Birchett that he did not think that Mr. Gillespie would stop, and Cst. Birchett, who was of the same view, repeated the comment to the dispatcher. Cst. Birchett also commented to Cst. Pompeo that he believed the occupants of the vehicle intended to flee.
- [10] Once Mr. Gillespie stopped his vehicle, he and his passenger immediately emerged from it. While there was conflicting evidence on the matter, the trial judge found that Mr. Gillespie and his passenger exited their vehicle of their own accord, without any request from the police. The judge accepted, as well, that in so doing, they "engaged in what the police officers regarded as unusual behaviour which, in the circumstances, they regarded as threatening."
- [11] The police officers exited their vehicle, and pointed their guns at Mr. Gillespie and his passenger. Cst. Pompeo focussed his attention on Mr. Gillespie, while Cst. Birchett dealt with the passenger.
- [12] The judge accepted Cst. Pompeo's evidence that Mr. Gillespie immediately reached into his left jacket pocket. This action caused Cst. Pompeo to fear that Mr. Gillespie was reaching for a weapon. He ordered Mr. Gillespie to keep his hands in front of him, away from his pockets, and to drop to the ground. Mr. Gillespie was not, initially, compliant, and reached into his pocket a second time. At that point, Cst. Pompeo placed his finger on the trigger of his service revolver, but did not shoot. When Mr. Gillespie's hand emerged from his pocket, and Cst. Pompeo was able to see that it was empty, he moved his finger from the trigger to the frame of the gun.
- [13] At that point, Mr. Gillespie began to comply with Cst. Pompeo's order that he get down on the ground, but, according to Cst. Pompeo, he did not assume a completely prone position, instead propping himself up on his elbows, with his hands under his body. Cst. Pompeo's evidence was that Mr. Gillespie reached into his pocket a third time, at which point Cst. Pompeo fired his gun at him. Mr. Gillespie suffered serious injuries as a result of the shooting.
- [14] The judge did not accept Cst. Pompeo's evidence that Mr. Gillespie's hand entered his pocket a third time. Instead, based on the evidence of an independent witness, he found that Mr. Gillespie reached toward his pocket, but stopped short of putting his hand into it. The witness described Mr. Gillespie as "sort of fluttering [his] hands on the pockets."

[15] The judge also did not accept Cst. Pompeo's evidence that Mr. Gillespie was moving toward him in a manner that threatened his safety. The judge found that any movement by Mr. Gillespie toward Cst. Pompeo was very slow.

B. The Argument and Analysis at Trial

[16] The issue at trial was whether Cst. Pompeo's actions were justified under s. 25 of the Criminal Code:

25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

(b) as a peace officer ,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

(3) [A] person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

[17] The judge, citing *R. v. Nasogaluak*, 2010 SCC 6, noted the court must, in applying these provisions, consider both the subjective belief of the officer and the objective reasonableness of the belief. He found that Cst. Pompeo had the required subjective belief:

[195] On the evidence before me I am satisfied Const. Pompeo did believe that it was necessary to shoot Mr. Gillespie for the reasons set forth in s. 25(3) of the Criminal Code. There is no evidence of any ulterior motive on his part. Thus the sole question to be decided is whether that belief was based on reasonable grounds, such grounds being presumed unless the Crown establishes beyond a reasonable doubt that his belief was not so based.

[18] The judge considered a number of factors to be relevant to the assessment of the reasonableness of Cst. Pompeo's belief:

[197] The reasonableness of that belief must be tested against (a) Const. Pompeo's training, (b) his experience, (c) his perception of Mr. Gillespie's actions and (d) the context in which those actions were unfolding. When undertaking that analysis, I must have regard for and give effect to those authorities that have cautioned against applying a standard of reasonableness that is either too narrow or too rigid.

[19] With respect to experience, Cst. Pompeo gave evidence that he had, on a number of occasions, located secreted firearms on persons stopped as a result of suspected motor vehicle infractions. He was also aware that there were a number of firearms in the community. Because Cst. Pompeo had been informed that Mr. Gillespie had been convicted of a robbery involving a firearm in the recent past, he considered the possibility that Mr. Gillespie was armed to be a very real one.

- [20] He also gave evidence that, in his experience, individuals who are intoxicated from alcohol or drugs can be unpredictable and violent. He believed Mr. Gillespie to be a heavy user of drugs, and testified that Mr. Gillespie appeared to be intoxicated at the time of the incident.
- [21] Cst. Pompeo indicated that he perceived Mr. Gillespie to be non-compliant with his instructions. He was concerned that Mr. Gillespie was slowly advancing on him and moving away from the well-lit area in front of the police vehicle's headlights. Cst. Pompeo was most concerned with Mr. Gillespie's apparent attempts to reach into his pocket. He feared that Mr. Gillespie was armed, and reaching for a handgun. He indicated that his training had demonstrated that he would not have time to react if Mr. Gillespie pulled a weapon from his pocket and fired a shot at him.
- [22] With respect to the context, Cst. Pompeo was of the view that Mr. Gillespie's acceleration down Juniper Road was an indication that he was attempting to flee. He interpreted Mr. Gillespie's immediate emergence from the vehicle, and his reaching into his pocket and toward his waistband, as threatening.
- [23] Cst. Pompeo tendered two expert witnesses on the issue of police training in the use of force: John McKay, a retired City of Vancouver police officer, and Corporal Clint Vair, a member of the R.C.M.P. stationed in Alberta. The judge allowed Mr. McKay to testify, but found that Cpl. Vair's evidence should not be admitted.
- [24] Mr. McKay was of the view that Cst. Pompeo's use of lethal force was in accordance with police training. He based his opinion on Cst. Pompeo's evidence. He considered the situation Cst. Pompeo encountered would reasonably have led him to believe that his life was in immediate danger, and that the use of lethal force was the only viable option.
- [25] The judge found Cst. Pompeo's belief that it was necessary for self-preservation to fire a shot at Mr. Gillespie was not reasonable. In reaching this conclusion, three factors were of particular significance. The first was the judge's finding that Mr. Gillespie did not place his hand in his pocket a third time.
- [26] In assessing the importance of this factor, the judge placed considerable reliance on answers given by Mr. McKay to a series of questions that the judge put to him after cross-examination concluded. The judge asked several dozen questions, challenging the witness on certain assumptions that he had made, and putting hypothetical scenarios to him. The following exchange appears to have been particularly important to the judge's reasoning:

Q [A]ssume again, for the moment, that when Mr. Gillespie is down on his knees, with his elbow - right elbow on the ground, and he turns, as described by the officer, and his left hand moves towards his left jacket pocket -

A Yes.

Q - into which it has been twice previously -

A Yes.

Q - assume that instead of going into the pocket, it goes simply toward the pocket.

A Yes.

Q Does that change your opinion?

A Well, if - if the officer could see the hand and he could see that, first of all, when the hand was out, there was nothing in it, and then as it went to the pocket, there was still nothing in it, that would change my opinion.

But if he reached into the pocket - that - then, I'm back to my original opinion.

Q So, out of all of the assumptions, then, that we - you have - and there were many, of course, that Mr. Hira gave you, but - and all of this is in the light of what the officer knows about this man, the fact that it's in a darkly-lit rural area, and all of those other pre- - preconditioned circumstances that - the way that - if you put all of these assumptions that I've put to you, as possible assumptions, together - in other words, a relatively slow speed down Juniper Crescent; the officers commanding them to get out of the car and they responding to that; Mr. Gillespie's slow movement, three to five feet towards the rear of the car and to the officer's left, over a period of perhaps as much as 30-35 seconds -

A Yes.

Q - and the - and Mr. Gillespie's hand not actually reaching the pocket - if you put all of those assumptions together, would your - your opinion would be different.

A Yes; it would, Your Honour.

[27] The judge concluded that, as he found Mr. Gillespie's hand did not go into his pocket a third time, Cst. Pompeo's decision to shoot was not in accordance with police training in the use of force.

[28] The second factor on which the judge placed considerable reliance was his finding that any movement by Mr. Gillespie toward Cst. Pompeo was slow and did not represent a serious threat. Mr. McKay, while acknowledging that the movement was limited, was of the view that it was a significant factor in assessing the threat to Cst. Pompeo. The judge disagreed, again relying on evidence that he himself drew out of the witness:

[187] Dealing with what he considered to be the critical aspect of Mr. Gillespie's non-compliance with Const. Pompeo's commands, namely the former continuously "advancing" on the officer in what he said was "absolutely an attack on the officer", it was suggested to Mr. McKay that Mr. Gillespie's actual movement in the direction of Const. Pompeo was roughly "3 to 5 feet" over a period as long as 30 seconds. His response was that he had no doubt the movement was slow, but it was also deliberate and that, irrespective of whether it was fast or slow, it was still an invasion of Const. Pompeo's space. He then emphasized what he called the outflanking movement of Mr. Gillespie and said, irrespective of whether it was

slow, that movement was dangerous because it deprived Const. Pompeo of the cover provided by the pickup's driver's door.

- [188] In my view that response did not grasp the significance of the fact that such minimal movement over 30 seconds could not reasonably be said to have amounted to either an "attack" or an "invasion." Even at a maximum of 5 feet toward Const. Pompeo together with some minimal movement laterally to his left, those words amounted to an exaggeration of what would have been there to be seen assuming, as Const. Pompeo apparently believed, it was sustained over a period of up to as much as 30 of the 39 seconds that elapsed between the time the vehicles came to a stop and the shot was fired. Furthermore, had he understood where Mr. Gillespie was when he went down to the ground, he would have realized that his minimal lateral movement did not deprive Const. Pompeo of the ability to use the driver's door of the pickup for cover in the event Mr. Gillespie did produce a firearm.
- [29] The third factor that was critical to the judge's finding was his view that Cst. Pompeo failed to adequately assess and re-assess the situation. He considered the officer's views that Mr. Gillespie and his passenger were trying to flee to be unreasonable, given the judge's own calculation of the average speed of Mr. Gillespie's vehicle from the moment the siren sounded until the time it came to a stop. He also considered that, given the nature of the traffic stop, it was unreasonable to believe that Mr. Gillespie would use a weapon against the police:
- [214] Const. Pompeo testified that he was constantly reassessing the situation and reacting to what was happening in front of him. However, again on his own evidence, he was convinced Mr. Gillespie had a firearm from the moment the latter got out of the Saturn and any "reassessing" that took place from that point on only served to identify more threat cues that confirmed that belief and escalated his fear, anxiety and conviction that he was at risk of being killed. The obsession that he was facing a lethal threat, combined with his rapidly escalating fear and anxiety interfered with his ability to recognize alternatives to those threat cues.
- [218] . Const. Pompeo repeatedly stressed his experience in seizing firearms during vehicle stops and his knowledge that there were firearms at large on the streets of the Cowichan Valley. Again, such experience and knowledge, none of which would seem out of the ordinary for a police officer on active duty, could not reasonably justify rushing to a conclusion, just 19 seconds after the decision to stop Mr. Gillespie, that by reaching for a pocket he was necessarily reaching for a loaded firearm, particularly when his hand emerged from that pocket [on the first occasion] and threw something that was obviously not a weapon on the ground.

[222] Based on Const. Pompeo's own evidence, it is clear that his ability to accurately perceive and assess the actual threat presented by Mr. Gillespie was significantly adversely affected by those factors previously referred to, namely, his concern that Mr. Gillespie was reaching for a firearm as soon as the latter emerged from the Saturn, his inability to see anything other than threat cues from that point on and the extent to which his growing fear provoked a stress that adversely affected both his vision and his ability to hear.

[30] In the result, the judge rejected Cst. Pompeo's reliance on s. 25 of the Criminal Code.

C. Issues on Appeal

[31] Cst. Pompeo alleges that the judge erred in four ways:

- a) by misapplying the test for reasonable belief pursuant to s. 25(3) of the Criminal Code;
- b) by misapprehending evidence;
- c) by misapplying the test for admissibility of expert evidence; and
- d) by interfering in the proceedings to an extent that rendered the trial unfair.

[32] I will deal with each of these alleged errors in turn.

D. Analysis

1. The Application of the Test for Reasonable Belief

[33] Cst. Pompeo contends the judge made three errors in applying the test for reasonable belief under s. 25(3) of the Criminal Code. First, he says the judge failed to take into account Cst. Pompeo's experience in assessing the reasonableness of his belief that it was necessary to use lethal force in the interests of self-preservation. Second, he says the judge erred in applying the "doppelganger" analysis suggested in this Court's jurisprudence. Finally, he says the judge applied a strictly objective test to reasonableness, rather than assessing reasonableness on a "subjective-objective basis."

[34] With respect to the first of the alleged errors, Cst. Pompeo relies on his evidence that he had previously, during motor vehicle stops, found secreted weapons, and on his evidence of the volatility of intoxicated persons who are stopped by the police. He says this ought to have been taken into account by the judge.

[35] In my view, the judge did not (as Cst. Pompeo alleges) "refuse to take Cst. Pompeo's experience into account," nor did he fail to consider it. He expressly referred to Cst. Pompeo's evidence of his experience, but found that, in the context of the events of September 18, 2009, Cst. Pompeo's experience did not provide a reasonable basis for his belief that his life was threatened by Mr. Gillespie's actions. It was open to the trial judge to reach that conclusion, and I am not persuaded that he made any reversible error in coming to that assessment.

- [36] The second error alleged by Cst. Pompeo relates to the "doppelganger" analysis. It is well-established that a trial judge must assess the reasonableness of the police officer's belief that the use of lethal force was necessary on a "subjective-objective basis" (see Nasogaluak at para. 34). In order to make such an assessment, the judge must consider the matter from the standpoint of a person with the background, experience, and training of the police officer in question. In *Berntt v. Vancouver (City)*, 1999 BCCA 345 at para. 24, Southin J.A. described the trial judge's role as being "a doppelganger to the peace officer whose conduct is in issue."
- [37] The trial judge, in assuming that role, placed considerable reliance on the reactions of Cst. Pompeo's partner, Cst. Birchett, on the night in question:
- [228] By way of assistance in the doppelgänger role, I have the advantage of being able to compare Const. Pompeo's reactions and conclusions with those of Const. Birchett. Const. Birchett experienced all of the same environmental and situational factors facing Const. Pompeo that evening with two exceptions .
- [232] In my view, the threat level facing Const. Birchett was no less than that facing Const. Pompeo. [Mr. Gillespie's passenger]'s actions in continuing to handle what appeared to be a small bag or backpack which could easily have contained a firearm, with his back turned so that Const. Birchett could not see what his hands were doing, while repeatedly ignoring the officer's commands to get down on the ground, presented as great a danger as anything Mr. Gillespie's did or did not do, notwithstanding the 5 feet of movement by him toward Const. Pompeo just before or as he finally went to his knees. [The passenger]'s non compliant and threatening behaviour continued for a period of time only a few seconds less than that of Mr. Gillespie. Yet, on cross examination Const. Birchett he said he was "as comfortable as anyone could be in those circumstances" to give [him] time to comply and he agreed that he kept repeating the commands to [him] because he realized that sometimes it takes time and multiple commands for people to comply.
- [38] Cst. Pompeo says it was inappropriate to engage in this analysis. In his factum, he argues:
- [A] fellow officer will have different levels of training and a different range of personal experience. Further, a fellow officer present at the same incident will likely face a different set of situational factors, which is exactly the case here.
- [39] He contends that the use of Cst. Birchett in the "doppelganger" analysis "is contrary to the test in *Berntt*."
- [40] In my view, it is misleading to speak of the doppelganger imagery as "the test in *Berntt*." The use of the concept of a "doppelganger" in *Berntt* was merely a manner of illustrating the nature of the subjective-objective test of reasonableness. *Berntt* does not establish a test separate from the subjective-objective one, nor does it suggest that the "doppelganger" imagery must be adopted in order to correctly apply the law. That said, the doppelganger imagery, if used carefully, may be helpful in applying the subjective-objective approach.

- [41] Where a judge chooses to adopt the role of a "doppelganger," it is essential that the judge recognize that the ultimate issue is not what a doppelganger would or should have done, but rather the reasonableness (on a subjective-objective basis) of the police officer's belief that the force used was necessary.
- [42] I agree with Cst. Pompeo that the judge's approach in this case was problematic. Rather than assessing the reasonableness of Cst. Pompeo's beliefs, he simply pointed to the fact that Cst. Birchett's beliefs were different. As Cst. Pompeo points out, Cst. Birchett was not in a situation identical to his. On the evidence, the suspect that Cst. Birchett was dealing with was more compliant than was Mr. Gillespie. Further, the judge's statement that "[The passenger]'s non-compliant and threatening behaviour continued for a period of time only a few seconds less than that of Mr. Gillespie" is telling. A few seconds before he shot Mr. Gillespie, Cst. Pompeo himself removed his finger from the trigger of his weapon, and placed it on the frame, considering the threat to his safety to have abated. When Mr. Gillespie's hand moved to his pocket a few seconds later, Cst. Pompeo again became frightened. Those "few seconds" were crucial to Cst. Pompeo's decision to use his weapon.
- [43] Most importantly, in using Cst. Birchett in the "doppelganger" analysis, the judge failed to come to grips with the critical question: "Was Const. Pompeo's belief that it was necessary to use lethal force a reasonable one?" Even if Cst. Birchett had been in precisely the same position as Cst. Pompeo, the fact that he did not share Cst. Pompeo's belief that lethal force needed to be used would not establish that Cst. Pompeo's belief was unreasonable. It could be that Cst. Birchett's belief was unreasonable; equally, it could be that both beliefs, though different, were reasonable.
- [44] While I am of the view that the judge's use of Cst. Birchett in the "doppelganger" analysis was ill-conceived, it is not apparent to me that it constitutes a reversible error. As I have indicated, the doppelganger analysis is simply a device that may be used in assessing reasonableness on a subjective-objective basis. In order to determine whether the judge made a reversible error, therefore, it is necessary to determine whether (quite apart from the "doppelganger" analysis) he assessed the reasonableness of Cst. Pompeo's belief on a subjective-objective basis. This takes me to the third error alleged by Cst. Pompeo.
- [45] Cst. Pompeo asserts that the judge did not apply a subjective-objective test. He says the judge applied a purely objective test, determining whether, objectively, the officer's fears and concerns were justified. Cst. Pompeo argues, "[t]he test to be applied is whether or not the officer lacked reason for his belief, which the trial judge must assess by placing himself in the shoes of the officer, and considering the officer's training, experience, and human frailties, including his perceptions of the events which may have been affected by fear or stress." He cites *R. v. Hibbert*, [1995] 2 S.C.R. 973 at para. 60, which describes a subjective-objective assessment as an objective standard "that takes into account the particular circumstances and human frailties of the accused."

[46] The judge in this case carefully considered Cst. Pompeo's training, experience, and circumstances. I do not read his reasons as failing to take into account either the detailed circumstances of the accused or ordinary human frailties. The judge carefully set out the nature of the inquiry. He noted that factors unique to Cst. Pompeo had to be considered, and recognized (citing *R. v. Asante-Mensah*, 2003 SCC 38, and several other cases) that "a certain amount of latitude is permitted to police officers who are under a duty to act and must often react in difficult and exigent circumstances" (*Ansante-Mensah* at para. 73).

[47] The analysis of reasonableness on a subjective-objective basis includes both subjective and objective elements. It requires the court to place itself in the shoes of the police officer, and to take into account considerations unique to that individual. Once those considerations are taken into account, however, objective elements of the analysis are applied. While I do not suggest that the test to be applied is identical to the test for "reasonable suspicion" discussed in *R. v. MacKenzie*, 2013 SCC 50, there are significant similarities in the manner in which the individual characteristics of the police officer must be taken into consideration in applying an objective test. In that case, at paras. 63-64, Moldaver J., for the majority, said:

[I]n assessing whether a case for reasonable suspicion has been made out, the analysis of objective reasonableness should be conducted through the lens of a reasonable person "standing in the shoes of the police officer" (*R. v. Tran*, 2007 BCCA 491, 247 B.C.A.C. 109, at para. 12; see also *R. v. Whyte*, 2011 ONCA 24, 272 O.A.C. 317, at para. 31).

That is not to say, however, that police training and experience must be accepted uncritically by the courts. As my colleague Karakatsanis J. notes in *Chehil* [*R. v. Chehil*, 2013 SCC 49], "hunches or intuition grounded in an officer's experience will [not] suffice", nor is deference necessarily owed to a police officer's view of the circumstances because of his or her training or experience in the field (para. 47). Reasonable suspicion, after all, is an objective standard that must stand up to independent scrutiny.

[48] I am not convinced that the judge applied the wrong standard in determining whether Cst. Pompeo's beliefs were reasonable. Given that he applied the correct test, this Court must defer to his assessment. Accordingly, I would not give effect to the first ground of appeal.

2. Misapprehension of Evidence

[49] Cst. Pompeo argues that the judge misapprehended evidence, and failed to properly apply the principles of reasonable doubt discussed in *R. v. W.(D.)*, [1991] 1 S.C.R. 742. His argument is detailed, and alleges specific errors in respect of three separate findings:

- a) the finding that the Gillespie vehicle did not accelerate quickly after turning onto Juniper Road;
- b) the finding that Mr. Gillespie's advance toward Cst. Pompeo was minimal; and
- c) the finding that Mr. Gillespie did not reach into his pocket a third time.

[50] This ground of appeal does not raise any novel issue of legal principle. Instead, it is concerned with a detailed analysis of the trial judge's findings on three issues that were critical to his assessment of the events of September 18, 2009.

[51] As, in my view, other errors require this matter to be returned to the Provincial Court for a new trial, it would not be useful for this Court to engage in a detailed discussion of the evidence. The judge who hears the case will be required to determine the facts based on the evidence adduced at the new trial. The judge should be free to do so untrammelled by this Court's assessment of the evidence that was before the previous trial judge. In my view, therefore, it is both unnecessary and unproductive to discuss this ground of appeal.

3. Expert Evidence

[52] As I have indicated, Cst. Pompeo tendered two experts - Mr. McKay and Cpl. Vair - to testify on the following issues:

- a) Police training in the use of force;
- b) Police tactics in the use of force;
- c) Police protocols regarding the use of force; and
- d) The practical application of police use-of-force training, tactics, and protocols.

[53] The judge held Mr. McKay could testify, but ruled Cpl. Vair's evidence inadmissible. While Cst. Pompeo also sought to tender Cpl. Vair to testify in the area of the physiology of high stress events and its effects on cognitive and physical performance, no appeal is taken from the judge's finding that he was not qualified to give expert evidence in that area.

[54] In his voir dire ruling, the judge commenced his discussion of expert evidence by referring to *R. v. Mohan*, [1994] 2 S.C.R. 9, *R. v. D.D.*, 2000 SCC 43, and *R. v. Abbey*, 2009 ONCA 624, cases that set out the basic framework for the admissibility of expert evidence.

[55] *Mohan* establishes a restricted scope for expert evidence in Canadian courts. At 20, Sopinka J., for the Court said:

Admission of expert evidence depends on the application of the following criteria:

- (a) relevance;
- (b) necessity in assisting the trier of fact;
- (c) the absence of any exclusionary rule;
- (d) a properly qualified expert.

[56] The judge dealt with the relevance of the expert opinions at para. 15 of his ruling on the voir dire:

I am satisfied that if a police officer's belief in the need to use lethal force is established, one factor informing that belief will have been the training he received, including his understanding of the underlying rationales for the training. I am also of the view that an opinion whether that officer's use of lethal force was consistent with his or her training will be one fact from which an inference can be drawn as to the reasonableness or otherwise of the belief that such force was necessary in the circumstances in which it was used. Thus, such evidence is logically relevant where both the existence and the reasonableness of that belief is in issue under s. 25(3) of the Criminal Code. Similarly, if the proportionality of force used by a police officer against a suspect is in issue, that same evidence will be logically relevant to a consideration of that issue under s. 25(1) of the Criminal Code. It seems to me that, in any given case, the descriptive evidence of both the training and its underlying rationales is inseparable from the opinion whether the training was followed and, as such, is an essential element of that opinion.

[57] After recognizing that no exclusionary rule applied, the judge turned to the issue of necessity:

[25] . In the context of this case, the proper test is whether the expert evidence will likely be outside the experience and knowledge of the trier of fact such that it will be necessary to enable that trier of fact both to understand the facts associated with police use of force and to reach the right conclusion on the legal issues against which those facts must be tested.

[26] Policing is a difficult and often dangerous profession. Police officers will often encounter and have to deal with situations and risks that are well outside the experience of ordinary people and require the use of force to resolve. In that sense, it is my view that an opinion whether the use of lethal force was consistent with a police officer's training, from an expert with special knowledge in such matters, will offer assistance in the quest for a correct judgment in this case with respect to the tests mandated by ss. 25(1) and (3) of the Criminal Code. Thus, the D.(D.) prerequisite of necessity has been met.

[58] It is not suggested by either party that the judge erred in determining that the subject matter of the expert evidence met the first three criteria of the Mohan test. Turning to the fourth criterion, the judge accepted Mr. McKay as a "properly qualified expert," but rejected Cpl. Vair.

[59] In Mohan, Sopinka J. discussed the requirement that an expert be properly qualified, only briefly. At 25, he said:

[T]he evidence must be given by a witness who is shown to have acquired special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify.

[60] The judge found Mr. McKay to be a properly qualified expert:

- [20] Mr. McKay is obviously highly qualified to describe not only the use of force training that an R.C.M.P. officer would receive, but also the underlying rationale for that training. For that he does not need to be qualified as an expert. However, I am also satisfied that his extensive operational experience qualifies him to offer opinion evidence with respect to whether, in any given factual situation, a police officer's use of force was consistent with his use of force training.
- [61] With respect to Cpl. Vair, the judge said:
- [21] By contrast, Cpl. Vair's background is quite different. He joined the R.C.M.P. in 2000. As a police officer he has had less than six years of on the street operational experience. He has taken and instructed numerous weapons and other courses and he has been a member of an Emergency Response Team since 2005. He is, of course, familiar with the IMIM [the R.C.M.P. Incident Management Intervention Model, described by the judge as "the use of force protocols or training modules"] training and has acted as a use of force instructor. In that sense he would be qualified to describe the use of force training given to members of the R.C.M.P.
- [22] However, in my view Cpl. Vair has not had the benefit of much exposure to the sort of policing experience that combines knowledge and understanding of training with its implementation in circumstances on the street where theory and training collide with the exercise of judgment. His written report demonstrates, as did his evidence before me, the extent to which his opinions are based primarily on the theory underlying the use of force training. There are no doubt hundreds of police officers across the country who are both familiar with the standard use of force training and able to offer an opinion on whether that training was followed in any given case. That does not make them experts in the field .
- [62] The judge erred in finding that Cpl. Vair was not a qualified expert. In addition to having considerable experience in training officers, he had been a police officer for twelve years, and had six years of operational experience. The judge appears to have rejected Cpl. Vair not on the basis that he lacked expertise, but on the basis that Mr. McKay had greater expertise, and on the basis that many police officers had expertise similar to his. Neither of those bases was a proper one for excluding his evidence.
- [63] In saying this, I do not suggest that parties are entitled to call multiple experts to give repetitive evidence. At some stage, the proliferation of expert witnesses may amount to an abuse of the trial process. In this case, however, the defence proposed to call only two experts: one an active member of the R.C.M.P., and the other a retired member of the Vancouver police. It is not suggested that that would have been abusive of the process.
- [64] The Crown argues that even if the judge wrongly excluded Cpl. Vair's evidence, the error was harmless. It contends:

[M]inimal weight would have been given to his opinion, as compared with the weight that was given by the trial judge on various points to the opinion evidence of [Mr.] McKay. There can be little dispute that [Mr.] McKay's expertise and practical experience were significantly greater than [Cpl.] Vair's when it came to the crucial matter of applying classroom theories regarding the use of force to a practical policing scenario such as the one in the case on appeal. On any aspects where his opinion simply accorded with that of [Mr. McKay], very little additional benefit would have been garnered from the admission of his evidence.

[65] I am not persuaded that the error was a harmless one. The weight given to an expert's opinion will depend not only on the expert's training and experience, but also on the expert's ability to explain and provide a rationale for the opinion, on the expert's familiarity with the facts of the case, and on the perceived independence of the expert. It is not at all uncommon for the opinion of a less-experienced expert to be preferred over that of one with greater credentials.

[66] Cpl. Vair differed from Mr. McKay on the importance of Mr. Gillespie's hand entering his pocket a third time, rather than simply "fluttering" on and around it. The defence had a right to have that opinion considered.

[67] Further, there were issues on which the judge disagreed with Mr. McKay, including the important one of whether Mr. Gillespie's alleged advance on Cst. Pompeo should have been seen as threatening. It may well be that the reinforcement of Mr. McKay's opinion by a second expert would have been of some importance.

[68] Put simply, the judge, by excluding the evidence of Cpl. Vair entirely, deprived Cst. Pompeo (as well as himself and the Crown) of the opportunity to have opinions weighed and included in the balance. In the context of this case, where the judge placed great weight on what appears to have been an off-hand opinion delivered by Mr. McKay in the course of the judge's own questioning of him, I am unable to say that the error was a harmless one.

[69] In the result, I would allow the appeal on this ground and order a new trial.

4. Interventions by the Judge

[70] Cst. Pompeo's final ground of appeal concerns numerous interventions by the trial judge during the course of the trial. Cst. Pompeo notes that much of the evidence relied on by the judge was either elicited by him in his questioning of witnesses or was requested by him to be tendered.

[71] The judge intervened to develop evidence in at least four important areas. First, when Cpl. Vair was tendered as an expert witness, the judge put numerous questions to him on the issue of his qualifications - for the most part, the questions were in the nature of cross-examination. The answers to those questions figured prominently in the judge's decision to rule parts of Cpl. Vair's evidence inadmissible.

[72] Second, the judge took an active role in developing evidence from which he concluded that he should discount Cst. Pompeo's assertion that Mr. Gillespie appeared to him to be fleeing the police. During the cross-examination, for example, Cst. Pompeo was asked by the Crown whether it was possible that Mr. Gillespie had swerved to the wrong side of the road on hearing the police siren in order to allow the police to pass him. Cst. Pompeo replied:

A There's no doubt in [sic] mind, Your Honour, that he was trying to flee

[73] The Crown turned to the question of how long the siren was on, and then continued:

Q And it was when you turned the lights on that you reached the conclusion the vehicle would [sic] stop?

A Yes. It was almost instantaneous. As soon as the lights came on, swerved onto the wrong side of the road, accelerated away.

[74] The judge then intervened, cross-examining the officer on his belief that Mr. Gillespie had intended to flee the police:

THE COURT: Sir, you say that there's no doubt in your mind that he was trying to flee, but he had nowhere to flee to.

A I know, and that's -- and that's what was bizarre about the whole thing. I mean, he was gone. That's the best way I can describe it.

THE COURT: Well, but then he was gone because he'd turned left into the driveway.

A This all happened very quickly, and it was hard for me to process the no exit sign with everything else. But he -- his driving behaviour was such that he was trying to get away.

THE COURT: Well, I accept that in your -- that at the time you thought he was trying to flee, when you first saw him, as you say, accelerate and go onto the wrong side of the road, but looking back at it now, do you think there might be some question as to whether that conclusion was right?

A Looking back on it, his driving behaviour was such that -- I mean, whether he was trying to get away to get into a house, but he was certainly trying to get away from us. I don't know where he was planning on going or what he was thinking, but his driving behaviour was very erratic. And he accelerated, there's -- there's no question. What his motive was, I don't know, but that's the way that --

THE COURT: But then -- then seconds later he stopped the car, got out, and started walking towards you, not away from you.

A No, no, exactly. And again, that's something else that factored into my -- my risk assessment. Why is this happening? This is bizarre.

- [75] The judge asked numerous questions designed to establish timelines and distances. He asked technical questions as to how he could acquire the time stamps of various communications, and requested that he be furnished measured distances for the path taken by the vehicles on Juniper Road.
- [76] The judge used the evidence elicited by these various questions and requests to find that Mr. Gillespie did not reach any unusual speed travelling down Juniper Road (a finding that contradicted both the police officers' testimony and that of an independent witness).
- [77] A third area in which the judge intervened was to determine the significance of cones in police photos. The judge asked that he be furnished with a scale drawing that he could use to measure the distances between the parties at various junctures. He used the information he elicited to find that Mr. Gillespie's advance on Cst. Pompeo, if any, was slow and minimal.
- [78] Fourthly, in a portion of the transcript that I have already quoted, the judge put a number of hypotheses to Mr. McKay, and elicited a crucial opinion from him as to the significance of Mr. Gillespie's hand fluttering on, rather than entering, his pocket.
- [79] While these are the interventions by the judge that had the greatest significance to his ultimate findings, Cst. Pompeo points to myriad other instances where the judge appears to have assumed control over the course of questioning, or sought to influence the tendering of evidence.
- [80] It is well established that trial judges are permitted to ask questions and to participate in the eliciting of evidence. Where that questioning has no effect on the appearance of trial fairness, this Court will not intervene: see, for example, *R. v. Parmar*, 2005 BCCA 187; *R. v. C.S.M.*, 2008 BCCA 397. That said, there are limits on the judge's role. Canadian criminal trials are structured as adversarial proceedings, not inquisitorial ones. An appearance of unfairness is likely to exist if the judge assumes too active a role in a trial (at least absent some very good reason or explanation). Where a trial judge has overstepped the boundaries, the appearance of trial fairness demands that a new trial be ordered: see *Brouillard v. The Queen*, [1985] 1 S.C.R. 39 at 44 et seq. and the cases cited therein; *R. v. Valley* (1986), 26 C.C.C. (3d) 207 (Ont. C.A.) cited with approval in *R. v. Ertmoed*, 2006 BCCA 365 at para. 76; *R. v. Huang*, 2013 ONCA 240; *R. v. Switzer*, 2014 ABCA 129.
- [81] The trial judge's interventions in the case before us were extensive and frequent. While I do not call into question the impartiality of the judge, his active participation in the trial went well beyond the norm. Given that both the Crown and defence were well-represented by counsel, there was no need for any departure from usual adversarial practices, and the judge's active role is, to say the least, curious.
- [82] Given that the judge, himself, developed theories that were detrimental to the defence, and that he elicited considerable evidence that he used to support the conviction, the appearance of trial fairness was, in my opinion, compromised.

[83] A new trial must be ordered, in any event, on the basis of the trial judge's refusal to hear potentially important and admissible expert evidence. It is, therefore, not necessary to say more on this last issue on appeal.

E. Conclusion

[84] In the result, I would allow the appeal, set aside the conviction, and remit the matter to the Provincial Court for a new trial.

"The Honourable Mr. Justice Groberman"

I agree:

"The Honourable Chief Justice Bauman"

I agree:

"The Honourable Madam Justice Garson"

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