

CANADA / JUDGMENT

R. v. R.P.

2020 BCSC 129

COURT

Supreme Court of British Columbia

DECIDED

5 February 2020

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2020 BCSC 129 R. v. R.P.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. R.P.,

2020 BCSC 129

Date: 20200205

Docket: X081376

Registry: New Westminster

Regina

v.

R.P.

Corrected Judgment: The text of the judgment was corrected at paragraph 83 where changes were made on May 20, 2020;

Before: The Honourable Mr. Justice Armstrong

On appeal from: An order of the Provincial Court of British Columbia, dated June 22, 2018 (R. v. R.P., 2018 BCPC 336, Surrey Docket 222998).

Reasons for Judgment

Counsel for the Crown:

J.L. Fogel

Counsel for the Accused:

J.R. Ray, Q.C.

Place and Date of Hearing:

New Westminster, B.C.

August 7, 2019

Place and Date of Judgment:

New Westminster, B.C.

February 5, 2020

Introduction

- [1] This is an appeal from Mr. P's conviction for touching a child under the age of 16 years for a sexual purpose, contrary to s. 151 of the Criminal Code, R.S.C. 1985, c. C-46 [Criminal Code or Code]. The charge concerned an event occurring on December 29, 2016 and the conviction was entered June 22, 2018.
- [2] In this appeal, the appellant seeks an order to admit fresh evidence in the opinion of Anthony Dugbartey, Ph.D. registered psychologist, and an order setting aside his conviction. The underlying basis of the appeal is that Mr. P suffered from mild cognitive impairment (MCI) at the time of the trial and if the trial judge had known of his mental health problems he may have formed a different opinion of Mr. P's credibility or reliability. Thus the trial judge may have formed a different opinion concerning his denial of guilt or might have held a reasonable doubt warranting an acquittal.
- [3] The appellant contends that when he testified at trial he was affected by MCI revealing itself in confusion, poor memory or irrational responses that persuaded the trial judge he lacked credibility or reliability. Thus, the appellant contends that if the court had received the medical opinion now advanced on this application, the trial judge might have recognized that his testimony was affected by cognitive deficits that unfairly skewed his ability to testify and "would not have rejected the testimony of the appellant in the manner that he did".
- [4] Thus the new information concerning the appellant's mental health might have resulted in a not guilty verdict.

Background

- [5] The appellant had known the R.A.'s family through their attendance at the same church. He had known the R.A.'s grandfather since the early 1980s. The R.A. had a close relationship with the appellant due to the friendship between him and her grandfather and between the R.A. and the appellant's granddaughter.
- [6] The friendship between the appellant and the R.A.'s family was the genesis of the appellant's attendance at the R.A.'s home on December 29, for 2016; following some discussion with the R.A.'s father, it was decided that she would go with Mr. P to a local store. Although the appellant denied initially forming the intention of taking the R.A. to the store, he

acknowledged taking her to his home and then to McDonald's restaurant and then to Value Village in Langley. Before returning the R.A. to her home, they stopped once again at his house.

- [7] Following this outing, the R.A. made a disclosure to her mother that the appellant had inappropriately touched her in a sexual way. As a result, the child was taken to hospital for a forensic medical examination and the police were notified.
- [8] The R.A. was interviewed by the police and a CCTV recorded statement concerning the events was taken from her. This statement was entered into evidence at the trial. The appellant was also interviewed by the police and was cross-examined on the statement he made at that time.
- [9] The appellant testified at trial and denied touching the R.A. for a sexual purpose on December 29. He said his reason for attending the R.A.'s home that day was to check on the health of her grandfather; he had no predetermined intention of taking the R.A. anywhere. He said that during the visit the possibility of the R.A. accompanying him to Value Village was discussed. This testimony was contradicted by the R.A.'s mother who said the appellant had called her on the phone expressly offering to drop by the house if the R.A. wanted to go with him to Value Village.
- [10] The appellant was cross-examined extensively concerning his testimony and certain notes he had made before attending a police interview. In cross-examination, he testified to a number of facts the trial judge concluded were inconsistent and contained explanations that defied common sense.

Trial Judgment

- [11] In the trial judge's conclusion he formed the view that the appellant's testimony was inconsistent and sometimes lacking in common sense regarding aspects of his police interview and his explanations. The trial judge found the testimony "deeply troubling". He said:
- [43] Based on the foregoing review and overall, I found Mr. [P's] testimony lacking in many respects. It was inconsistent internally as well as externally and in particular, regarding the nature of his relationship with the [the R.A.'s family] and [the R.A.]. Mr. [P's] ongoing relationship with the family is also entirely inconsistent with what he described as the red - flag concerns he professed to have about them. The numerous social activities with the family and his voluntary attendance at the [the family's] residence on December 29th, for what I find to be the purpose of taking the child out on an outing where he would be alone with her, flies completely in the face of his characterization of the relationship being more of a charitable burden that he tolerated and was going to terminate.

- [44] Mr. [P's] explanation for failing to follow up with [the family] after the police mistakenly attended his residence rather than theirs on December 29th was internally inconsistent and was, again, completely contrary to the close relationship between the families. His failure to call them is more consistent with his consciousness of guilt.
- [45] Later, during the police interview, his unprompted focus on the events of December 29, despite that date being the last thing he said he was worried about, as well as his inconsistent and sometimes common-sense defying explanations regarding various aspects of his police interview and the circumstances under which he came to raise other possible explanations for the allegations against him are also deeply troubling.
- [12] The court concluded:
- [57] I find the testimony tendered by the accused to be neither true nor reasonably capable of being true. Where his evidence conflicts with that of [the R.A.] and her mother, I reject his testimony and I accept theirs.
- [13] The trial judge found Mr. P guilty.

Positions of the Parties

Appellant

- [14] The appellant contends there were a number of inconsistencies, memory lapses and common sense defying explanations given by him to relatively straightforward questions. He argues, if the trial judge had been aware that he suffered from MCI, he would not have made the adverse credibility findings and the trial decision may have been different.
- [15] Dr. Dugbartey examined the appellant and formed the opinion that he suffered a mild cognitive impairment. He also said the behaviours and expressions Mr. P reported exhibiting at trial, including confusion, shuffling of papers and difficulty maintaining a sequential train of thought, were in keeping with a person with the appellant's current neuropsychological test profile.
- [16] He also opined that the appellant's neuropsychological deficits were, more likely than not, extant before June 19 when he gave his in court testimony.
- [17] Thus, the appellant contends that Dr. Dugbartey's conclusions are rooted in his evaluation of the appellant and relevant. Taking into account the principles set out in *R. v. W.D.*, [1991] 1 S.C.R. 742, he contends the trial judge would have proceeded on a different "footing" in analyzing his testimony if his cognitive defects had been brought to the court's attention. These difficulties would have explained "testimonial difficulties the appellant experienced at trial " that would not have led to the rejection of his testimony.

Crown

- [18] Crown argues that nothing in the transcript of the appellant's testimony nor the analysis of the Provincial Court Judge supports the possibility that the accused's mild cognitive impairment, if known to the trial judge, would have resulted in a different outcome. The Crown says this is because none of the appellant's statements which were disbelieved by the trial judge, would have been influenced by the cognitive impairment as described by Dr. Dugbartey.
- [19] The Crown argues that overall, Dr. Dugbartey's evidence could not reasonably be expected to have affected the result.
- [20] Thus, the analysis in this case must focus on the question:

Could Dr. Dugbartey's evidence reasonably be expected to lead a trial judge to conclude that the unreliability of the appellant's testimony was a product of his mild cognitive impairment? If the appellant's answers to questions in cross-examination would not likely have been affected by his cognitive impairment, then it could not be said the admission of Dr. Dugbartey's evidence might reasonably have affected the trial judge's conclusions.

- [21] It is significant to this appeal that the appellant did not provide affidavit evidence indicating that during direct and cross examination his answers were inaccurate, or that he was confused by questions, or misconstrued questions, or misphrased answers, suffered a loss of his train of thought, or suffered any memory lapses concerning prior events and his testimony at trial.

The Fresh Evidence of Dr. Anthony Dugbartey

- [22] After the appellant was interviewed for the purposes of a forensic psychiatric assessment dated August 20, 2018, it emerged he was having cognitive problems that might have impacted his information processing capabilities. The author also recommended a further neuropsychological assessment to address his memory and information processing issues.
- [23] Thus Dr. Dugbartey, a forensic psychologist, conducted a neuropsychological assessment of the appellant to determine his neuropsychological functioning; his report and opinion was presented to this court.
- [24] Dr. Dugbartey based his report, in part, on his clinical interview of the appellant. In his report he said:

Mr. [P] tells me he was deemed an unreliable witness at his sexual offence trial because of some of his mannerisms at examination when he seemed confused and he also shuffled papers and had a hard time maintaining a sequential train of thought. Those sorts of behaviour expressions would, in my view, be entirely in keeping with what one would expect from Mr. [P's] current neuropsychological test profile.

- [25] In his summary of opinions and recommendations, Dr. Dugbartey listed eight specific areas where psychometric testing that indicated the appellant suffered significant impairments. He was cross-examined on his conclusions and summary of events. He testified:
- a. The effect of Mr. P's MCI on memory concerned only his short term memory which was not implicated in his cross-examination.
 - b. Any difficulties in word finding triggered by the MCI would have been evident to the trial judge.
 - c. limitations in the appellant's motor skills may have had an impact on speaking skills; there was a small correlation between the two; and
 - d. The effects of MCI will not result in persons making untruthful statements about facts.
- [26] The doctor also acknowledged that persons with MCI are subject to "good days" and "bad days". He indicated that if the subject was responsive to questions he was probably not affected by MCI at the time. If he appeared to understand questions and provide responsive answers, MCI would not likely have been affecting the witness. It may have been he was having a "good day".
- [27] He acknowledged that cross-examination at a criminal trial would have been a stressful event for the appellant; this setting could result in an increase in his MCI activated behaviour.
- [28] In the second appendix to the report, Dr. Dugbartey commented that the appellant said he could not understand some of the questioning from prosecuting counsel. That fact was not proved on this application.
- [29] His opinion is based on the appellant's report to him concerning his mannerism, confusion, paper shuffling and train of thought issues. No affidavit evidence proved the appellant was confused or lost his train of thought.
- [30] Dr. Dugbartey acknowledged that nothing in the reasons for judgement indicated that the appellant's mannerisms, confusion, train of thought or his behaviour, including shuffling papers, formed a basis for the trial judge rejecting his evidence.
- [31] Dr. Dugbartey performed all testing on the appellant before reading the reasons for judgement.
- [32] In a supplementary report, Dr. Dugbartey reported that he had read the reasons for judgement and found them sufficient for the purposes of his assessment and informing his conclusions. He also indicated that the passage of six months between June 6, 2018 and his test dates in December 2018 did not impact his opinion. He said "his risk factors for the neuropsychological deficits exhibited at objective psychometric testing in December 2018 preceded June 2018".

[33] Nonetheless, Dr. Dugbartey said in his report:

Mr. [P] presents with multiple cognitive symptoms, including memory failures, word finding difficulties, slowed thinking and distractibility, as well as periods when his mind goes blank. His memory symptoms have taken on a worsening course, which he tells me his wife has also observed.

[34] Dr. Dugbartey was cross-examined about the role MCI might have played in answers given by the appellant in his examination in chief and cross-examination.

[35] Before his interview with the police, the appellant created a collection of notes made within two weeks of December 30 which included everything he could remember.

[36] The trial judge noted:

With assistance of his spouse, before attending the interview, Mr. [P] compiled lengthy notes of all he could remember that could possibly bear on the issue. All Mr. [P] could think it might relate to was a couple of episodes roughly a month apart in July and August 2016.

[37] The first four pages of these notes dealt exclusively with events happening on December 29, 2016. The police asked him to start his statement at the beginning; he began to talk extensively about December 29, 2016 notwithstanding his assertions that he believed he was being investigated for events occurring in the summer of 2016. During his examination at trial the appellant discussed the police interview; he denied reading his notes during the interview. After he was shown a video recording of the interview and taking out his glasses and reading the notes for five minutes he said "I truly didn't recall that".

[38] In his notes the appellant had written that he had gone to pick up R.A. at her home. At trial, he said he had gone to R.A.'s home to see her grandfather, whereas he told R.A.'s mother that he intended to come to their home and take R.A. shopping. Dr. Dugbartey said that he could not interpret or construe this inconsistency as something triggered by MCI. He said the question was too complex to reach that conclusion.

[39] The appellant initially testified that he would only go on outings with R.A. in the presence of his granddaughter. He changed testimony and said that he had taken R.A. to a dollar store "a couple of times" with just the two of them.

[40] He testified that he had called B.A. on December 29, 2016 to make contact with R.A.'s grandfather. He said he went to R.A.'s home on December 29 to see T.W. and R.A. asked to accompany him. When he returned R.A. to her home, T.W. invited him in for coffee but he declined. Later he testified that he and T.W. are simply acquaintances. Dr. Dugbartey said this change in evidence was unlikely related to his MCI.

[41] Dr. Dugbartey indicated that circumlocution can be a symptom of MCI. However there was no evidence of circumlocution in the appellant's testimony.

- [42] Concerning the contradiction in the appellant's evidence concerning shuffling notes versus reading notes, Dr. Dugbartey said that confusion between shuffling and reading is not something attributable to MCI. MCI does not typically cause people to misrepresent things willfully. Nonetheless he said over time persons with MCI may experience memory degradation.
- [43] The appellant was also cross-examined on the identification he produced to the police. He said he took his Métis identification document as proof of his identity. Insofar as he carried a driver's license, he was asked why he used his Métis identification; he altered his evidence to state that he produced his Métis document because he was proud of his heritage and that it was not carried to prove his identity. Dr. Dugbartey said this change in evidence could have been related to the stress of the interview process with the police. Nonetheless, MCI would not have caused him to lie about that fact.
- [44] The appellant was questioned about whether he planned an outing with R.A. when he attended at her house on December 29. He had told R.A.'s mother that he was coming to their home for the purposes of taking her shopping; in his cross-examination he said he had intended to visit with R.A.'s grandfather. Dr. Dugbartey reiterated that MCI would not have been reflected in a change in Mr. P's reasoning or planning concerning his purposes for the shopping trip he took with R.A.
- [45] Overall, Dr. Dugbartey said that the appellant's explanations that were described by the trial judge as "common sense defying" might have been a product of MCI.

The Issues

[46] The issues are interrelated and can be usefully categorized as follows:

1. Admissibility and Use of the Expert Opinion Evidence
2. Application of the Palmer Test on Admissibility of Fresh Evidence

Analysis

[47] The Criminal Code permits admission of fresh evidence on appeals. The relevant provisions of the Criminal Code are as follows:

Powers of court of appeal

683 (1) For the purposes of an appeal under this Part, the court of appeal may, where it considers it in the interests of justice,

- (a) order the production of any writing, exhibit or other thing connected with the proceedings;
- (b) order any witness who would have been a compellable witness at the trial, whether or not he was called at the trial,
- (i) to attend and be examined before the court of appeal, or

(ii) to be examined in the manner provided by rules of court before a judge of the court of appeal, or before any officer of the court of appeal or justice of the peace or other person appointed by the court of appeal for the purpose;

- (c) admit, as evidence, an examination that is taken under subparagraph (b)(ii);
- (d) receive the evidence, if tendered, of any witness, including the appellant, who is a competent but not compellable witness;
- (e) order that any question arising on the appeal that
 - (i) involves prolonged examination of writings or accounts, or scientific or local investigation, and

(ii) cannot in the opinion of the court of appeal conveniently be inquired into before the court of appeal,

be referred for inquiry and report, in the manner provided by rules of court, to a special commissioner appointed by the court of appeal;

- (f) act on the report of a commissioner who is appointed under paragraph (e) in so far as the court of appeal thinks fit to do so; and
- (g) amend the indictment, unless it is of the opinion that the accused has been misled or prejudiced in his defence or appeal.

Parties entitled to adduce evidence and be heard

- (2) In proceedings under this section, the parties or their counsel are entitled to examine or cross-examine witnesses and, in an inquiry under paragraph (1)(e), are entitled to be present during the inquiry, to adduce evidence and to be heard.

[48] The Code also provides that:

Powers

686 (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal

- (a) may allow the appeal where it is of the opinion that
 - (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence,
 - (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
 - (iii) on any ground there was a miscarriage of justice;

- (b) may dismiss the appeal where
 - (i) the court is of the opinion that the appellant, although he was not properly convicted on a count or part of the indictment, was properly convicted on another count or part of the indictment,
 - (ii) the appeal is not decided in favour of the appellant on any ground mentioned in paragraph (a),
 - (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (a)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred, or
 - (iv) notwithstanding any procedural irregularity at trial, the trial court had jurisdiction over the class of offence of which the appellant was convicted and the court of appeal is of the opinion that the appellant suffered no prejudice thereby;

Admissibility and Use of the Expert Opinion Evidence

- [49] The first issue is the admissibility of Dr. Dugbartey's report and the use to be made of it if admitted.
- [50] Dr. Dugbartey's report is based in part on information provided by Mr. P.
- [51] The weight accorded to expert opinion evidence is dealt with in *R. v. Lavallee*, [1990] 1 S.C.R. 852 [Lavallee] and *R. v. Abbey*, [1982] 2 S.C.R. 24, 39 B.C.L.R. 201 [Abbey]. In *Lavallee*, Madam Justice Wilson interpreted the *Abbey* principles as follows:
1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.
 2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.
 3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.
 4. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.
- [52] The expert opinion evidence at issue relates to the reliability or credibility of the accused's testimony. Important to this appeal is whether opinion evidence bringing into question the credibility or reliability of a witness's testimony, in particular the accused's testimony, can be admitted at an accused's trial.
- [53] The general rule is that the trier of fact is to assess witness credibility. Per *R. v. Marquard*, 1993 CanLII 37 (SCC), [1993] 4 S.C.R. 223 [Marquard]:

It is a fundamental axiom of our trial process that the ultimate conclusion as to the credibility or truthfulness of a particular witness is for the trier of fact, and is not the proper subject of expert opinion. This Court affirmed that proposition in *R. v. Béland*, supra, at p. 408, in rejecting the use of polygraph examinations as a tool to determine the credibility of witnesses:

From the foregoing comments, it will be seen that the rule against oath-helping, that is, adducing evidence solely for the purpose of bolstering a witness's credibility, is well grounded in authority.

[54] The Court went on to say in *Marquard*:

For this reason, there is a growing consensus that while expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility, is admissible, provided the testimony goes beyond the ordinary experience of the trier of fact. Professor A. Mewett describes the permissible use of this sort of evidence as "putting the witness's testimony in its proper context." He states in the editorial "Credibility and Consistency" (1991), 33 *Crim. L.Q.* 385, at p. 386:

The relevance of his testimony is to assist -- no more -- the jury in determining whether there is an explanation for what might otherwise be regarded as conduct that is inconsistent with that of a truthful witness. It does, of course, bolster the credibility of that witness, but it is evidence of how certain people react to certain experiences. Its relevance lies not in testimony that the prior witness is telling the truth but in testimony as to human behaviour.

...

There are concerns. As the court stated in *R. v. J. (F.E.)*, [(1990), 53 C.C.C. (3d) 94, 74 C.R. (3d) 269, 36 O.A.C. 348 (C.A.)], and *R. v. C.(R.A.)* (1990), 57 C.C.C. (3d) 522, 78 C.R. (3d) 390, the court must require that the witness be an expert in the particular area of human conduct in question; the evidence must be of the sort that the jury needs because the problem is beyond their ordinary experience; and the jury must be carefully instructed as to its function and duty in making the final decision without being unduly influenced by the expert nature of the evidence.

The conditions set out by Professor Mewett, reflecting the observations of various appellate courts which have considered the matter, recommend themselves as sound. To accept this approach is not to open the floodgates to expert testimony on whether witnesses are lying or telling the truth. It is rather to recognize that certain aspects of human behaviour which are important to the judge or jury's assessment of credibility may not be understood by the lay person and hence require elucidation by experts in human behaviour.

[55] The principles discussed in *Marquard*, establish the basis on which Dr. Dugbartey's evidence might be admitted. Dr. Dugbartey's evidence can provide context for assessing the testimony of a witness with MCI.

[56] The House of Lords decision in *Toohey v. Metropolitan Police Commissioner*, [1965] 1 All E.R. 506 (U.K. H.L.) [Toohey], is frequently cited for the proposition that medical evidence is admissible to show that a witness suffers some disease, defect or abnormality of the mind that affects the reliability of evidence given. The opinions may include the expert's reasons and diagnosis and the extent to which a witness's credibility might be affected by those conditions of the mind.

[57] In *R. v. Kliman*, 1996 CanLII 8364 (B.C.C.A.), at para. 63, the Court adopted the principle set out in *Toohey*:

63 Expert evidence is admissible to show that a witness suffers from a mental disability which affects his or her ability to testify reliably. The admissible evidence is not limited to the fact of the diagnosis, but extends to the facts and circumstances on which the diagnosis is based and the extent to which the credibility of the witness is affected (*Toohey v. Metropolitan Police Commissioner*, [1965] 1 All E.R. 506 (H.L.) at 512)

[58] The application of the principles in *Toohey* have been affirmed in many cases including *R. v. Hawke*, 1975 CanLII 672 (ONCA) and in *R. v. Irwin*, 1994 CanLII 486 (B.C.C.A.)

[59] I was provided no authority supporting the proposition that an accused person whose testimony has been disbelieved by a trial judge should be able to seek to revisit that finding on appeal by utilizing fresh evidence. In this case, the appellant seeks an opportunity of a new trial because after-acquired discovery of his MCI might undermine the trial judge's conclusions that his testimony was unreliable and lacked credibility.

[60] Medical evidence can be admitted to show that a witness suffers from an abnormality or defect capable of affecting the reliability of that person's evidence. In *McWilliams' Canadian Criminal Evidence*, the authors suggest that the principle in *Toohey* applies to evidence adduced by the prosecution and the defence. The question is whether evidence of this type can be used to undermine the reliability of an accused's own testimony because cognitive deficits caused by the abnormality or defect of the mind may affect the reliability of the witness: see *R. v. Burkart*, 1964 CanLII 379 (S.K.C.A.)

[61] In *Regina v. Dietrich*, 1970 CanLII 377 (O.N.C.A.) [Dietrich], the defence proposed to call psychiatric evidence on behalf of an accused to support its theory that the accused was a psychopathic personality who had confessed to crimes which he had not actually done and had a propensity to lie in effort to explain confessions he had made. The psychiatrists were permitted to testify concerning the veracity of the accused:

If, as held by the majority in that case [referring to *R. v. Lupien*, [1970] 2 C.C.C. 193, 9 D.L.R. (3d) 1, 9 C.R.N.S. 165], opinion evidence could be given that, in effect, the accused was to be believed, it would seem to follow that similar opinion evidence by a psychiatrist that an accused who had confessed could not be believed without supporting evidence is admissible. Consequently, in my view, the learned trial Judge was right in admitting in evidence the psychiatrists' opinions as to the credibility of the accused man.

- [62] In Dietrich, the court also adopted the reasons of Lord Pearce at p. 159 in Toohey.
- [63] On the basis of these authorities, I am satisfied that appellant is entitled to seek admission of fresh evidence of psychiatric or psychological opinion to undermine his own credibility/reliability as a witness.
- [64] Overall, I am satisfied that if Dr. Dugbartey's opinion meets the requirements of the Palmer test, it would be admissible to support the proposition the application to admit the evidence and allow the appeal because the appellant's should be able to seek to revisit that finding utilizing fresh evidence.

Application of the Palmer Test on Admissibility of Fresh Evidence

- [65] To be admissible on appeal, fresh evidence must satisfy the four part test set out in *Palmer v. The Queen* (1979), [1980] 1 S.C.R. 759 [Palmer], at p. 775:
- (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*.
 - (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
 - (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
 - (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[66] In *Palmer* the court concluded, at p. 776:

In my view, the approach taken in the authorities cited above follows that of this Court in *McMartin*. The evidence in question in the case at bar was not available at trial and it would be, if received, relevant to the issue of guilt on the part of the Palmers. The evidence sought to be introduced in *McMartin* was evidence of an expert opinion not of matters of fact and therefore no issue of credibility in the ordinary sense arose. It is clear, however, that in dealing with matters of fact a consideration of whether, in the words of Ritchie J., the evidence possessed sufficient strength that "it might reasonably affect the verdict of the jury" involves a consideration of its credibility as well as its probative force if presented to the trier of fact.

[Emphasis added.]

[67] The Supreme Court of Canada in *McMartin v. The Queen*, 1964 CanLII 43 (S.C.C.); [1964] S.C.R. 484, said at p. 494:

I would respectfully adopt the following views expressed on behalf of the majority of the Court of Appeal of British Columbia by Sloan C.J.B.C. in *R. v. Buckle*, where he said:

In my opinion the rule to be applied in criminal cases in relation to the introduction of fresh evidence and consequential relief which may be granted by the Court, is wider in its discretionary scope than that applied by the Court in civil appeals. If the newly-discovered evidence is in its nature conclusive, then the Court of Appeal, in both civil and criminal cases, may itself finally deal with the matter ... If, on the other hand, in a criminal case, the new evidence does not exert such a compelling influence, but is however of sufficient strength that it might reasonably affect the verdict of a jury, then, in my opinion, the Court may admit that evidence and direct a new trial, so that such evidence might be added to the scale and weighed by the trial tribunal in the light of all the facts.

[Emphasis added.]

[68] The Supreme Court of Canada, in *R. v. Lévesque*, 2000 SCC 47, said the overriding consideration is the "interests of justice" and that the criteria "call for a relaxed and flexible application". Gonthier J. for the Court went on to state, however, that more flexibility should not be permitted in the application of *Palmer*. The Court states, at para. 18:

...In accordance with the last three criteria, a court of appeal may admit only evidence that is relevant and credible, and could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. If these criteria were made more flexible, it would be open to a court of appeal to accept evidence that was not relevant or credible, and that could not reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result to which they led at trial. In my view, it would serve no purpose and be contrary to the interests of justice to introduce this kind of flexibility.

[Emphasis added.]

[69] Much of the above analysis on the admissibility and use of Dr. Dugbartey's expert opinion evidence is also relevant to the application of the *Palmer* criteria. On the basis of the principles outlined in *Dietrich*, *Toohey* and *Marquard*, I find the appellant has met the first three requirements in *Palmer*:

- (1) The evidence was not available at the time of trial by due diligence on the appellant, the MCI was only diagnosed after trial;
- (2) The evidence is relevant in the sense that it may bear on the reliability of the appellant's evidence; and
- (3) The evidence is credible and capable of belief.

[70] The remaining issue is whether fresh evidence undermining the credibility of Mr. P's testimony at trial establishes that the diagnosis of MCI could reasonably have affected the result, taking into account all other evidence adduced at trial.

[71] The question to be decided on this application this case is whether Dr. Dugbartey's opinions regarding aspects of the appellant's MCI including memory, confusion, train of thought or attention, and rational consistency in articulating facts might reasonably have influenced the trial judge's assessment of his credibility or reliability.

[72] There is no of evidence from the appellant\witness that he was confused, misremembered facts, misunderstood questions, or lost his train of thought. Thus, there is little evidence to support the assumptions set out in Dr. Dugbartey's report insofar as it addresses the appellant's circumstances at the time of trial; the weight accorded to his opinion on the impact of MCI on Mr. P is not significant.

[73] In a decision with some similarities to this case, the Alberta Court of Appeal dealt with a fresh evidence application from a psychologist specialized in diagnosing adults with FASD and an interpreter dealing with difficulties faced by deaf persons. In that decision the court said:

39 Mr. Peequaquat's first ground of appeal poses three distinct questions. The first is: if the fresh evidence was adduced at the application to set aside the guilty pleas, could it reasonably be expected to have changed the trial judge's findings regarding Mr. Peequaquat's credibility? We do not think so. The trial judge's decision was based on Mr. Peequaquat's demeanour, the evasiveness of his answers to questions, and his unwillingness to admit things that were obviously true. It was reinforced by Mr. Chartrand's [the lawyer] own evidence at the set aside hearing, which the trial judge accepted. Mr. Chartrand's evidence on appeal is, quite properly, tentative. Without renouncing his evidence at the set aside hearing, he speculates that Mr. Peequaquat's apparent evasiveness might be explained by his inability to understand what was happening in court; equally, it might not. Mr. Chartrand's affidavit also reaffirms the care and steps he took in communicating with Mr. Peequaquat including the care related to confirming Mr. Peequaquat's guilty plea.

40 Dr. Russell's (the interpreter's) affidavit suggests that Mr. Peequaquat's testimony may have appeared evasive in court because the ASL and Deaf interpreters did not accurately convey his meaning. Again, this is speculation. Dr. Russell was not present in court, and did not interview Mr. Peequaquat. Both ASL and Deaf interpreters were present and this is the standard called for in Dr. Russell's affidavit.

41 Neither the interpreter's evidence nor Mr. Chartrand's evidence give rise to a reasonable possibility that the trial judge would have assessed Mr. Peequaquat's credibility differently had this evidence been before him.

[74] The requirement under the fourth part of the Palmer test is that the proposed new evidence could, "reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result".

- [75] The Crown argued that none of the trial judge's reasons for disbelieving the accused would be affected by the evidence of Dr. Dugbartey. The trial judge's conclusions dealt mainly with "significant internal inconsistencies" and his evidence being at odds with his unprompted focus on December 29" during his police interview.
- [76] The trial judge did not describe the appellant as confused, confusing, unresponsive, or averring to a lack of detailed memory in his assessment of the appellants' reliability.
- [77] Trial counsel did not observe the accused demonstrating any memory difficulties although he noticed the appellant showed "considerable lack of focus in having to repeatedly redirect the appellant to issues at hand". Defence counsel declined an opportunity to re-examine the appellant after cross examination during which he could have canvassed concerns about his responses, uncertainty, memory, or misunderstanding of questions.
- [78] Crown contends that mild cognitive impairments will not cause internal or external inconsistencies in a person's testimony. A person experiencing MCI can lie, and, if found lying, that testimony will not raise any doubt. The Crown contends this was the outcome in this case and fresh evidence could not reasonably be expected to change the assessment of the appellant's credibility. He noted this was a question of the accused's credibility and not his reliability.
- [79] Thus, absent some reliable evidence gleaned from the trial judge's reasons that Mr. P was deemed an unreliable witness "because of some of his mannerisms at examination when he seemed confused and he also shuffled papers and had a hard time maintaining a sequential train of thought", it seems little weight should be accorded Dr. Dugbartey's opinion where he said "those sorts of behaviour expressions would, in my view, be entirely in keeping with what one would expect from Mr. [P's] current neuropsychological test profile".
- [80] It was open to the appellant to provide some evidence supporting the assertions that he lost his train of thought, was confused, had memory difficulties, or was otherwise impacted by a MCI while testifying. He did not.
- [81] Based on the cross-examination of Dr. Dugbartey, I am satisfied that a diagnosis of MCI does not explain the basic contradictions between the appellant's evidence at trial, his police statement, and the evidence of the R.A.'s mother. In short, I cannot conclude that if Dr. Dugbartey's evidence was admitted it could have been expected to affect the result.
- [82] MCI will not cause a person to be untruthful or to create memories that did not exist. Thus, on those points on which the trial judge disbelieved the appellant, none of the inconsistencies mentioned by the trial judge appear to have stemmed from his mannerisms during examination, confusion, shuffling papers or struggling to maintain a sequential train of thought. It is those behaviours that were, in Dr. Dugbartey's opinion, in keeping with the appellant's neuropsychological test profile.

[83] Thus, exercising my discretion I refuse the application to admit fresh evidence on this appeal; the application and the appeal are dismissed.

"Armstrong J."

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