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R. v. Reed

2024 BCSC 1636

COURT

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2024 BCSC 1636 R. v. Reed

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Reed,

2024 BCSC 1636

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Registry: Vancouver

Rex

v.

Richard Charles Reed

Before: The Honourable Madam Justice Watchuk

Ruling on Voir Dires #1 and #2

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INTRODUCTION

- [1] Richard Charles Reed is charged with five offences, including the first degree murder of Jian Jun Zhu. All the charges arise from a shooting at the Manzo Itamae Japanese Restaurant (the "Manzo Restaurant") in Richmond, BC on September 18, 2020.
- [2] The Crown alleges that Mr. Reed fired seven gunshots through a window into the Manzo Restaurant, killing Mr. Zhu and injuring Paul King Pao Jin. The Crown says Mr. Reed first aimed and fired the handgun at Mr. Zhu, shooting Mr. Zhu in the back of his head. Mr. Reed then fired six more shots as he fled the Manzo Restaurant. Mr. Zhu immediately collapsed after he was shot, and later died in hospital. Mr. Jin was treated for his injuries and recovered.
- [3] As part of its case, the Crown seeks to tender:
- a) Mohammed Elburai's evidence about Mr. Reed's statements to Mr. Elburai on the evening of September 18, 2020, and a few days later ("Voir Dire #1"); and
 - b) Tyler Laramie-Chan's evidence about his communications with Mr. Reed in respect of the location where Mr. Laramie-Chan picked up Mr. Reed on September 18, 2020 ("Voir Dire #2").

GOVERNING LEGAL PRINCIPLES

- [4] The governing framework for determining the admissibility of evidence was recently summarized in *R. v. Schneider*, 2022 SCC 34 at para. 36. The Supreme Court lays out the three-part test a judge must consider when a party objects to the admission of evidence:
- a) whether the evidence is relevant;
 - b) whether it is subject to an exclusionary rule; and
 - c) whether to exercise their discretion to exclude the evidence.

Relevance

- [5] The question for the trial judge at this stage is whether, in light of all the other evidence, the evidence at issue logically tends to make a fact in issue more or less likely: Schneider at paras. 39, 45. The focus of the relevance inquiry "should remain on whether the jury can give meaning to the witness's testimony in a manner that is non-speculative, not the overall strength of the Crown's case": Schneider at para. 44. Beyond this question, there is no legal test for relevance and trial judges must evaluate relevance "as a matter of logic and human experience": Schneider at para. 39.
- [6] The threshold for relevance is low: Schneider at para. 39. The evidence need not "firmly establish" the truth or falsity of a fact in issue, nor be unequivocal, to be relevant: Schneider at paras. 39, 43. However, in some circumstances, evidence may be too speculative or equivocal to be relevant, as the meaning of the statement offered cannot be determined and it cannot give rise to logical inferences: Schneider at para. 39; *R. v. Merritt*, 2023 ONCA 3 at paras. 75-76. What matters is whether a witness can recall the general "gist" of the evidence they are providing, rather than the exact words used: Schneider at para. 71. The Court is not to consider ultimate reliability, believability, or probative value in determining relevance: Schneider at para. 39. Uncertainty and memory frailties may be considered later in the test when balancing probative value and prejudicial effect: Schneider at paras. 39, 43, 71.

Absence of an Exclusionary Rule

- [7] There are two exclusionary rules engaged on these voir dires: the rule against hearsay and the rule against prior consistent statements.

Hearsay and party admissions

- [8] Out-of-court statements adduced for the truth of their contents are presumptively inadmissible as hearsay. Not all out-of-court statements are hearsay, as they may be adduced to prove that a statement was made, which "is frequently relevant in considering the mental state and conduct thereafter of the witness or of some other person in whose presence the statement was made": *R. v. Smith*, [1992] 2 S.C.R. 915 at 924, 1992 CanLII 79, citing *Subramaniam v. Public Prosecutor*, [1956] 1 W.L.R. 965 (P.C.) at 970; *R. v. Baldree*, 2013 SCC 35 at paras. 35-36.
- [9] If an out-of-court statement is adduced for a hearsay purpose, it may be admissible under either a categorical exception or the principled approach. A hearsay statement that falls under a recognized exception is presumptively admissible, absent a "rare case" wherein the litigant successfully challenges admission of the evidence because the indicia of necessity or reliability are lacking in the case at hand: Schneider at para. 51; *R. v. Mapara*, 2005 SCC 23 at para. 15.

- [10] A "rare case" will contain "special features", or circumstances of particular difficulty, beyond the ordinary fallibility of human memory, reliability concerns inherently captured in the traditional hearsay exception, or weaknesses that go to the ultimate weight of the evidence: *R. v. MacKinnon*, 2022 ONCA 811 at paras. 44-46, 49-50, leave to appeal to SCC ref'd, 40581 (22 June 2023). The onus is on the party wishing to invoke the "rare case" exception to establish that it applies: *MacKinnon* at para. 51.
- [11] The party admissions exception is a categorical exception to the hearsay rule which allows for the admission of the accused's out of court statements, silence, actions, and demeanour. In *Schneider* at para. 57, the Supreme Court endorsed a summary of the rule that "[a]nything the other side ever said or did will be admissible so long as it has something to do with the case".

Prior consistent statement and narrative as circumstantial evidence

- [12] In *R. v. Khan*, 2017 ONCA 114 at para. 25, leave to appeal to SCC ref'd, 37534 (3 August 2017), citing *R. v. Stirling*, 2008 SCC 10 at paras. 5-7, the Court of Appeal explained that "[p]rior consistent statements are presumptively inadmissible because they lack probative value". The fact that a witness previously said the same thing they are now testifying to in court is generally not probative of whether the witness is offering truthful testimony: *Khan* at para. 25. It would be self-serving to allow a witness to buttress their testimony with their prior consistent statements: *Khan* at para. 25.
- [13] There are exceptions to this rule, including the narrative as circumstantial evidence exception. This arises where "the circumstances surrounding the making of the prior consistent statement are such that the statement assists in assessing the reliability and credibility of a witness' in-court testimony, giving prior consistent statements admitted as 'narrative' a more substantive use": *Khan* at para. 31.
- [14] The Court of Appeal in *Khan* at para. 34 instructed that the "fact that a statement was made, and the context in which it was made, can be probative". A prior consistent statement can be used not to corroborate the witness's evidence by duplication, but to provide narrative as circumstantial evidence to evaluate the credibility and reliability of the witness's testimony: *Khan* at para. 39.

Discretion to Exclude Based on Prejudicial Effect versus Probative Value

- [15] If the proposed evidence is relevant and not subject to an exclusionary rule, the third and final step is for the trial judge to determine whether to exercise their discretion to exclude the evidence based on a balancing of prejudicial effect and probative value: *Schneider* at para. 59.

[16] Probative value speaks "to the degree of relevance to trial issues and the strength of inference that can be drawn from evidence": Schneider at para. 60. This is the appropriate place in the party admission analysis to consider the frailties of memory: Schneider at para. 71.

[17] Prejudicial effect speaks to the likelihood that the evidence will be misused by the trier of fact: Schneider at para. 60. As Justice Charron explained in *R. v. B. (L.)* (1997), 35 O.R. (3d) 35 at 46-47, 1997 CanLII 3187 (C.A.), leave to appeal to SCC ref'd, 111 O.A.C. 396 (19 March 1998):

It is important to define what is meant by prejudice in this context. In its widest sense, any evidence that tends to prove guilt can be said to be prejudicial to the accused since it is detrimental to his or her position. Obviously that is not the kind of prejudice that calls for special evidentiary rules. Professor Delisle defines the meaning of prejudice in this context succinctly as follows:

Prejudice in this context, of course, does not mean that the evidence might increase the chances of conviction but rather that the evidence might be improperly used by the trier of fact. It is one thing for evidence to operate unfortunately for an accused but it is quite another matter for the evidence to operate unfairly. The trier who learns of the accused's previous misconduct may view the accused as a bad man, one who deserves punishment regardless of his guilt of the instant offence and may be less critical of the evidence presently marshalled against him.

[Emphasis added.]

[18] Trial judges should provide clear reasons for their probative value and prejudicial effect weighing exercise, to facilitate appellate review: Schneider at para. 62.

VOIR DIRE #1

Background

[19] Mr. Elburai testified about two different interactions with Mr. Reed: one on the night of September 18, 2020; and the other a few (approximately three to five) days after September 18, 2020 (the "Second Encounter").

[20] Mr. Elburai testified that at around midnight on September 18, 2020, Mr. Reed called him in distress and asked to be picked up from the Wendy's restaurant on Cambie Street in Vancouver. Mr. Elburai drove to the Wendy's restaurant and picked Mr. Reed up as requested; Mr. Reed entered Mr. Elburai's car and requested a ride home (the "Ride Request"). During their drive, Mr. Reed told Mr. Elburai to "look at the news". While driving, Mr. Elburai searched the internet on his phone and saw news articles reporting that a shooting at the Manzo Restaurant had just occurred.

[21] There are two statements at issue from September 18, 2020:

a) the Ride Request; and

- b) Mr. Reed's statement "look at the news".
- [22] Mr. Elburai also testified that he spent time with Mr. Reed a few days after September 18, 2020, defined above as the Second Encounter. Mr. Elburai testified that during the Second Encounter, Mr. Reed did and said the following:
- a) bragged that "he's the one who was responsible for that", referring to the shooting at the Manzo Restaurant;
 - b) showed Mr. Elburai a photo of a Chinese man with his mouth or cheek bleeding (the "Photograph");
 - c) said that an East Indian man named "Jas" was in the restaurant during the shooting and provided Mr. Reed the Photograph;
 - d) said he shot Mr. Jin;
 - e) claimed he got "some money", maybe \$6,000 to \$10,000;
 - f) said he fired nine or ten shots;
 - g) said Mr. Jin was his intended target;
 - h) said he walked into the restaurant two times prior to the shooting to look for the target;
 - i) said he shot the wrong person, who was the assistant of Mr. Jin; and
 - j) said he was in a high-end vehicle after the shooting.
- [23] The Crown applies to admit these statements as party admissions.
- [24] The defence does not oppose the admission of the Ride Request. The defence opposes admission of the balance of Mr. Elburai's evidence because it is too speculative and equivocal and, as a result, it is not relevant; it does not comfortably qualify as a party admission (because Mr. Reed may or may not have made these statements), or it should qualify as a "rare case" such as to warrant its exclusion; and it carries prejudicial effect that outweighs any probative value.

Analysis

- [25] The Crown's application as heard in Voir Dire #1 to admit Mr. Reed statements to Mr. Elburai is granted in part.
- [26] With regard to the interaction between Mr. Reed and Mr. Elburai on September 18, 2020, the Ride Request is admitted. There is no objection to the admissibility of that statement.
- [27] The remainder of Mr. Elburai's evidence is discussed below. I will address the first two branches of the Schneider test together. I will then separately consider the probative value versus prejudicial effect of the evidence.

The entirety of Mr. Elburai's evidence is relevant and falls under the party admission exception

- [28] Applying the first branch of the Schneider test, all of Mr. Elburai's evidence is relevant to a fact in issue--whether Mr. Reed fired the shots at the Manzo Restaurant--and as a matter of logic and human experience, it tends to increase the probability of that fact.
- [29] While Mr. Elburai was equivocal on the stand, his evidence need not be unequivocal to be relevant: Schneider at para. 43. Importantly, the meaning of Mr. Reed's statements to Mr. Elburai can be determined, unlike in R. v. Ferris, 1994 ABCA 20, aff'd [1994] 3 S.C.R. 756, 1994 CanLII 31; R. v. Hunter (2001), 54 O.R. (3d) 695 at paras. 14, 21, 2001 CanLII 5637 (C.A.). Mr. Elburai testified to entire firsthand encounters he had with Mr. Reed on September 18, 2020 and a few days later in the Second Encounter. Mr. Elburai was sufficiently able to recall the general "gist" of those encounters. His evidence is therefore able to support logical inferences: Merritt at para. 76.
- [30] Mr. Reed's statement to Mr. Elburai of "look at the news"; the Photograph; and the remainder of Mr. Elburai's evidence from the Second Encounter all, to varying degrees, increase the probability that Mr. Reed knew of and was involved in the shooting.
- [31] Under the second branch of the Schneider test, it is plain that the entirety of Mr. Elburai's evidence falls under the party admission exception. Mr. Elburai's evidence of Mr. Reed's statements to Mr. Elburai are out-of-court statements. Mr. Elburai's testimony is evidence of Mr. Reed's actions and utterances, offered as evidence against him. It is therefore presumptively admissible.
- [32] I do not accept that this constitutes a "rare case" wherein evidence falling within an existing exception should be excluded because the indicia of reliability and necessity are lacking. The fallibility of Mr. Elburai's memory is not a special or unusual circumstance such as to render this a "rare case". That concern is properly dealt with in weighing the probative value and prejudicial effect of the evidence.

The probative value of Mr. Elburai's evidence that Mr. Reed told him to "look at the news" outweighs the prejudicial effect

- [33] Mr. Reed's statement to Mr. Elburai of "look at the news" is admitted as a party admission exception to the hearsay rule, and I do not exercise my discretion to exclude it under the third branch of the Schneider test.
- [34] The probative value of this evidence is modest. It is not a direct confession by Mr. Reed of committing the shooting. At the very least, Mr. Reed's statement "look at the news" grounds an inference that Mr. Reed was aware that the shooting had occurred at the Manzo Restaurant and was interested in it. Considered alongside other evidence before the Court, it may also reasonably ground an inference that Mr. Reed was indicating to Mr. Elburai that he was involved in the shooting at the Manzo Restaurant. As a result, this evidence tends to increase the probability of a fact in issue--whether Mr. Reed committed the shooting at the

Manzo Restaurant.

- [35] While Mr. Elburai was highly equivocal on cross-examination, Mr. Elburai's memory appeared adequately strong on this point of evidence, in that he remembered the "gist" of this evidence. He recalled that as a result of Mr. Reed telling him to "look at the news", he searched for and saw news articles on his phone about the shooting at the Manzo Restaurant. He also recalled feeling "shocked" and "shit scared" upon viewing the news articles.
- [36] Additionally, I do not accept that Mr. Reed's propensity to brag means that Mr. Elburai's evidence about Mr. Reed's statements is inherently or necessarily unreliable. As Justice Nordheimer stated in *R. v. F.O.*, 2016 ONSC 1898:
- [30] In respect of the defence contention that Gritty's tendency to brag or boast supports his position that he invented the story, I would note the salient fact that people often boast or brag about things that are true. In other words, just because someone is boasting or bragging does not, of necessity, mean that the core of what they are saying is untrue.
- [37] The prejudicial effect of this evidence is low. The significant risk of prejudice from confession-like evidence (*Schneider* at para. 81) is attenuated in a judge-alone trial: *R. v. B. (T.)*, 2009 ONCA 177 at para. 27; *R. v. Colyer*, 2023 ABCA 206 at para. 37. The court is presumed to know the law and can instruct itself on the proper use of this evidence, thereby, ameliorating any risk of its misuse: *B.(T.)* at para. 27.
- The probative value of Mr. Elburai's evidence that Mr. Reed showed him the Photograph outweighs the prejudicial effect
- [38] With regard to Mr. Reed showing Mr. Elburai the Photograph during the Second Encounter, this evidence is admitted under the party admission exception to the hearsay rule. I do not exercise my discretion to exclude this evidence under the third branch of the *Schneider* test.
- [39] Mr. Elburai's evidence about Mr. Reed showing him the Photograph tends to increase the probability of a fact in issue--whether Mr. Reed committed the shooting at the Manzo Restaurant. Again, while it is not a direct confession by Mr. Reed of committing the shooting, considered alongside other evidence before the Court, it could reasonably ground an inference that Mr. Reed possessed the Photograph because he was involved in the shooting at the Manzo Restaurant.
- [40] Although Mr. Elburai severely qualified his evidence as a whole, he was clear that Mr. Reed showed him the Photograph. He recalled where the person in the Photograph was bleeding from (his cheek or mouth) and could physically describe and identify the person in the Photograph (Mr. Jin). He also testified to his specific doubt about how Mr. Reed obtained the Photograph. Mr. Reed told him he received it from a man named Jas, but Mr. Elburai did not believe him. Mr. Elburai's disbelief in how Mr. Reed obtained the Photograph suggests Mr. Reed did indeed show him something. Mr. Elburai's testimony regarding Mr. Reed's tendency to brag does not alter these findings, for the same reasons described above.

- [41] As discussed above, the prejudicial effect of this evidence is low in the context of a judge-alone trial.

The prejudicial effect of the remainder of Mr. Elburai's evidence outweighs the probative value

- [42] The remainder of Mr. Elburai's evidence about statements by Mr. Reed to Mr. Elburai (para. 22 (a) and (c)-(j) above) is excluded and is not admitted as evidence in the trial proper. In balancing the probative value with the prejudicial effect, I have found that the balance favours exclusion of the remainder of the statements.
- [43] The probative value of this evidence is low. Mr. Elburai qualified the information he provided the Court, repeatedly referencing and conceding his memory's frailty. On cross-examination, Mr. Elburai agreed that it was difficult for him to know what information he obtained from Mr. Reed, other people, or the news. Mr. Elburai testified that "the whole of Rosewood must know about it", referring to an apartment complex where Mr. Elburai and Mr. Reed's mutual friends live and/or spend time. The frailty of Mr. Elburai's memory and his equivocation are germane in the context of this particular evidence, which concerns more general details of the Manzo Restaurant shooting--information that could realistically have come from a source other than Mr. Reed, including their mutual friends, in the days following the shooting. Mr. Elburai did not provide any detail or context to indicate he was confident about the source of this evidence.
- [44] If this information indeed came from another person or the news, then Mr. Elburai's evidence in this respect has no probative value. In other words, it is not capable of any non-speculative meaning: *Schneider* at paras. 65-72, citing *Ferris*; *Hunter* at paras. 14.
- [45] Conversely, the prejudicial effect on Mr. Reed is high. This evidence involves a direct confession by Mr. Reed. Justice Wedge in *R. v. Haevischer*, 2012 BCSC 1641 at paras. 32-33 explained that the prejudicial effect of confession-like evidence is not entirely absent in a judge-alone trial. The Court would be effectively left to guess whether Mr. Elburai heard these details from Mr. Reed or from another source, thereby raising the spectre of reasoning prejudice. The prejudicial effect of Mr. Elburai's evidence would therefore operate in an "unfair" rather than merely "unfortunate" manner.

VOIR DIRE #2

Background

- [46] Mr. Laramie-Chan testified that on September 18, 2020, he picked Mr. Reed up from Bowcock Road. He marked the pickup location with an "X" on Exhibit A on this voir dire. The Crown contends that the "X" drawn by Mr. Laramie-Chan is next to 8231 Bowcock Road, Richmond, BC, when considered concurrently with Exhibits 4, and 8.

- [47] Mr. Laramie-Chan testified that, at some point after September 18, 2020, Mr. Reed contacted Mr. Laramie-Chan and asked where Mr. Laramie-Chan picked him up on September 18, 2020 (the "Pickup Location Request"). Mr. Laramie-Chan testified that he "went on Google Maps, dropped a pin to the closest spot where I could find to where I picked him up, and sent him the address for that".
- [48] Exhibit C on this Voir Dire shows two text messages sent on December 15, 2020 at 12:12 p.m. by Mr. Laramie-Chan to Mr. Reed (the "Text Messages"). The Text Messages read "8231 bow com" followed by "Bowcock".
- [49] There are two pieces of evidence in issue on this Voir Dire:
- a) the Pickup Location Request; and
 - b) the Text Messages.
- [50] The Crown seeks to admit the Pickup Location Request for a pure narrative purpose. The defence does not object to the admission of the Pickup Location Request for this purpose.
- [51] The Crown seeks to admit the Text Messages under the narrative as circumstantial evidence exception to the rule against prior consistent statements. They seek to use this information to support Mr. Laramie-Chan's testimony that he did in fact send a text to Mr. Reed, after Mr. Reed's request that he do so. The defence contends that this evidence is inadmissible as narrative as circumstantial evidence, because the trier of fact does not require narrative assistance and so the only possible use of the evidence is an impermissible use.

Analysis

- [52] The Crown application as amended regarding the evidence of Mr. Laramie-Chan heard in Voir Dire #2 is granted.
- [53] The Pickup Location Request is admissible for a pure narrative purpose. There is no objection to this evidence being used for this purpose.
- [54] The Text Messages are also admissible under the narrative as circumstantial evidence exception to the rule against prior consistent statements. They are to be used solely for the limited purpose of assessing Mr. Laramie-Chan's credibility, such that the Text Messages confirm his testimony that he sent an address to Mr. Reed.
- [55] The Text Messages are relevant to assessing Mr. Laramie-Chan's credibility. Mr. Laramie-Chan testified that on September 18, 2020, he picked up Mr. Reed at the "X" he marked on Exhibit A. When viewed alongside Exhibits 4 and 8, the "X" on Exhibit A corresponds with 8231 Bowcock Road, Richmond, BC. The Text Messages read "8231 bow com" followed by "Bowcock". The Text Messages enhance Mr. Laramie-Chan's credibility because they are independent evidence corroborating Mr. Laramie-Chan's testimony that he sent an address to Mr. Reed. The Court may look to the Text Messages in assessing whether Mr. Laramie-Chan is telling the truth in his testimony that he texted an address to Mr. Reed.

- [56] The applicable exclusionary rule for the Text Messages is the rule against prior consistent statements. The defence argued that *R. v. N.P.*, 2021 BCCA 25 at para. 12 stands for the proposition that the narrative as circumstantial evidence exception applies only where the trier of fact requires assistance in situating a witness's evidence in time. With respect, that is not the only permissible use of the exception: *Khan* at paras. 33-37; *R. v. Langan*, 2019 BCCA 467 at para. 99 (per Bauman C.J., dissenting), rev'd 2020 SCC 33 (aff'g dissent of Bauman C.J.). One permissible use is to assess the witness's truthfulness: *Khan* at paras. 33-37.
- [57] The Text Messages are admissible under the narrative as circumstantial evidence exception for the sole purpose of assessing Mr. Laramie-Chan's truthfulness, and therefore his credibility and reliability: *Khan* at paras. 33-37. The Court may not use the Text Messages to reason that Mr. Laramie-Chan has said the same thing twice, and therefore he should be believed.
- [58] The Text Messages have modest probative value. They tend to increase the probability of a fact in issue--Mr. Laramie-Chan's credibility and reliability. As explained above, the fact that Mr. Laramie-Chan sent the Text Messages confirms Mr. Laramie-Chan's evidence that he texted the address to Mr. Reed. The Text Messages are probative not because Mr. Laramie-Chan has said the same thing twice (a prohibited use of a prior consistent statement), but as circumstantial evidence which suggests Mr. Laramie-Chan is credible about this aspect of his testimony. Properly confined to a pure narrative use, the Text Messages carry no prejudicial effect.

CONCLUSIONS

- [59] The Crown application to admit the Mr. Elburai's evidence heard in Voir Dire #1 is granted in part:
- a) Mr. Reed's request to Mr. Elburai on September 18, 2020 for a ride home is admitted. There is no objection to the admissibility of that statement.
 - b) Mr. Reed's statement to Mr. Elburai of "look at the news" is admitted under the party admission exception to the hearsay rule.
 - c) Mr. Elburai's evidence that a few days after September 18, 2020, during the Second Encounter, Mr. Reed showed Mr. Elburai the Photograph is admitted under the party admission exception to the hearsay rule.
 - d) The remainder of Mr. Elburai's evidence of Mr. Reed's statements to Mr. Elburai is excluded and will not be admitted as evidence in the trial proper. In balancing the probative value with the prejudicial effect, I have found that the balance favours exclusion of the remainder of the statements.
- [60] The Crown application as amended regarding the evidence of Mr. Laramie-Chan heard in Voir Dire #2 is granted. The Pickup Location Request is admissible as narrative as circumstantial evidence.

[61] The Text Messages are also admissible as narrative as circumstantial evidence, and are to be used solely for the limited purpose of assessing the credibility of Mr. Laramie-Chan in that the Text Messages confirm his testimony that he sent an address to Mr. Reed.

"The Honourable Madam Justice Watchuk"

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