

CANADA / JUDGMENT

R. v. Saumier

2020 BCSC 1211

COURT

Supreme Court of British Columbia

DECIDED

31 July 2020

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Saumier,

2020 BCSC 1211

Date: 20200731

Docket: 88660-2

Registry: Kelowna

Regina

v.

Robin Darec Saumier

Before: The Honourable Mr. Justice S. Wilson

Oral Ruling on Crown Application for

Constable Clarke to Provide Opinion Evidence

Counsel for the Crown:

J. Le Dressay

Counsel for the Accused:

B. Lynskey

Place and Date of Trial/Hearing:

Kelowna, B.C.

July 21-24, 2020

Place and Date of Judgment:

Kelowna, B.C.

July 31, 2020

- [1] THE COURT: This is my decision as to whether Constable Clarke will be permitted to provide opinion evidence as to whether certain events he observed were a drug transaction.
- [2] The accused is charged with three counts of possession of narcotics for the purposes of trafficking. Constable Clarke was the lead investigator on an investigation that involved conducting surveillance on a black GMC motor vehicle for approximately two hours over two different days culminating in an arrest. The identity of the accused was not determined until the arrest. In other words, the police were investigating conduct pertaining to the use of the vehicle as opposed to investigating a particular person.
- [3] Constable Clarke testified at a voir dire to determine the validity of Mr. Saumier's arrest. I concluded that based upon the totality of the circumstances including a number of short stops over a short period of time, the overall pattern of behaviour, and the fact that a manoeuvre referred to as a "heat check" may have occurred on the day of the arrest provided Constable Clarke with reasonable grounds to believe that the driver of the Jimmy was engaged in drug trafficking and that his decision to arrest the driver was objectively reasonable.
- [4] The Crown intends to recall Constable Clarke at the trial proper to give evidence that what he observed at the last stop constituted a drug transaction, presumably to show that the drugs in the Jimmy were possessed for the purposes of trafficking. On this particular occasion, the GMC drove into an area near Cecil's Perogies on Gordon Drive. A black Toyota SUV parked in behind the Jimmy and an unknown person was seen leaving the passenger side of the Jimmy and getting into the driver's side of the Toyota at which part both vehicles departed. The Jimmy was stopped for no more than a minute or so.
- [5] The Crown argues that Constable Clarke's opinion is lay opinion that a police officer is entitled to give and relies on *R. v. Rowe*, 2012 ONSC 2600. In that case, a voir dire was held to determine two things: whether a police officer could give evidence regarding the characterization of his observations, and also regarding the admissibility of surveillance evidence. As to the latter, at issue was whether the evidence could be characterized as similar fact evidence or evidence of prior discreditable conduct. That is not in issue here.
- [6] On the question of whether the officer who had observed the two encounters described as to hand-to-hand transactions were drug transactions, the court held the following at para. 11:

In this case, do the facts that Mr. Rowe is seen coming and going from this apartment, uses the silver Kia which is rented to Speedy Rowe and is usually parked in the driveway to the house in question, and is seen in this car involved in two encounters described as hand to hand transactions, make it more likely that he was in possession, alone or jointly with Ms. Morgan, of the cocaine. In my view, the answer is clearly yes. The evidence has direct probative value to the main issue in the case without resort to propensity reasoning.

- [7] The court went on to discuss the officer providing opinion evidence at paras. 13, 14, and 15 citing the Supreme Court of Canada's decision in *R. v. Graat*, [1982] 2 S.C.R. 819. The accused argues that the evidence intended to be proffered is expert evidence that is presumptively inadmissible. He argues that there is and must be a clear distinction between fact witnesses and expert witnesses and that notice must be provided if expert evidence is intended because the accused needs to:
- (a) determine the expertise of the witness;
 - (b) decide whether to challenge the witness' expertise;
 - (c) proffer expert evidence to the contrary; or
 - (d) have ample opportunity to prepare for cross-examination.
- [8] I am told in this case the Crown has an expert witness, Sergeant Woodcox, and notice of his opinion has been provided. However, his report is not directed to the indicia of drug trafficking and, in particular, to a dial-a-dope operation, as it relates to matters that might have been observed by Constable Clarke.
- [9] The accused argues that the Supreme Court of Canada's decision in *Graat*, which was a case that concluded that lay witnesses could opine on whether someone was drunk and included other examples such as the speed of a vehicle, does not go as far as the Crown argues. He refers to *R. v. Gill*, 2017 ONSC 3558, at paragraphs 44-45:
- [44] I do not intend to address this issue in any detail. Suffice to say that the officers' observations were easily recounted without reference to the inferences they may have drawn from the driving observed. The inference drawing is part of the court's fact-finding function. To have permitted the officers to give their opinions as to whether the driving constituted counter-surveillance, would be to usurp the fact finding function of the court. To the extent that a few opinions seeped in, I do not rely upon them in deciding this case.
- [45] With that said, I find that Ms. Gill's driving pattern is highly probative on the issue of knowledge. While any one or two of her driving maneuvers could be explained by possibilities other than knowledge that she was in possession of a controlled substance, the full constellation of driving maneuvers paints a very different picture.
- [10] The accused argues that to allow Constable Clarke to provide evidence regarding what he believed had transpired is improper because it is not the police officer's beliefs or impressions that will ultimately determine whether the drug transaction took place, but

rather this is a decision for the court to make. The role of an expert is to assist the court by providing impartial and objective opinion evidence on matters outside the expertise and knowledge of the trier of fact. Opinion evidence is presumptively inadmissible and the burden is on the Crown to establish its admissibility.

- [11] In *R. v. Mohan*, the admission of expert evidence was held to depend on meeting four criteria:
- (a) it must be relevant and the court must balance the probative value against its prejudicial effect;
 - (b) it must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical or specialized nature;
 - (c) the absence of an exclusionary rule; and
 - (d) the expert must be properly qualified.
- [12] The trial judge has an overriding discretion to exclude evidence even if it meets the Mohan criteria if receiving the evidence is outweighed by the potential risk of its introduction. The court has a gatekeeper role in ensuring and in so doing conducts a cost benefit analysis to determine whether the evidence is sufficiently beneficial to the trial process to warrant admissibility. In *R. v. Sekhon*, the court, after listing the four Mohan criteria, stated the following:
- [44] With respect to the "relevance" criterion, Mohan states that the judge must conduct a cost-benefit analysis to determine "whether its value is worth what it costs" The cost-benefit analysis requires the judge to balance the probative value of the evidence against its prejudicial effect
- [45] As for the "necessity" criterion, Mohan holds that "[i]f on the proven facts a judge or jury can form their own conclusions without help, then the opinion of [an] expert is unnecessary" The Court went on to note that the concern "inherent in the application of this criterion [is] that experts not be permitted to usurp the functions of the trier of fact"
- [46] Given the concerns about the impact expert evidence can have on a trial -- including the possibility that experts may usurp the role of the trier of fact -- trial judges must be vigilant in monitoring and enforcing the proper scope of expert evidence. While these concerns are perhaps more pronounced in jury trials, all trial judges -- including those in judge-alone trials -- have an ongoing duty to ensure that expert evidence remains within its proper scope. It is not enough to simply consider the Mohan criteria at the outset of the expert's testimony and make an initial ruling as to the admissibility of the evidence. The trial judge must do his or her best to ensure that, throughout the expert's testimony, the testimony remains within the proper boundaries of expert evidence. As noted by Doherty J.A. in *R. v. Abbey*

The admissibility inquiry is not conducted in a vacuum. Before deciding admissibility, a trial judge must determine the nature and scope of the proposed expert evidence. In doing so, the trial judge sets not only the boundaries of the proposed expert evidence but also, if necessary, the language in which the expert's opinion may be proffered so as to minimize any potential harm to the trial process.

- [13] There would appear to be little doubt that the evidence that Constable Clarke would provide here would properly be characterized as expert evidence; that is, his testimony would be intended to assist the court in determining from a constellation of characteristics of drug transactions that a drug transaction did in fact take place.
- [14] With regard to the facts here, Constable Clarke will testify that he followed the GMC Jimmy and saw it stop near the Cecil Perogies location. He saw a black Toyota SUV pull in behind the Jimmy. Approximately two minutes later, he saw someone get out of the passenger side of the Jimmy and into the driver's seat of the Toyota and that he saw both vehicles drive off.
- [15] It is anticipated that Constable Clarke's evidence would be that he can infer from his experience as a drug investigator that the driver of the black Toyota went to the GMC Jimmy to buy drugs. Unlike the facts in Rowe, Constable Clarke did not see a hand-to-hand exchange or transaction and it may be that the best that Constable Clarke can say is that this interaction was consistent in his opinion with a dial-a-dope operation. The fact that this type of exchange may be consistent with a dial-a-dope operation may provide a sufficient basis to conclude that a criminal offence took place for the purposes of determining the validity of the arrest but, of course, the test for a valid arrest is very different than proof of the underlying offence beyond a reasonable doubt.
- [16] The Crown relies on the Supreme Court of Canada's decision in *R. v. Graat*. In *Graat*, the Supreme Court of Canada held that expert evidence was not required on the issue of intoxication. An assessment of whether someone is too impaired to drive a vehicle may involve a constellation of observations: the smell of liquor, staggering, slurring, glassy eyes, and the like. The court said:

It has long been accepted in our law that intoxication is not such an exceptional condition as would require a medical expert to diagnose it. An ordinary witness may give evidence of his opinion as to whether a person is drunk. This is not a matter where scientific, technical, or specialized testimony is necessary in order that the tribunal properly understands the relevant facts. Intoxication and impairment of driving ability are matters which the modern jury can intelligently resolve on the basis of common ordinary knowledge and experience. The guidance of an expert is unnecessary.

- [17] In *Graat*, the Supreme Court of Canada said the following with regard to what it regarded as the "compendious statement of facts" exception":

Mr. Wilson [who was the non-expert witness] does not need any special qualifications. Nor were the police officers relying on any special qualifications when they gave their opinions. Both police and non-police witnesses are merely giving a compendious statement of facts that are too subtle and too complicated to be narrated separately and distinctly. Trial judges should bear in mind that this is non-expert opinion evidence, and that the opinion of police officers is not entitled to preference just because they may have extensive experience with impaired drivers. The credit and accuracy of the police must be viewed in the same manner as that of other witnesses and in the light of all the evidence in the case. If the police and traffic officers have been closely associated with the prosecution, such association may affect the weight to be given to such evidence.

- [18] However, it is not only the compendious statement of facts that lead to the conclusion that a layperson can provide the opinion, but also because the observation of people who are drunk is within normal human experience. In *Graat*, the Supreme Court of Canada provided two caveats, one of which was to caution against preference for the evidence of police witnesses over the evidence of lay witnesses in matters of ordinary human experience. The court pointed out that the opinion of police officers in those circumstances is entitled to no special regard and, to the extent that ordinary people are able to determine whether someone is drunk, that can be tested by way of cross-examination or otherwise.
- [19] The circumstances in *Graat* are therefore quite different from what we have here. Unlike drunkenness or estimating the speed of a vehicle, mood, or age, all of which are part of everyday human experience, the indicia of a dial-a-dope operation are not commonly known or recognized and are not within the purview of everyday human experience. Indeed, the techniques employed by those involved in drug trafficking in a dial-a-dope operation are designed to avoid detection by the average person on the street even though the drug trafficking is happening in plain view in front of unsuspecting members of the public. Discretion is critical to the success of the dial-a-dope drug trafficker, even though the transactions are in plain sight.
- [20] The point of *Graat* is that a qualified expert is not required for matters of opinion where ordinary jurors would be just as capable of forming an opinion. The ordinary person walking by the area of Cecil Perogies who saw a black Jimmy and then a Toyota SUV arrive and then depart would likely think nothing of it and would not form the opinion that a criminal act had occurred. Constable Clarke's opinion that those same facts suggest that what he saw was a drug operation could only be as a result of his expertise in dealing with dial-a-dope operations which comes from his training and experience.
- [21] Trial fairness requires that if the Crown intends to lead opinion evidence that suggests that the court should infer from proven facts that a drug transaction took place, notice of the opinion should be provided. I conclude that Constable Clarke will not be permitted to testify that in his opinion what he saw was a drug transaction.
- [22] That concludes my ruling.

"S. Wilson J."

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