

CANADA / JUDGMENT

R. v. Scott

2018 BCSC 2554

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 2554 R. v. Scott IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Scott, 2018 BCSC 2554 Date: 20181019 Docket: X080205 Registry: New Westminster Regina v. Randy William Scott Before: The Honourable Madam Justice Ker Oral Ruling re Application to Call Reply Evidence Counsel for Crown: R. Flannigan T. Iandiorio E. Lehrer Counsel for Defence: T.E. La Liberté, Q.C. K. Wilkinson Place and Date of Trial: New Westminster, B.C. October 17, 2018 Place and Date of Judgment: New Westminster, B.C. October 19, 2018

- [1] These Reasons for Judgment were delivered as oral reasons. They have since been edited for distribution.

Introduction

- [2] The issue addressed in this ruling is whether the Crown should be granted leave to call reply evidence in Mr. Scott's trial. The Crown seeks a ruling permitting it to call Dr. Rakesh Lamba, a forensic psychiatrist, in reply to the defence case, should it be necessary. I say should it be necessary because the Crown has not yet made a final determination on the issue as Crown counsel are still in the midst of cross-examining Dr. Alexander Levin, one of the defence psychiatrists. Once they conclude that cross-examination, they will make a final determination. If they conclude that Dr. Lamba's evidence is necessary, and they are granted leave to call reply evidence, Dr. Lamba is available to testify on Monday, October 22, 2018.
- [3] Counsel for Mr. Scott opposes the Crown's application, arguing it amounts to an improper splitting of the Crown's case.
- [4] Counsel for Mr. Scott relies upon the well-established and oft-cited principles outlined in the jurisprudence, and in particular, as found in R. v. Krause, [1986] 2 S.C.R. 466 at 473c-475c; R. v. Aalders, [1993] 2 S.C.R. 482 at 496i-497h; R. v. Green, 2015 ONCJ 265 at para. 9; R. v. Haevischer, 2014 BCSC 2640 at paras. 16-17; R. v. Pattison, 2011 BCSC 1466 at paras. 14-15; R. v. Dalen, 2008 BCCA 530 at paras. 14-17; and R. v. Garnot, 2010 BCSC 2039 at paras. 19-20.

- [5] For its part, the Crown relies upon three other decisions to support its argument that the Court ought to exercise its discretion and permit the Crown to call Dr. Lamba in reply: *R. v. R.D.*, 2014 ONCA 302; *R. v. Aday*, 2008 BCSC 397; and *R. v. A.W.* (1991), 3 O.R. (3d) 171 (C.A.).
- Background Context
- [6] The accused, Randy William Scott, is charged with one count of second degree murder contrary to s. 235(1) of the Criminal Code, R.S.C. 1985, c. C-46 [Code]. There is no issue that Mr. Scott shot and killed Peter Bender in the early morning hours of December 19, 2015. The only issue the Court will be called upon to determine at the conclusion of this trial is whether the Crown has proven beyond a reasonable doubt that Mr. Scott had the requisite intent for second degree murder.
- [7] Mr. Scott's defence rests on the principles of the "cumulative effect" defence, commonly referred to as a "rolled-up charge" when addressed in the jurisprudence and raised in the context of a jury trial. The defence had its genesis in the Ontario Court of Appeal decisions in *R. v. Clow* (1985), 44 C.R. (3d) 228 and *R. v. Desveaux* (1986), 51 C.R. (3d) 173.
- [8] The defence in this case has called a forensic psychiatrist, Dr. Andrew Kolchak, and a clinical psychiatrist, Dr. Alexander Levin, to provide opinion evidence addressing the issue of Mr. Scott's psychiatric conditions and his state of mind at the time of the offence.
- [9] In various pretrial conferences conducted in this matter in March and April 2018, the defence indicated that its position is that this case is to be determined on the issue of intent, to wit, did Mr. Scott have the requisite specific intent for second degree murder when he shot and killed Mr. Bender.
- [10] By the March 9, 2018, pretrial conference, the Crown was on notice that the defence would be calling Dr. Kolchak to provide opinion evidence as to Mr. Scott's state of mind at the time of the offence. Crown counsel advised they were aware a report would be coming and that the Crown had its own expert on standby.
- [11] In later pretrial conferences, defence counsel alluded to the fact that while intent was the only issue in this case, they would be relying upon the "cumulative effect" defence to assist in advancing their position that the Crown would be unable to prove the essential element of specific intent beyond a reasonable doubt.
- [12] Counsel for Mr. Scott now argues that this is not a case of advancing a true defence such as provocation or intoxication or not criminally responsible by reason of mental disorder ("NCRMD") but rather putting the Crown to the strict proof of its case--in particular, the essential element of intent.
- [13] Counsel for Mr. Scott, Mr. La Liberté, argues that he is advancing "a cumulative effect defence factually". To put it another way, Mr. La Liberté argues that the defence here is not technically a defence but rather the cumulative effect of the a number of factors which the totality of the evidence adduced establishes in respect of Mr. Scott's personal circumstances at the time of the offence. Those factors include evidence about Mr. Scott's: · consumption of

alcohol; · a relapse in his gambling addiction; · a relapse in his alcohol addiction; · depression; · suicidal ideation; and · elements of emotional upset (that do not constitute provocation).

- [14] As I understand it, the defence will argue the above circumstances coalesced on the night of December 18 and the early morning hours of December 19, 2015, to produce a constellation of factors that together had a significant effect on Mr. Scott's mental state and impulse regulation. The defence will argue that, as a result, the Crown is unable to establish that Mr. Scott had the requisite intent for murder when he shot Mr. Bender four times with a 12-gauge shotgun at close range while Mr. Bender was seated in his vehicle, parked across the street from the home of his girlfriend, Miranda Thomas. Factual Context Specific to the Current Application: The Evolution of the Expert Evidence Issues
- [15] As Mr. Justice Vickers made plain in para. 22 of Aday, and no doubt the rest of the previously cited cases demonstrate, each case will, to some extent, turn on individual fact situations. Given that rather obvious point, it is necessary to review the circumstances extant in this case to fully understand how this has developed into a hotly contested application.
- [16] Crown counsel provided a brief point form chronology for this application to illustrate the confusion that has arisen over whether Dr. Lamba would be called in reply. For ease of reference, it will be attached as Appendix A to this ruling.
- [17] From this chronology, the following is clear.
- [18] On March 21, 2018, by means of a letter to defence counsel, the Crown served written notice pursuant to s. 657.3(3) of the Code that (1) it did not intend to call as part of the Crown's case the psychiatrist it had retained to assist it with the defence expert's report, and (2) it might call its expert, Dr. Lamba, in response to the defence expert. It appears defence counsel did not respond to this letter.
- [19] As of March 21, 2018, the defence had only retained Dr. Kolchak--Doctors Levin and Maté were not yet in the picture.
- [20] Dr. Kolchak conducted his forensic assessment of Mr. Scott on March 16, 2018. He produced a draft report to the defence sometime in early April 2018. At the April 16, 2018, pretrial conference, defence counsel advised they had received Dr. Kolchak's report but that it raised more questions in certain areas. As a result, the defence was endeavouring to obtain further authorization from the Legal Services Society ("LSS") to retain other experts to address the addiction issues and a possible brain injury issue. The Court directed counsel to convey to LSS the need to get the matter resolved quickly, particularly as this trial was scheduled to start on May 1, 2018. A further pretrial conference was set for April 25, 2018, to address any outstanding issues.

- [21] At the April 25, 2018, pretrial conference, the defence had not provided Dr. Kolchak's report to the Crown as there remained grammatical issues to be corrected and Dr. Kolchak had been out of the country. At the Court's urging, the defence shared this preliminary report with the Crown later that same day on the understanding that there may be further corrections.
- [22] Also during the April 25, 2018, pretrial conference, the defence advised that it was still endeavouring to locate an addictions expert in Calgary, AB, but had not managed to connect with that individual. The defence also advised that another expert was going to assess the accused on Saturday, being April 28, 2018. It may be that this expert was actually Dr. Kolchak conducting his follow-up interview with Mr. Scott, as the Court was advised on May 1, 2018, that is what had occurred.
- [23] The trial on this matter started on May 1, 2018. At the conclusion of the evidence that day, a scheduling discussion was held. During this scheduling discussion, the defence indicated it had retained Dr. Alexander Levin, a clinical psychiatrist, to conduct an assessment of Mr. Scott. The defence also advised it was still endeavouring to retain Calgary psychiatrist Dr. el-Guebaly who has a sub-specialization in addictions medicine. However, Dr. el-Guebaly was not going to be able to see Mr. Scott until the middle of May 2018 and would not have a report prepared until the beginning of June 2018.
- [24] At the conclusion of the May 1, 2018, scheduling discussion, the matter was adjourned to May 11, 2018, for a further scheduling or pretrial conference, perhaps more accurately described as a mid-trial conference.
- [25] Dr. Levin had interviewed Mr. Scott in late April 2018. He prepared a report dated May 5, 2018. The Crown received this report on May 9, 2018.
- [26] At the May 11, 2018, mid-trial conference, Mr. La Liberté advised that he had retained Dr. Gabor Maté and that Dr. Maté was going to interview Mr. Scott on May 14, 2018. He hoped to have Dr. Maté's report in the Crown's hands by May 25, 2018.
- [27] Also at the May 11, 2018, hearing, defence counsel advised he would obtain instructions from his client as to whether Mr. Scott would consent to being interviewed by the Crown's psychiatrist, Dr. Lamba.
- [28] A further scheduling, mid-hearing conference was held on May 18, 2018, and the defence advised that Dr. Maté had met with Mr. Scott. The defence was asked by the Court to urge Dr. Maté to complete his report before May 25, 2018, so that the Crown would have the report to review over the weekend before the trial resumed on May 28, 2018.
- [29] Dr. Maté's report was provided to the Crown at approximately 7:45 a.m. on May 28, 2018.
- [30] The trial resumed on May 28, 2018, and the Court heard from three police officers. At the conclusion of the evidence that day, there was a scheduling discussion. During that discussion, the Crown indicated it had not had an opportunity to review Dr. Maté's report

and commented about the possible need to retain an expert in addition to Dr. Lamba and Dr. O'Shaughnessy. I should pause to note by way of digression that Dr. O'Shaughnessy was retained to assist the Crown with Dr. Levin's evidence, but due to the fact that Dr. Levin was not qualified in the area of neuropsychiatry, Dr. O'Shaughnessy was not required as a witness.

- [31] During the May 28, 2018, scheduling discussion, the Crown also placed on the record that it may need to call reply evidence to address issues in Dr. Maté's report. The defence provided no view on this issue.
- [32] Also during this scheduling discussion, the Crown clearly indicated that it expected to conclude its case the following week.
- [33] On Friday, June 1, 2018, at the conclusion of that day's evidence, the Court was advised that Mr. Scott had consented to be interviewed by Dr. Lamba and that the interview had been set for Wednesday, June 6, 2018.
- [34] When the trial resumed on June 4, 2018, the Court was advised the Crown would close its case the following day, Tuesday, and that the trial would then have to go over to the end of June in order to permit Dr. Lamba to interview Mr. Scott and prepare a report that the parties could digest and, in particular, the defence could review with its experts.
- [35] On Tuesday, June 5, 2018, the Crown finished calling its witnesses and would have closed its case but was unable to do so as the parties were finalizing a second set of admissions. The trial was adjourned to June 25, 2018.
- [36] On Monday, June 25, 2018, the Crown filed the formal admissions as Exhibit 22 and read them into the record. The Crown then closed its case at approximately 10:53 a.m.
- [37] After the Crown closed its case, there was a brief scheduling discussion from 10:54 a.m. to 11:01 a.m. During that discussion, counsel for Mr. Scott proposed the following schedule for witnesses to be called and the case completed: · The week of June 25, 2018: Mr. Scott's evidence · July 3, 2018: Dr. Kolchak · July 4 to 6, 2018: Dr. Maté · July 16 to 17, 2018: Dr. Levin · July 18 to 19, 2018: Dr. Lamba (with the Crown stating "if required") · The week of July 23, 2018: closing submissions.
- [38] Mr. La Liberté made a brief opening for the defence at the commencement of the afternoon sitting and advised that the defence would be calling his client and three experts: Dr. Kolchak, Dr. Levin, and Dr. Maté.
- [39] Mr. Scott took the witness stand that day. His direct examination carried on for the balance of the day and the next day until 2:27 p.m. Cross-examination of Mr. Scott commenced at that time and did not conclude until 2:10 p.m. on July 5, 2018. Brief re-examination was conducted, and Mr. Scott finished his evidence later that afternoon.

- [40] Given the protracted nature of Mr. Scott's cross-examination, the schedule proposed on June 25, 2018, was, for the most part, lost.
- [41] On Friday, July 6, 2018, the Court embarked upon a voir dire into Dr. Gabor Maté's qualifications as an expert witness. Unfortunately, the cross-examination of Dr. Maté did not conclude that day.
- [42] The longer than anticipated cross-examination of Mr. Scott thus had a domino effect on the schedule. Dr. Maté was set to travel to Dublin, Ireland to speak at a conference and then he was to transit through Vancouver later in July, before going to Australia to speak at another conference. The scheduling of witnesses started to become a very complicated issue given conflicts in counsels' schedules and their commitments to other matters.
- [43] On July 12, 2018, a further scheduling conference was held in order to determine when the trial would continue and when expert witnesses could be fitted in to testify. During this hearing, defence counsel proposed that Dr. Lamba be called "out of order" as he had the reports of the other experts. Defence counsel further indicated that if something arose with the other experts, Dr. Lamba could always be called back if necessary.
- [44] The Crown was opposed to calling Dr. Lamba out of order, advising he was only to be called as a reply witness if necessary. As the defence evidence had not concluded and, more specifically, Dr. Maté had not testified, the Crown did not want to embark on calling Dr. Lamba. Defence counsel provided no further comment on this proposed course of action.
- [45] Dr. Levin was called by the defence on July 18, 2018. He testified on July 18 and all day on July 19, 2018. His cross-examination did not conclude on July 19, 2018 and so the conclusion of his evidence had to be stood down.
- [46] Dr. Maté concluded his evidence on the voir dire on August 7, 2018. Argument on whether he could be qualified as an expert witness and the admissibility of his evidence was made the following day. On August 15, 2018, I gave an oral ruling dismissing the defence application to call Dr. Maté as an expert witness and held his evidence to be inadmissible. My ruling on that application is indexed at 2018 BCSC 1739.
- [47] Following that ruling, the trial was adjourned to October 15, 2018, to accommodate the then-existing prior trial commitments of counsel.
- [48] On October 15, 2018, Dr. Levin returned to the witness stand to resume his cross-examination. His evidence did not conclude. He was adjourned over to today's date, October 19, 2018.
- [49] At the end of the day's proceedings on October 15, 2018, Crown counsel advised that the defence opposed the Crown calling Dr. Lamba as a reply witness.
- [50] Defence counsel advised that he had never consented to the Crown calling reply evidence in this case.

- [51] Crown counsel agrees that there was no specific overt consent by the defence but submits that the conduct of this matter and the positions taken by defence counsel earlier this year amount to an implicit consent and that the change in the defence position had taken the Crown by surprise.
- [52] I pause to observe that I find it regrettable that senior counsel on both sides of this case should let the matter drift along in such an ambiguous fashion and not clearly have indicated their positions on this issue from the outset. In my view, it is understandable why the Crown is taken by surprise with the defence position. There are three events in particular that support this finding:
- 1) There is no evidence that the defence responded or objected to the March 21, 2018, notice provided by the Crown that it intended to call Dr. Lamba in reply, if necessary, notwithstanding the Crown's invitation in that letter for the defence to "please feel free to contact me if you have any questions regarding the above". Unfortunately, it appears the Crown never followed up on this letter to determine if there was a problem from the defence perspective.
 - 2) On June 25, 2018, it was defence counsel who outlined that Dr. Lamba was scheduled to testify after the defence experts. At bare minimum, this telegraphed an agreement or acquiescence in having Dr. Lamba called in reply.
 - 3) Finally, from the July 12, 2018, scheduling conference, it certainly appears to have been in the contemplation of the defence that Dr. Lamba would have been called, albeit out of order, and called back if something arose from the expert evidence called after Dr. Lamba. The defence provided no warning that it objected when the Crown outlined why it preferred to hold off on calling Dr. Lamba until the defence experts had concluded their evidence.
- [53] It is this particular constellation of factors that informs the context of this application. Governing Principles
- [54] The governing principles on reply evidence are not really in issue. Rather, it is the application of those principles to the circumstances of this case that is in issue. Accordingly, I will refer to them very briefly.
- [55] The classic formulation of the rule with respect to reply evidence, also known as rebuttal evidence, is found in Krause and repeated by Mr. Justice Cory in Aalders at 496-498: In Krause, *supra*, this Court set out the principles governing the introduction of rebuttal evidence. The general rule is that Crown counsel, in cross-examining an accused, are not limited to subjects which are strictly relevant to the essential issues in a case. Counsel are accorded wide latitude in cross-examination which enables them to test and question the testimony of the witnesses and their credibility. However, where the questions asked by Crown counsel are not relevant to an issue essential for the determination of the case, the Crown is bound by the answers given and cannot present evidence in rebuttal to challenge the statements made by the witness. The reason for this rule was stated by McIntyre J. in

Krause at pp. 473-74 in the following words: This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence--as much as it deemed necessary at the outset--then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it the full case for the Crown so that it is known from the outset what must be met in response. However, an exception to this rule is made when the defence has raised some new matter or a defence which the Crown has had no opportunity to deal with in presenting its case and which the Crown could not reasonably have anticipated. McIntyre J. expressed the following caveat to the exception on p. 474: ... rebuttal will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made. It will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other. He added the following comments regarding the rule against rebuttal on collateral issues: Where something new emerges in cross-examination, which is new in the sense that the Crown had no chance to deal with it in its case-in-chief (i.e., there was no reason for the Crown to anticipate that the matter would arise), and where the matter is concerned with the merits of the case (i.e., it concerns an issue essential for the determination of the case) then the Crown may be allowed to call evidence in rebuttal. Where, however, the new matter is collateral, that is, not determinative of an issue arising in the pleadings or indictment or not relevant to matters which must be proved for the determination of the case, no rebuttal will be allowed. [Emphasis added.] [Emphasis in original.]

- [56] In *Aalders* the Supreme Court of Canada upheld the Quebec Court of Appeal and the trial judge's decision permitting the Crown to call rebuttal evidence in a jury trial for an accused charged with murder. In *Aalders*, the homicide took place as part of what was alleged to have been a planned robbery of the victim. During his evidence, the accused testified that the robbery arose by opportunity without prior planning and that the part of the money found on him at the time of his arrest was from welfare payments that he had received. At trial the Crown was permitted to rebut that evidence by calling the accused's two welfare workers to testify that his welfare applications had been refused. Mr. *Aalders* was convicted of first degree murder.
- [57] A majority of the Supreme Court of Canada upheld the decision to permit the Crown to call this rebuttal evidence because the details of the robbery were "integral and essential" aspects of the case and evidence about the origins of the money tended to show the importance to the accused of committing a robbery to obtain money. It was also held that the Crown could not have foreseen that the accused would have testified in this manner. *Aalders* is an example of the engagement of the *ex improviso* aspect of the rebuttal rule.

- [58] In *Krause*, the Supreme Court of Canada found that the trial judge had erred in admitting rebuttal evidence. Mr. Krause was also charged with murder in connection with the stabbing of an individual in a marijuana drug deal gone bad. The deceased was sent by a third party to buy a pound of marijuana from the accused. He never returned, and the money he had for the purchase (\$400) went missing. A jail cell informant provided evidence against the accused to the effect that the accused had told him details about the murder and that the accused had taken the money from the deceased and stabbed him.
- [59] At his trial, Mr. Krause testified not only with regard to the circumstances that surrounded the murder but also with respect to his involvement with the police during the course of the murder investigation. Crown counsel cross-examined Mr. Krause about his statements to the police and then applied pursuant to s. 11 of the former Canada Evidence Act, R.S.C. 1970, c. E-10 to call rebuttal evidence at the conclusion of the case for the defence.
- [60] It was observed by Justice McIntyre, writing on behalf of the unanimous Court, that the trial judge had erred in admitting and permitting the cross-examination on the statement to the police as there had been no inconsistent statement made by the accused in the course of his testimony. Furthermore, it was held that the evidence in respect of which rebuttal had been permitted dealt with the accused's assertion that the police had harassed him before his arrest. This was found to be a collateral issue that was neither material nor relevant to a decision as to whether the accused had killed the victim. It reflected only on the integrity of the police and did not touch on the guilt or innocence of Krause. Krause, then, is an example of the prohibition of adducing rebuttal evidence on collateral issues.
- [61] More recently, the Ontario Court of Appeal has addressed the issue of reply evidence in *R. v. K.T.*, 2013 ONCA 257 and in further detail in *R.D.* The governing principles on reply evidence by the Crown are succinctly outlined by Mr. Justice Tulloch in *R.D.*:
- [16] The general rule with respect to the order of proof in a criminal case is that the Crown must introduce, in its case-in-chief, all the evidence in its possession upon which the Crown relies to prove the guilt of the accused: *R. v. K.T.*, 2013 ONCA 257, 295 C.C.C. (3d) 283, at para. 41; *R. v. Krause*, [1986] 2 S.C.R. 466, at pp. 473-74. The underlying objective of the rule is to prevent the unfair surprise, prejudice and confusion that could result if the Crown were allowed to split its case: *K.T.*, at para. 42. The accused is entitled at the close of the Crown's case to have its full case so that the accused knows from the outset what must be met in response: *Krause*, at pp. 473-74.
- [17] However, it is well-established that the general rule regarding order of proof is not an absolute bar to the introduction of reply evidence by the Crown. Crown rebuttal is permitted when necessary to ensure that each party has had an equal opportunity to hear and respond to the full submissions of the other: *Krause*, at p. 474. Accordingly, the Crown is permitted to call reply evidence not only when the defence has raised some new matter or defence which the Crown could not have reasonably anticipated and with which it had no opportunity to deal, but also when an aspect of the Crown's case has taken on added significance as a result

of the defence case: K.T., at para. 43. Rosenberg J.A. stated the principle succinctly in *R. v. Quance* (2000), 146 C.C.C. (3d) 153, at para. 21: [I]t has always been understood that the trial judge has a discretion to admit evidence in reply concerning an issue that was of only marginal importance during the prosecution's case in chief, but that took on added significance as a result of the defence evidence.

- [18] Similarly, because the rule regarding order of proof is designed to prevent the Crown from splitting its case, it does not prevent the Crown from introducing evidence in reply to the defence case that is not in and of itself probative of guilt. Reply evidence can be adduced to refute a specific defence advanced by the accused: see e.g. *W. (A.)*, supra, at p. 181; *R. v. Campbell* (1977), 17 O.R. (2d) 673 (C.A.), at p. 693; *R. v. Stevenson* (1990), 58 C.C.C. (3d) 464 (Ont. C.A.), at p. 490. As Doherty J.A. recognized in *W. (A.)*, at p. 181, the Crown is entitled to introduce this kind of reply evidence regardless of whether it could have anticipated the position of the defence: I also reject the suggestion that because the Crown had some indication that the appellant would advance physical incapacity as a defence that the Crown was required to lead any evidence it had to counter that position as part of its case. That proposition is contrary to this court's decisions in *R. v. Campbell*, supra, and *R. v. Stevenson*, supra, and would, in my view, if accepted, prolong and potentially confuse trials by requiring that the Crown lead evidence on matters which, in the end, may have virtually no significance in a particular case.
- [19] This court's traditional approach, as applied in [*R. v. Quance* (2000), 146 C.C.C. (3d) 153 (Ont. C.A.)], [*R. v. W. (A.)* (1991), 3 O.R. (3d) 171 (C.A.)], [*R. v. Campbell* (1977), 17 O.R. (2d) 673 (C.A.)] and [*R. v. Stevenson* (1990), 58 C.C.C. (3d) 464 (Ont. C.A.)], is consistent with the objective of the order of proof. There is no question that the defence is entitled to have the Crown's full case in order to mount its response. Case-splitting is impermissible. Yet evidence that is not probative of the accused's guilt is not part of the case that the Crown must establish. Put somewhat differently, an accused is not surprised by reply evidence that is directed solely at an issue put in play by the defence case. Reply evidence that is not in and of itself probative of guilt does not engage the fairness concerns addressed by the rules against case-splitting.
- [20] Inherent in all the various formulations of the test for reply evidence is the significance of the case actually called by the defence. Whether or not the Crown is entitled to call reply evidence depends in large measure on the evidence adduced and arguments raised by the defence. The Crown's entitlement to lead reply evidence turns in part on whether the defence has raised a new matter or defence, or tendered evidence that caused the Crown's case to be viewed in a new or different light. In other words, only with the benefit of the defence evidence can the admissibility of reply evidence be assessed. [Emphasis in original.]
- [62] *R.D.* involved the question of whether the Crown had to lead alibi evidence of the third-party suspect in its case or in reply. The accused in *R.D.* had developed the defence of a third-party suspect at the preliminary hearing. As a result, the police investigated and determined the third party had an alibi. The trial judge precluded the Crown from calling the alibi in

reply. The accused was acquitted at trial. On appeal, a new trial was ordered, in part because the trial judge had erred in precluding the Crown from calling the alibi of the third-party suspect in reply.

- [63] The trial judge's ruling in R.D. forced the Crown to call the alibi in its case, thereby also introducing the proposed defence in its case. Despite statements by the defence that it was calling a third-party suspect defence, it never did. The Ontario Court of Appeal concluded that reply evidence is not limited to a response to matters or defences that the Crown could not reasonably have anticipated. The alibi evidence the Crown was forced to call in its case was not probative of the accused's guilt until the alternate suspect theory was adduced by the defence in the trial. The trial judge's erroneous ruling in R.D. put the Crown in the position of responding to evidence that had not yet been led and a defence theory that had not yet been put forward.
- [64] R.D., then, is an example of how reply evidence is permissible when the defence case takes on a certain character with the calling of evidence or presents a live issue, notwithstanding that the Crown was in possession of the reply evidence before it closed its case.
- [65] One other case of some import on this issue is R. v. Stevenson (1990), 58 C.C.C. (3d) 464 (Ont. C.A.) as cited by Vickers J. in Aday at para 21.
- [21] R. v. Stevenson (1990), C.C.C. (3d) 464, 41 O.A.C. 1 (Ont. C.A.) was approved of by the Supreme Court of Canada in [R. v. Charlebois, 2000 SCC 53]. In Stevenson, the issue turned on intent of the accused when he discharged a gun. The only issue was whether the Crown had proved the intent required for murder or whether the accused should have been convicted of manslaughter. At pp. 490-1, the Court considered the question of whether the trial judge erred in admitting reply evidence and said: The appellant submits that the trial judge erred in permitting Crown counsel to adduce the evidence of Drs. McDonald and Fleming in reply to the defence case. Although the Crown expert evidence on intent could probably have been led as part of the Crown's case (see R. v. Fisher (1961), 130 C.C.C. at p. 2, 34 C.R. 320 (Ont. C.A.)) and although the Crown had been advised that psychological and psychiatric evidence would be led by the defence on the question of the appellant's mental condition relating to planning and deliberation and intention, and the defence had furnished the Crown with copies of the reports of Drs. Shedletsky and Taylor (but not one of Dr. Orchard), I am not persuaded that the trial judge erred in allowing Drs. McDonald and Fleming to give their expert evidence in reply. It appears that, although the issue of diminished capacity did not arise ex improviso, it did not become a "live issue" and its precise nature was not clear until the defence witnesses gave their evidence. Cf. R. v. Sparrow (1979), 51 C.C.C. (2d) 443 at 454-6, 12 C.R. (3d) 158 (C.A.). In any event, I do not think that the reply evidence caused prejudice to the defence as the defence experts were in receipt of the psychiatric reports of the Crown witnesses and either commented on them during their evidence-in-chief or had the opportunity to do so. [Emphasis added.]

[66] In Aday, Vickers J. permitted the Crown to call Dr. Semrau in reply after the defence psychiatrist, Dr. Lohrasbe, had testified. In that case, the accused was charged with second degree murder. Although psychiatric evidence was called by the defence, it was not an NCRMD case. Rather, like the situation currently before the Court in Mr. Scott's case, the defence position was a lack of specific intent. Mr. Justice Vickers permitted the Crown to call Dr. Semrau in reply. Critical to his decision was the fact that the accused had declined to be interviewed by the Crown psychiatrist. Mr. Justice Vickers provided obiter comments that a different result might occur when pretrial access to the accused is granted to Crown experts: Aday at para. 22.

Analysis

- [67] With the governing legal principles firmly in mind, I turn to their application to the circumstances of this case.
- [68] Counsel for Mr. Scott argues that the Crown has known from the outset what the defence would be--that is, a requirement of putting the Crown to the strict proof of the essential element of the specific intent for murder. Defence counsel further argues that because the Crown expert interviewed his client before the Crown closed its case, there could be no possible reason to delay the calling of Dr. Lamba in the Crown's case.
- [69] This point might have more weight if Dr. Lamba had had access to Mr. Scott closer to the time that access was sought, which was on or about May 11, 2018. However, the defence did not advise the Crown until May 28, 2018, that Mr. Scott was consenting to the interview by Dr. Lamba. Mr. Scott was interviewed by Dr. Lamba on June 6, 2018, the day after the Crown indicated it wanted to close its case but could not as some further admissions had to be finalized. Moreover, on June 25, 2018, after the Crown closed its case but before the defence opened and started to call evidence, the defence indicated that Dr. Lamba was scheduled to testify after the defence experts. There was no indication at that time that the defence objected to the calling of Dr. Lamba after the defence. To the contrary, it seemed the defence was agreeing to this order of expert witnesses. By this time, the defence had been in possession of Dr. Lamba's report for 13 days and knew what he had to say.
- [70] While the defence is not required to tell the Crown how to conduct its case, in this instance it is not entitled to lead the Crown on that it was not objecting to Dr. Lamba being called in reply, as it clearly did, and then voice objection well after it started calling its case.
- [71] The defence also asserts that it is not calling a "true" or "specific" defence in this case but rather is adducing evidence as to cumulative factors that had the effect of compromising Mr. Scott's ability to form the requisite intent for murder. In my view, the distinction between the true or specific defence and challenging the Crown's evidence going to the essential element of intent is strained to the point of being a distinction without a difference. The fact of the matter remains that Mr. Scott has elected to call evidence and a defence with psychiatric expert evidence.

- [72] As Vickers J. noted in Aday at para. 27, citing the Supreme Court of Canada, the Crown is required to adduce, as part of its case, only evidence relevant to an element of the offence that the Crown must prove. The Crown need not adduce evidence in its case to challenge a defence that an accused might possibly raise.
- [73] In the case at bar, the Crown asserts that its evidence has been adduced to address the element of specific intent. While it was aware the defence was saying they were calling expert evidence about Mr. Scott's mental state at the time of the offence, it did not become a live issue until Mr. Scott and the defence experts testified.
- [74] The Crown argues that while it must prove the essential element of specific intent, it need not call psychiatric evidence in its case to rebut an anticipated defence. And so, while intent is a live issue, the Crown's evidence was adduced to show that Mr. Scott did not appear to have mental health or cognitive issues to a circle of friends and did not appear to be impaired by alcohol on the evening in question. The features of mental health issues, including depression and suicidal ideation, coupled with relapse into gambling and alcohol consumption did not become live until Mr. Scott testified.
- [75] The Crown makes an important point, in my view, arguing that if this was a jury trial, it would be confusing for the jury to hear first from the Crown civilian witnesses that Mr. Scott appeared sober, normal, and exhibited no mental health difficulties or depressive behaviour. Then, still in the Crown's case, they would hear that Mr. Scott had said to a psychiatrist in an interview that he was having a number of such difficulties, but the psychiatrist was of the opinion that those issues would not have affected Mr. Scott's ability to form the intent for murder.
- [76] While defence counsel argues that the Crown is not correct in saying the issues did not crystallize until Mr. Scott and the defence experts testified, I do not entirely agree with this assertion. While the Crown was on notice that the defence intended to call such expert evidence, trials are fluid situations that change as the evidence unfolds; it is not until the evidence is called that the defence truly becomes a live issue.
- [77] In the circumstances of this case, although the issue of Mr. Scott's diminished or compromised capacity or lack of intent did not arise ex improviso, it did not become a "live issue" and its precise nature was not clear or did not take shape until Mr. Scott and the defence expert witnesses gave their evidence: Stevenson, at 490-491.
- [78] In my view, this case represents an example of what the Ontario Court of Appeal has discussed in a long line of authorities culminating in the decision in R.D. Certainly, the Crown is not entitled to split its case, but this rule about the order of proof does not create an absolute barrier to the introduction of further evidence by the Crown after the defence is closed. The Crown may be permitted to call evidence in reply after completion of the defence case where some matter that emerged during the Crown's case has taken on added significance as a result of the evidence adduced in the defence case. That is most definitely the situation in this case. Dr. Levin has commented on Dr. Lamba's report in his evidence,

and he has provided evidence about issues such as borderline personality structure not contained in his report. He has also provided evidence on a number of issues that arose in his evidence but were not in his report that the Crown seeks to have Dr. Lamba comment upon. The Crown also may seek to have Dr. Lamba comment upon a feature of Mr. Scott's evidence about no longer remembering certain events although he remembered them at the time he was interviewed by Dr. Lamba, less than a month before he testified.

- [79] In this case, the defence is not taken by surprise by the evidence the Crown intends to lead in reply. The defence has had Dr. Lamba's report since June 12, 2018, and on June 25 and July 12, 2018, appeared to indicate that it was acceptable that Dr. Lamba testify after the defence experts. Nor is the defence prejudiced by Dr. Lamba being called in reply.
- [80] It cannot be forgotten that this is a judge alone trial and so the element of the Crown calling reply evidence is neutralized in a way that may not be apparent in a jury trial.
- [81] Finally, like Justice Cory in *Aalders*, in my view the crucial question with respect to the admission of reply evidence is not whether the evidence the Crown seeks to adduce is determinative of an essential issue but rather whether it is related to an essential issue which may be determinative of the case. If the reply evidence goes to an essential element of the case and the Crown could not have foreseen that such evidence would be necessary, then it is generally admissible. Thus, if a statement is made during the course of a witness' testimony at trial which conflicts with other evidence relating to an essential issue in the case, reply evidence will be permitted to resolve the conflict.
- [82] Of course, it is a fundamental and basic principle that the Crown cannot split its case to obtain an unfair advantage. Nor can the Crown be permitted to adduce evidence in reply on a purely collateral issue. However, in my view, that is not what is happening here.
- [83] Reply evidence is fit and proper when it relates to an integral and essential element of the case, particularly when the matter that emerged in the Crown's case takes on added significance as a result of evidence adduced in the defence case. In such circumstances, it would be wrong to deprive the trier of fact of important evidence relating to an essential element of the case. The course of a trial, particularly in a criminal trial, must be based upon rules of fairness so as to ensure the protection of the individual accused; however, the rule should not go so far as to deprive the trier of fact of important evidence that can be helpful in resolving an essential element of the case: *Aalders* at 498-499.
- [84] Accordingly, the Crown may call reply evidence to address the issues it needs to address as a result of the defence evidence in this case. "Ker J." Appendix A DATE ITEM March 9, 2018 · PTC - Defence to call Dr. Kolchak March 21, 2018 · Expert notice from Crown to Defence for Dr. Lamba in case called in response to Defence expert April 16, 2018 · PTC - Defence discusses retaining a second doctor, Dr. Levin is mentioned April 25, 2018 · Preliminary vetted report of Dr. Kolchak received by the Defence May 1, 2018 · Crown opens its case and calls witnesses Manning and Hamel · Scheduling discussions o Defence states: § Dr. Levin preparing a report § May call an expert ElGubalay (sp?) o Crown states: § May need to call

recall witnesses o Court reviews trial plan and states that Crown may have some sort of application to make to call Dr. Lamba May 9, 2018 · Dr. Levin's initial report received from Defence May 11, 2018 · Crown receives the following from the Defence regarding Dr. Kolchak: o A report (version 2 unvetted) o A supplementary letter/Addendum report o Notes of his interviews with Mr. Scott o His CV May 11, 2018 · PTC o Defence confirms they plan to call 3 expert witnesses: Dr. Kolchak, Dr. Mate and Dr. Levin o Defence will provide a response by May 15 whether Mr. Scott will meet with Dr. Lamba May 11, 2018 · Defence provides Crown with Notice of Experts and statement of qualifications May 16, 2018 · The Crown receives the following from Defence: o Notes of Dr. Levin's interview with Mr. Scott o An updated copy of Dr. Levin's Report May 18, 2018 · PTC - discussion about Dr. Mate; Crown requests area of expertise May 24, 2018 · Final version of Dr. Kolchak's Report received from the Defence (change to date on report) May 28, 2018 · Dr. Mate's Report received from the Defence May 28, 2018 · Crown calls witnesses Wolbeck, Stewart and Ryder · Scheduling discussions: o Defence discusses proposed defence and confirms will not be arguing NCRMD; confirms dates for 3 expert witnesses o Crown advises: § Considering retaining Dr. O'Shaughnessy § Has yet to review Dr. Mate's report received today § May need to call rebuttal evidence to address items in Dr. Mate's report May 29, 2018 · Crown calls witnesses Plastow and Mr. Thomas May 30, 2018 · Crown calls witnesses M. Thomas, A. Thomas and Smith May 31, 2018 · Crown calls witness Roberts June 1, 2018 · Crown calls witnesses Evancic and Lewis · Crown advised Court that Dr. Lamba will be interviewing Mr. Scott on June 6, 2018 June 4, 2018 · Crown calls witnesses Post, Garbutt and Moreno · Scheduling discussions: o Defence advised Court that they want to wait to see what Dr. Lamba had to say before calling a defence June 5, 2018 · Crown calls witnesses Jones and Matthews · Crown advised Court that Dr. Lamba should have his report by June 12 at the latest · Defence advised Court that they want an audio recording and transcript of Dr. Lamba's interview with Mr. Scott June 6, 2018 · Dr. Lamba interviews Mr. Scott June 6, 2018 · Expert notice from Crown to the Defence for Dr. O'Shaughnessy in case called in response to Defence expert June 12, 2018 · Dr. Lamba's Report to the Defence June 12, 2018 · Dr. Mate's CV received from the Defence June 13, 2018 · Transcript of Dr. Lamba's interview of Mr. Scott sent to the Defence June 25, 2018 · Further Admissions filed · Crown closes its case · Scheduling discussion: o Defence advised the Court of the following schedule: § Mr. Scott's evidence for the week § July 3 - Dr. Kolchak § July 4-6 Dr. Mate § July 16-17 - Dr. Levin § July 18-19 - Dr. Lamba § Week of July 23 for closing submissions · Mr. Scott direct examination June 26, 2018 · Mr. Scott direct examination · Mr. Scott cross examination June 27, 2018 · Mr. Scott cross examination June 28, 2018 · Mr. Scott cross examination June 29, 2018 · Mr. Scott cross examination July 3, 2018 · Mr. Scott cross examination July 4, 2018 · Mr. Scott cross examination July 5, 2018 · Mr. Scott cross examination · Mr. Scott re-examination July 6, 2018 · Mr. Mate qualification voir dire testimony July 12, 2018 · PTC - Discussions regarding: o Dr. Mate being unable to attend court on July 27th o When to call Dr. Kolchak o Defence suggesting that Dr. Lamba be called out of order July 16, 2018 · Dr. Levin qualification voir dire testimony July 17, 2018 · Dr. Levin qualification voir dire testimony · Dr. Levin qualification voir dire submissions July 18, 2018 · Ruling on Dr. Levin qualifications voir dire

· Dr. Levin direct examination July 19, 2018 · Dr. Levin direct examination · Dr. Levin cross examination July 31, 2018 · Dr. Kolchak direct examination August 1, 2018 · Dr. Kolchak direct examination · Dr. Kolchak cross examination August 7, 2018 · Dr. Mate qualification voir dire testimony August 8, 2018 · Submissions on Dr. Mate qualification voir dire August 15, 2018 · Ruling on Dr. Mate qualification voir dire October 15, 2018 · Dr. Levin cross examination

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