

CANADA / JUDGMENT

R. v. Sipes

2012 BCSC 765

COURT

Supreme Court of British Columbia

DECIDED

31 May 2012

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2012 BCSC 765 R. v. Sipes

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Sipes,

2012 BCSC 765

Date: 20120531

Docket: 66431-2

Registry: Kelowna

Regina

v.

Dale Gordon Sipes, Leslie Podolski, Sheldon Richard O'Donnell

Peter Manolakos and Douglas Corey Brownell

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Before: The Honourable Mr. Justice Smart

USE OF WITNESS STATEMENTS

Reasons for Judgment

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Place and Date of Judgment:

Vancouver, B.C.

May 31, 2012

I. INTRODUCTION

- [1] An issue which has arisen from time to time during this trial is the manner in which counsel have used transcripts of police interviews ("statements") during their cross-examinations. It arose again during Mr. Claus' cross-examination of Witness B and evolved into the broader question of whether I was unfairly intervening during cross-examination. I repeated my earlier directions to counsel regarding the use of statements and said I would provide additional reasons to explain my decision.
- [2] Although I have intervened during the trial for a number of different reasons, often I have done so in regards to defence counsels' use of witnesses' statements. In particular, I have intervened when counsel have asked witnesses to read a portion of a statement to themselves and, after the witnesses have done so, counsel have stated their interpretations or summaries of what is contained in the passages and asked the witnesses if they agree. This has been done without the jury having a copy of the statement.

- [3] This occurred several times during Mr. Claus' cross-examination on Friday, April 13, 2012 and, when it did, I intervened and requested that the entire passage be read aloud so the jury would know the actual questions and answers of the witnesses.
- [4] At the end of that day I invited Mr. Claus to make further submissions, if he wished, concerning the procedure I was directing he follow. He did so on Monday, April 16, 2012, before continuing his cross-examination. Although Mr. Nathanson had completed his cross-examination, he also made submissions supporting Mr. Claus' position.

II. BACKGROUND

- [5] The question of interventions by the court initially arose in October during Mr. Nathanson's cross-examination of another key witness, Witness A. Mr. Nathanson submitted that I was improperly intervening in his cross-examination. His objection was primarily based on my interventions concerning the manner in which he and other defence counsel were using witnesses' statements.
- [6] As a result of Mr. Nathanson's submission I provided counsel with a memorandum identifying what I saw as the issues raised either explicitly or implicitly. The memorandum (Exhibit JJ) reads:

QUESTIONS RAISED BY MR. NATHANSON'S SUBMISSION

1. If and when should a trial judge intervene in defence counsel's cross-examination in the absence of an objection by Crown counsel?
 2. What is the proper use during cross-examination of a witness of a prior statement made by that witness? What is the procedure that should be followed? What role, if any, does a trial judge have when prior statements are used during cross-examination of a witness?
 3. What is the proper use during cross-examination of a witness of a statement or document not authored by the witness? If cross-examination is permitted, what is the procedure that should be followed? What role, if any, does a trial judge have when third party statements or documents are used during cross-examination of a witness?
- [7] The questions I posed went beyond Mr. Nathanson's immediate objection and encompassed the broader use of statements by defence counsel, including statements not authored by the witnesses. Although I invited counsel to make submissions at a convenient time to address these questions, they did not and my directions concerning the use of statements were generally followed over the next five and half months until Mr. Claus' cross-examination of Witness B.

III. SUBMISSIONS OF COUNSEL

- [8] Mr. Claus said he was unable to find any case authorities that considered the correctness of the procedure he was seeking to employ in his cross-examination of Witness B. As a result, he focused his submissions on the importance of cross-examination and how unwarranted judicial interventions can unfairly interfere with that right. He relied on *R. v. Watson*, (2004) 191 C.C.C. (3d) 144 (Ont. C.A.) and *R. v. Huber*, 2007 BCSC 1074.
- [9] He argued that, in the absence of an unfair, abusive, or improper cross-examination, there should be no restrictions placed upon his cross-examination. He submitted he had not violated any of those prohibitions and, accordingly, the court's interventions were unjustified.
- [10] Mr. Nathanson submitted that tactical decisions concerning cross-examination are made by counsel and it is an error for a trial judge to intervene when those tactical decisions are not unfair. He referred me to paras. 16 to 18 of *Watson* and emphasized that unwarranted interventions remove the right of counsel to frame critical questions and interrupt the cadence or flow of cross-examination. Mr. Nathanson argued that counsel ought to be able to cross-examine as they see fit. He submitted that there is no rule requiring counsel to read out questions and answers contained in statements and, as long as the witness is afforded an opportunity to read what he or she is being questioned about, there is no unfairness unless counsel mischaracterizes the passage. He said that in our adversarial system the only proper procedure is for the Crown to object and the trial judge, as the neutral arbiter, to then rule. He argued that it is extremely problematic for the court to interject and further, that it is not for the court to determine what is most helpful to the jury.

IV. ANALYSIS

- [11] There can be no dispute concerning the importance of an accused person's right to make full answer and defence. This includes the ability to cross-examine Crown witnesses without unwarranted interventions by the court. Cross-examination is fundamental to an accused person's right to a fair trial. However, a fair trial extends beyond the accused. A fair trial is one which appears fair from both the perspective of the accused and of society: *R. v. Harrer*, [1995] 3 S.C.R. 562; *R. v. Khelawon*, 2006 SCC 57; *R. v. Grant*, 2009 SCC 32; *R. v. Bjelland*, 2009 SCC 38. A fair trial is also one that satisfies the truth-seeking function of a trial.
- [12] Given the submission that it is problematic for a trial judge to interject, it is useful to consider when judicial interventions may be necessary. In *Watson*, the court said, at para. 10:

... Trial judges are not mere passive observers at a trial. They are entitled and, in some circumstances, obliged to clear up ambiguities in the evidence, to pursue matters which witnesses' testimony has left vague and to put questions which should have been posed to clarify relevant matters. They also enjoy trial management powers that are designed to permit the effective control of a trial, to ensure fairness to witnesses and to foster clarity in the evidence [citations omitted, emphasis added].

[13] In *R. v. Hamilton*, 2011 ONCA 399, the Ontario Court of Appeal again considered judicial interventions and stated, at paras. 47-48:

An examination of whether a trial judge has unduly intervened in a trial begins with the recognition that there are many proper reasons why a trial judge may intervene through comments, giving directions or asking questions during the course of a trial. A trial judge has an inherent authority to control the court's process and, in exercising that authority, a trial judge will often be required to intervene in the proceedings: *R. v. Felderhof* (2003), 68 O.R. (3d) 481 (C.A.), at para. 40.

A trial judge may properly intervene to focus the evidence on the matters in issue, to clarify evidence, to avoid irrelevant or repetitive evidence, to dispense with proof of obvious or agreed matters, and to ensure that the way a witness is answering or not answering questions does not unduly hamper the progress of the trial.

[14] I do not interpret the Court's reasons in *Watson* and *Hamilton* as providing an exhaustive list of reasons as to when it may be appropriate for a trial judge to intervene but, rather, examples. Ultimately, it will be for the court to determine when and why it concludes intervention is necessary, keeping in mind that the right to intervene must be exercised with caution.

[15] In my view, a trial judge has a responsibility to ensure that the rules of evidence are followed and the manner in which evidence is led accords with those rules and fairly advances the overarching goal of a fair trial, regardless of whether opposing counsel objects to the approach of counsel in question.

[16] This is an extraordinary trial in many respects. A number of Crown witnesses are former members or associates of a gang involved in drug trafficking of which four of the accused were members. These witnesses have been interviewed by the police numerous times over many years about the events concerning which they are testifying. Witness A and Witness B, in particular, have provided over 30 and over 80 statements, respectively, totaling thousands of pages. Most of these witnesses are unsophisticated individuals with little or no experience testifying in a courtroom. They are testifying in a large courtroom, before a jury, five accused, and usually in the presence of 15 to 20 lawyers. They are often cross-examined by four or five lawyers for the accused. Some of the cross-examinations have lasted for many days and have focused primarily on the witnesses' previous statements. At times, counsel have cross-examined witnesses on documents the witnesses did not author.

- [17] As the trial proceeded I became increasingly concerned with the manner in which witnesses' statements were being used by the defence. In particular, I was concerned with the practice of counsel providing their interpretations or summaries of what was contained in a particular passage and then asking the witnesses to agree. While I am confident defence counsel were attempting to be accurate, mistakes may occur.
- [18] I recognize that it is open to the witnesses to disagree and Crown counsel to object if counsels' interpretations appear inaccurate or incomplete. However, this is not always simple to do in a fast paced cross-examination. Before objecting, Crown counsel may need to re-read the passages to confirm whether counsels' summaries or interpretations are accurate and complete, while at the same time trying to listen as the cross-examination continues. I know I have found it difficult at times to keep up with cross-examination while at the same time ensuring counsels' summaries or interpretations of a particular passage are correct.
- [19] Similarly, I have been concerned with the ability of these unsophisticated witnesses to read each passage, hear counsels' summaries or interpretations of what are contained in the passages and then quickly assess whether counsel is accurate, particularly while under the strain of a series of lengthy cross-examinations. These tasks for the witnesses are further complicated by the fact that interspersed through many of the statements are discussions of other information not admissible at this trial that the witnesses have been instructed by the Crown not to disclose. The witnesses must make these assessments, moment by moment, during extensive cross-examination.
- [20] Most important, the members of the jury do not have copies of the witnesses' statements and cannot independently assess whether counsels' summaries or interpretations are accurate and complete. After all, and above all, it is for the jury, as the trier of fact, to decide whether what was said by the witnesses is consistent with counsels' interpretations or whether the passages are inconsistent with the witnesses' evidence and, if so, to determine the significance of that inconsistency.
- [21] In my view, it is unfair to the trier of fact to be given only counsels' interpretations of what is contained in witnesses' statements. This is why I directed counsel to read the entire passage in question aloud. In the presence of the jury I said that I thought it would be more helpful for the jury if counsel proceeded this way. In the absence of the jury I said that my direction was subject to exception, such as when necessary to avoid disclosing inadmissible evidence, or when counsel are merely summarizing one passage in a statement to put another passage into context. This latter exception has been conveniently referred to as "pinpointing" the witnesses to a particular topic or passage, and does not require the jury to make any assessment as to the content or meaning of the statements.

- [22] In my view, absent an exception, when counsel are cross-examining witnesses on a particular passage, the jury should know the actual questions asked and answers given and not be asked to rely solely on counsels' summaries or interpretations. This is the best and most reliable evidence, and with it, the jury is permitted to come to its own conclusion as to what was said and its import. After all, at the end of the trial I must instruct the jury on what use it may make of the evidence.
- [23] I see no prejudice to the accused in proceeding this way. These statements are hearsay and inadmissible for their truth unless adopted by the witnesses. Counsel can still suggest their interpretations of what the witnesses said and the witnesses can agree or disagree, and the jury will be in a position to assess for itself whether counsels' summaries or interpretations are accurate and complete.
- [24] It is for these reasons that I directed counsel to read aloud the questions and answers when they are relying on what the witnesses said in their statements for the purpose of: (i) having the witnesses adopt what they said as true, (ii) demonstrating an inconsistency with the witnesses' testimonies, or (iii) having the witnesses adopt counsels' interpretation of what the witnesses said either for the truth or to prove an inconsistency. This procedure is subject to the exceptions I noted earlier.
- [25] In my view, proceeding in this way enhances the fairness of the trial without compromising the right of the accused to fully cross-examine the witnesses.

"SMART J."

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