
CANADA / JUDGMENT

R. v. Stewart

2016 BCSC 2489

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Stewart,

2016 BCSC 2489

Date: 20160226

Docket: 26613-1

Registry: Vancouver

Regina

v.

Colin Victor Stewart and Kevin James Jones

Before: The Honourable Madam Justice Wedge

Oral Ruling re Admissibility of Balaclava into Evidence

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Place and Date of Trial:

Vancouver, B.C.

February 15-19, 22-26, 2016

Place and Date of Judgment:

Vancouver, B.C.

February 26, 2016

- [1] THE COURT: At issue here is the admissibility of a piece of physical evidence the Crown wishes to tender at trial. It is a black balaclava found by police during the search of Mr. Stewart's residence on October 9, 2009. The item was found in the living room on the main floor of the house.
- [2] The Crown initially did not seek to tender the balaclava. Various witnesses gave statements to the effect that the two individuals who shot and killed Raj Soomel were wearing face coverings. The staff member who had interactions with the two males who burst into the Dick Bell Irving Halfway House ("DBI"), masked and armed with guns, shortly before the shooting, gave statements to the effect that he thought the suspects were wearing bandanas.
- [3] A bandana bearing the DNA of one of the accused was found a few blocks away from the murder, which occurred on Cambie and 19th.
- [4] However, a resident of DBI, Jeremy Coles, made some observations and had some interactions with the two males after they entered the house on September 29. He will likely testify that he fled from one of the men by climbing out of an upper floor window and onto the roof of the house, that he was pursued onto the roof by the one male, and then escaped by jumping onto a nearby tree and climbing to the ground. He then made his way to Cambie Street where he called 9-1-1.
- [5] In the call with the 9-1-1 operator, Mr. Coles describes a male coming up the stairs to the top of the house, together with a staff member who appeared to have his arms up. Referring to the unknown male, Mr. Coles said, "I noticed the guy had some kind of mask or something over his face". When asked by the 9-1-1 operator if he could give a description of either of the males, he replied, "I don't know -- I couldn't -- I honestly can't".

- [6] Mr. Coles was interviewed a few hours later by the police. He described one of the males as having his back to him and that he did not see the man's face. He described a second male he saw in profile very briefly, wearing a hat. He remembers seeing white skin around whatever was covering his face. One of the officers made a note that Mr. Coles also said he thought the suspects were white because he could see their foreheads.
- [7] Due to a malfunctioning of the audio/videotape system, Mr. Coles's statement was unfortunately not recorded. What remains are the officer's notes of what Mr. Coles said.
- [8] He was next interviewed by Crown counsel in December 2015. That interview was not recorded.
- [9] Mr. Coles said that one of the males came to the window when Mr. Coles was on the roof, and that the male had something covering his face.
- [10] The only recorded interview with Mr. Coles took place in late January of this year. In that interview, he recalled that he was in his bedroom on the top floor of the house when he smelled a strong smell of alcohol. He heard someone talking. He went out and looked down the stairwell and saw people there. He said (at page 1 of the transcript):

Q Okay, so you looked down the stairwell, and what did you see?

A First I just kinda seen people standing there, and then the more I looked it, I noticed that the staff member was against the wall, kind of in a defensive posture, and then I seen the guys had something with their face, then I all at once kinda seen the guns and mask and I just closed the door as soon as I seen it.

[11] Again at page 3 of the transcript, line 9:

Q Okay, so it was then you see the two men there -- two suspects, and then you're talking about the -- um -- what in terms their faces being covered. You mentioned masks. But how --

A Yeah, like I -- I didn't really take it in at all -- take it all in at first because like maybe I just didn't anticipate it. You know, maybe I was just looking and thought people, I smelled stuff. I just didn't think what was going on, you know. I mean, I didn't anticipate it. And then once I seen that I couldn't really see the first guy's face, you know, then I kind of really took in the situation and maybe I was on the phone, you know, people are on the phone. That's probably why you're not supposed to drive. I was distracted, and once I focused on what was actually happening, it was pretty evident that masked, armed guys were holding a staff member.

[12] And, at page 9, line 25:

Q So then I'm the first fellow or -- fellow -- first fellows or the fellow -- that would be the fellow closest to you, had some sort of face covering on?

A I think both of them had.

Q Both of them had --

A Black ski masks.

Q Okay.

A Now I could be wrong, but I'm quite sure both of them had black -- a black dark ski mask. Um, I couldn't remember if they wore all dark clothes, but just -- yeah, a dark thing, like you know.

[13] As a result of that information from Mr. Coles, the Crown now seeks to tender the balaclava found in Mr. Stewart's living room. Mr. Stewart argues that the evidence should not be put before the jury. He says the probative value of the evidence is minimal when you consider the totality of Mr. Coles's evidence, as well as the evidence of Mr. Woelke, who spoke of bandanas.

[14] Mr. Stewart argues that while the evidence likely meets the low relevance threshold, the court must still consider its prejudicial effect and weigh that against its probative value.

[15] He says that the balaclava will take an inordinate degree of importance in the minds of the jury, far more importance than they should attach to it. Mr. Stewart cites *R. v. Mohan*, [1994] 2 S.C.R. 9, at pp. 20-21, where the court said the following in the context of expert evidence:

... Relevance is a matter to be decided by a judge as question of law. Although prima facie admissible if so related to a fact in issue that it tends to establish it, that does not end the inquiry. This merely determines the logical relevance of the evidence. Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs" [citing *McCormick on Evidence*]. ... Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. While frequently considered as an aspect of legal relevance, the exclusion of logically relevant evidence on these grounds is more properly regarded as a general exclusionary rule. Whether it is treated as an aspect of relevance or an exclusionary rule, the effect is the same. The reliability versus effect factor has special significance in assessing the admissibility of expert evidence.

[16] Mr. Stewart argues that not only does the prejudicial effect of the evidence outweigh its probative value, but that cross-examination on the issue will involve an inordinate amount of time, particularly as the first Coles statement was not taped, and that it could be misleading in the sense that its effect on the jury will be out of proportion to its reliability.

[17] The Crown argues there is no prejudice to the accused in the sense the term is used in the case law. Further, cross-examination concerning the balaclava will not take an inordinate amount of time and that the effect of the evidence will not mislead the jury.

[18] The Crown notes that *Mohan* is about expert opinion evidence, which is not at issue here.

- [19] There is no question the evidence here is relevant. It relates to a central fact in issue which is the identity of Mr. Soomel's killers. I think it is important to ask why this evidence would be prejudicial. It is clearly prejudicial to the accused in the sense that all probative evidence is prejudicial to an accused because being probative, it tends to prove the fact in issue, which advances the Crown's case against the accused.
- [20] But how is it otherwise prejudicial? This is not expert evidence or evidence that could otherwise be barred by the hearsay rule. It is not unreliable in the sense the term is used when considering, for example the principled approach to admissibility of hearsay evidence which could be tainted by mistake or lack of truth. It is not unreliable or misleading in the sense that expert evidence with minimal probative value could mislead or confuse the jury in its fact finding role.
- [21] The balaclava is linked to the evidence the Crown intends to call from Mr. Coles.
- [22] In essence, Mr. Stewart seeks to have this evidence removed from the jury because Mr. Coles did not describe it as a ski mask in his first statement or his second statement. In his earlier statements, Mr. Coles did not describe the kind of face coverings worn by the two men; he merely referred to them generically as face coverings. He did not, for example, describe them as bandanas. There is no suggestion that he was shown the balaclava in issue, nor was it suggested to him by police or Crown in the interviews that the men were wearing balaclavas.
- [23] In the January 2016 interview, it was not suggested to him that either accused was wearing a ski mask. He spontaneously said "ski masks".
- [24] The jury will undoubtedly hear a great deal of evidence from witnesses to the shooting on Cambie Street about the attire of the two shooters. Mr. Coles's evidence and the balaclava are just two more pieces of evidence for the jury to consider.
- [25] The admonition of the Supreme Court of Canada in *R. v. Khelawon*, [2006] 2 S.C.R. 787, although made in the context of the principled approach to hearsay, resonates here. Where a trial is before a judge and jury, it is crucial that the questions of ultimate reliability be left for the jury. In criminal cases, it is a constitutional imperative. Were I to take this evidence from the jury, I would be usurping its role.
- [26] The evidence is relevant. It has some probative value, and it is for the jury to ultimately decide what import to give it. Accordingly, it is admissible as evidence at trial.
- [27] As with many other issues, counsel, this issue can always be revisited depending on how the evidence unfolds. That is my ruling for now.

The Honourable Madam Justice C.A. Wedge

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