

CANADA / JUDGMENT

R. v. Tait

2020 BCSC 1425

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Tait,

2020 BCSC 1425

Date: 20200924

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Registry: Nelson

Regina

v.

Jason Tait

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Corrected Judgment: The text of this judgment was corrected on Page 1

where changes were made November 13, 2020

Before: The Honourable Madam Justice Murray

Reasons for Judgment re: the Admissibility

of Proposed Defence Evidence

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C.A. Fleck

Place and Dates of Hearing:

Nelson, B.C.

September 17, 18, 21 and 22, 2020

Place and Date of Judgment:

Nelson, B.C.

September 24, 2020

Introduction

- [1] The accused, Cst. Tait, an RCMP officer, is charged with manslaughter using a firearm in connection with the shooting death of Waylon Edey. He has elected to be tried by judge and jury.
- [2] This voir dire (#6) deals with the admissibility of proposed defence evidence. The Crown seeks to proactively block proposed defence evidence as they expect the defence to raise the impugned evidence throughout their cross-examinations of Crown witnesses. There is merit to this application being heard at this time as it avoids the jury being excused repeatedly. The danger, of course, is that this ruling is based on expected evidence rather than actual evidence. As such, this ruling may be revisited as the trial proceeds.
- [3] A brief background is required in order to place this application. The facts in the main are not contested.
- [4] On January 29, 2015 two calls were made to the police regarding Mr. Edey being a suspected impaired driver. The first, from a bar owner in Nelson at approximately 3:30 p.m., resulted in police issuing a call to all officers in the area, which includes Castlegar, to be on the lookout for (or BOLF in police speak) Mr. Edey's truck. The second came about four hours later, at approximately 7:20 p.m. from an employee at the A&W restaurant in Castlegar. In addition to issuing another BOLF, Cpl. Johnson of the Castlegar RCMP contacted members, including Cst. Tait, directing them to find Mr. Edey, and stating "let's see if we can stop him".

- [5] Cst. Tait spotted Mr. Edey's truck on Highway 3 heading toward the Kinnaird Bridge. In an effort to stop Mr. Edey from driving over the bridge to an area of Castlegar that would be busy with pedestrians and traffic, Cst. Tait decided to try to "cut him off". Cst. Tait overtook Mr. Edey's vehicle then swung his police vehicle across Mr. Edey's lane of travel, partially blocking his lane. Mr. Edey did not stop. He continued to drive at the police vehicle. Cst. Tait got out of his car. Mr. Edey abruptly veered his truck to drive directly at him. Fearing for his life, Cst. Tait shot at the truck. One of the bullets struck Mr. Edey in the head, killing him.
- [6] The Crown does not take issue with the fact that at the time he shot at Mr. Edey's vehicle Cst. Tait was in fear for his life and his actions in shooting at Mr. Edey's truck were reasonable and justified. However, the Crown takes the position that that justification is lost because Cst. Tait's actions in putting himself in that life threatening position were unreasonable.
- [7] In their written submission on this voir dire the Crown set out their theory of the case as follows:
9. The Crown theory is that the jury could find [Cst. Tait] guilty by one or both of the two recognized routes, i.e. unlawful act or criminal negligence. For unlawful act manslaughter, the Crown is required to prove that Cst. Tait committed an unlawful act that caused Mr. Edey's death with objective foreseeability that the likely consequences would be bodily harm and without the benefit of a statutory defence under sections 25 or 34 of the Criminal Code.
 10. For criminal negligence manslaughter, the Crown must prove that Cst. Tait's actions were a marked and substantial departure from the conduct of a reasonable police officer in which he either recognized and ran an obvious and serious risk, or, alternatively, gave no thought to that risk. Given the high standard required which must be reached for a finding of criminal negligence, it is unlikely that one could benefit from either of the statutory defences which both require a measure of reasonableness.
 11. Cst. Tait's decision to implement a roadblock on a highway in front of a moving vehicle created a situation where he put himself at risk of serious bodily harm or death. By putting his own life in jeopardy, Cst. Tait correspondingly created a situation where there was a substantial risk that he would have no choice but to use lethal force to extricate himself from that situation. The use of such a dangerous tactic was not necessary or reasonable in the circumstances given that he did not possess sufficient information to reasonably believe that Waylon Edey posed a threat of imminent harm or death to other members of the public.

[Emphasis added]

- [8] I emphasize the final statement as it is key to this application, and will likely be the central issue the jury will have to decide. Of particular import is the word "imminent" and the fact that the belief was based on the information known by Cst. Tait at the time he made the decision to set the partial block.

[9] To prove their theory, the Crown relies on the evidence of Chris Butler, a retired member of the Calgary Police Department, who they will be calling as an expert in, among other things, police use of force and emergency vehicle operation. The Crown states two reasons for eliciting his evidence:

- 1) to assist the jury with measuring the conduct of Cst. Tait against the standard of care expected of a similarly-trained officer in the circumstances; and
- 2) to provide assistance to the jury in determining the reasonableness, including the necessity and proportionality, of Cst. Tait's conduct so the jury can decide if any statutory defences apply.

[10] In his analysis Mr. Butler refers to the RCMP Incident Management Intervention Model (the IMIM) which instructs RCMP officers that the use of force (which includes driving) must be proportionate to the force used or threatened by the subject. Broadly speaking it permits an officer to increase the level of force as the level of danger/ threat posed by the subject increases. The use of force must be both objectively and subjectively reasonable.

[11] Mr. Butler's opinion is that:

- 1) Cst. Tait's actions in shooting at the truck were consistent with RCMP training and policy;
- 2) However, his driving, including the way he positioned his vehicle, exited his vehicle and put himself on the roadway in front of Mr. Edey's oncoming truck, were contrary to RCMP training and policy;
- 3) Through his actions, Cst. Tait put himself in a place of danger where he had to use force likely to cause death or grievous bodily harm. Mr. Butler calls that "officer generated jeopardy".

[12] Mr. Butler's conclusion regarding the driving being contrary to policy and training is based on his opinion that Mr. Edey did not constitute a high risk of danger to the public that justified the use of a high-risk police tactic to stop his vehicle. Mr. Butler's opinion is that from the information known to Cst. Tait, Mr. Edey's driving did not constitute an immediate risk to the public. As he stated in cross-examination at the preliminary hearing:

A So in terms of the -- Mr. Edey's known subject behaviour in relation to the IMIM, I indicated that what was known was that he was an impaired driver or suspected impaired driver, was apparently not causing an immediate risk of harm to other citizens on the roadway, and then I wrote my opinion as to why I believed that was the case at that point in time.

[Emphasis added]

[13] Mr. Butler's opinion regarding the level of danger posed by Mr. Edey is pivotal to his conclusion that Cst. Tait's driving was contrary to policy and training.

- [14] The defence will be calling an expert or experts to give opinions that Cst. Tait had sufficient information to reasonably conclude that Mr. Tait posed an immediate threat to public safety.
- [15] The jury will be left with conflicting opinions.
- [16] At the end of the trial the Crown will be urging the jury to find that, on the information he had, Cst. Tait did not have reasonable grounds to believe that Mr. Edey posed an immediate danger and therefore was not justified in attempting to stop him using a high risk manoeuvre to stop his vehicle. The Crown will further be asking the jury to find that by putting himself in the way of Mr. Edey's truck, Cst. Tait created a situation where it was foreseeable that he would have to use lethal force.
- [17] The Crown plans to call a case focussed solely on what Cst. Tait knew. They do not intend to call any narrative evidence from the bar owner, the A&W employee or the friend Mr. Edey was drinking with all day. They do not intend to file photos of Mr. Edey's truck depicting the open alcohol in it. They take the position that none of this evidence is relevant to the issue the jury has to decide as Cst. Tait did not know about it when he made the decision to cut Mr. Edey off.
- [18] At issue in this application is the following evidence that defence intends to call:
- a) Mr. Edey's blood alcohol level at the time of the incident;
 - b) Mr. Edey's history of alcohol abuse;
 - c) Mr. Edey's drinking pattern that day;
 - d) photographs of the interior of Mr. Edey's vehicle showing open beer cans and a glass;
 - e) the observations of the bar owner in Nelson and the employee at the A&W restaurant in Castlegar regarding Mr. Edey's state of intoxication;
 - f) expert evidence from a toxicologist, a psychologist and a former Superintendent of Motor Vehicles regarding the effects of alcohol on driving and the danger posed by impaired drivers and high risk drivers;
 - g) police reports of previous police dealings with Mr. Edey;
 - h) transcripts of sentencing proceedings involving Mr. Edey;
 - i) statements made by Mr. Edey regarding his hatred of the police and his desire to go out in a blaze of glory.
- [19] The defence argues that it is improper for the Crown to suggest that there was no objective evidence to support the belief that Mr. Edey posed an imminent danger when they know from all of the evidence that he did. The defence urges that this evidence is required in order for Cst. Tait to have a fair trial and make full answer and defence. More specifically the defence takes the position that the jury must have all of this evidence in order to:

- 1) assess the Crown's theory. As put by the defence: "As the Crown has asserted that there was no risk of imminent harm, the defence is entitled to lead evidence to prove that Edey was objectively dangerous";
- 2) assess the experts' opinions regarding Mr. Edey's objective risk of harm;
- 3) assess the probability of Mr. Edey being imminently dangerous and to support Cst. Tait's opinion that he was; and
- 4) for narrative.

[20] The Crown responds that none of the facts the defence seeks to lead were known to Cst. Tait at the time. They object to the admissibility of this evidence on the basis that it is not relevant to the issues that the jury will be required to decide, and the cost/risk of the evidence is too high, in that it will:

- 1) arouse the jury's emotions of prejudice, hostility or sympathy;
- 2) create a side issue that will unduly distract the jury from the main issue in the case; and
- 3) consume an undue amount of time.

Issue

[21] The issue I must decide is whether any of the proposed defence evidence is admissible.

[22] Two basic principles frame this analysis. The first is that all relevant evidence is admissible unless it is subject to exclusion under a rule of law or policy. To be relevant, evidence has to prove a fact in issue: *R. v. Corbett*, [1988] 1 S.C.R. 670 at p. 715. The second is that courts must be extremely cautious in restricting the power of the accused to call evidence in his or her defence. Circumstances in which truly relevant and reliable evidence is excluded are few, particularly where the evidence goes to the defence. In order to exclude evidence relevant to a defence, the prejudice must substantially outweigh its probative value: *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at paras. 43 and 44.

[23] Given those principles, the issue can be broken down into two questions:

- 1) Is the proposed evidence relevant to an issue in this trial; and
- 2) If so, does its probative value substantially outweigh its prejudicial effect?

Analysis

[24] The defence that will be presented at trial will be, in part, that:

- 1) Cst. Tait's conclusion that Mr. Edey posed a threat of imminent harm to the public was reasonable on the information he had;
- 2) His attempt to stop Mr. Edey from driving was reasonable in the circumstances; and

3) His act of shooting is justified under ss. 25 and 34 of the Criminal Code, R.S.C. 1985, c. C-46.

[25] I will address these statutory defence sections in turn.

[26] Section 25 of the Criminal Code protects police officers from criminal liability for actions committed during the course of their duty. It reads in part as follows:

25 (1) Everyone who is required or authorized by law to do anything in the administration or enforcement of the law ...

(b) as a peace officer or public officer,

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as necessary for that purpose.

(2) ...

(3) Subject to subsections (4) and (5), a person is not justified for the purposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm.

(4) A peace officer ... is justified in using force that is intended or is likely to cause death or grievous bodily harm to a person to be arrested, if

(a) the peace officer is proceeding lawfully to arrest, with or without warrant, the person to be arrested,

(b) the offence for which the person is to be arrested is one for which that person may be arrested without warrant,

(c) the person to be arrested takes flight to avoid arrest,

(d) the peace officer believes on reasonable grounds that the force is necessary for the purpose of protecting the peace officer, the person lawfully assisting the peace officer or any other person from imminent or future death or grievous bodily harm, and

(e) the flight cannot be prevented by reasonable means in a less violent manner.

[Emphasis added]

[27] It is common ground that s. 25(3) applies to the present case. Depending on Cst. Tait's evidence, s. 25(4), which applies to flight from police, may also apply.

[28] In order for s. 25 to apply:

1) Cst. Tait must have reasonably believed that force likely to cause death or grievous bodily harm was necessary to protect him or anyone under his protection from death or grievous bodily harm;

- 2) his belief must be objectively reasonable; and
- 3) he must have used no more force than necessary in all of the circumstances: *R. v. Nasogaluak*, 2010 SCC 6, at paras. 32- 34.

[29] Section 34 is the self-defence section. It reads in part:

34 (1) A person is not guilty of an offence if

- (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
 - (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
 - (c) the act committed is reasonable in the circumstances.
- (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
- (a) the nature of the force or threat;
 - (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
 - (c) the person's role in the incident;
 - (d) whether any party to the incident used or threatened to use a weapon;
 - (e) the size, age, gender and physical capabilities of the parties to the incident;
 - (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
 - (f.1) any history of interaction or communication between the parties to the incident;
 - (g) the nature and proportionality of the person's response to the use or threat of force; and
 - (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

[30] In order for s. 34 to apply:

- 1) Cst. Tait must have reasonably believed that there was a threat of force against him and/or others;
- 2) His belief must be objectively reasonable; and
- 3) The actions taken by Cst. Tait to protect himself and/or others must have been reasonable in the circumstances.

- [31] As can be seen, both ss. 25 and 34 incorporate a subjective and objective test.
- [32] With respect to objective reasonableness, it is easy to parse apart and second guess actions of police while sitting in an office or courtroom in the cold light of day. However the objective assessment must be made with a full appreciation of the circumstances and pressures facing the police officer at the time. The realities of policing can not be ignored. Police officers are obliged to take positive action. They are entrusted with the duty to protect the public. Doing nothing is not an option. They often have to respond quickly. As LeBel, J. stated in *Nasogaluak*:
- [35] Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. As Anderson J.A. explained in *R. v. Bottrell* (1981), 60 C.C.C. (2d) 211 (B.C.C.A.):

In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude. [p. 218]

- [33] In an oft-quoted passage from *Berntt v. Vancouver (City)*, 1999 BCCA 345, a case involving the actions of police in dealing with the 1994 Stanley Cup rioters, Southin, J.A. set out the approach that should be followed in assessing the objective reasonableness of a police officer's actions:
- [24] . the trial judge should be a doppelganger to the peace officer whose conduct is in issue.
- [25] The judge must go with the officer, at least from the time the officer first was sent to the place where the riot was in progress. I say "at least" because the peace officer's training, experience, the orders of the day given to him, are all part of what goes into the answer to the question of "reasonable grounds".

[Emphasis added]

- [34] In his concurring decision, McEachern, C.J.B.C. put it this way:

- [53] I agree with Madam Justice Southin that the issue is whether a reasonable person standing in the position of the constable, who had the same responsibility as the officer to bring the riot to an end, and who was operating on the same data base as the officer acquired both in previous training and experience and from the dynamics of that evening including the need to rescue other officers, the need to use gas and other anti-riot devices, and who had previously shot a number of rioters without causing serious injury, could reasonably have concluded that it was a part of his responsibility to shoot the Plaintiff with an Arwen gun.

[Emphasis added]

- [35] All of the above makes this clear: the inquiry into objective reasonableness is focussed solely on what Cst. Tait knew at the time he made the decision to try to stop Mr. Edey. The test is not whether Cst. Tait was right or wrong; it is whether his actions were objectively reasonable. It follows that information learned after the fact cannot be used to assess objective reasonableness or to prove that Cst. Tait was right, as sought by the defence. For the same reasons, information later learned cannot be used to assess expert opinions regarding the objective reasonableness.
- [36] I will now address some of the other arguments advanced by the defence.
- [37] The defence argues that the evidence sought is akin to evidence of a deceased's prior acts of violence that is routinely admitted in cases involving self-defence. In making this submission the defence is referring to the decision of *R. v. Scopelliti*, (1982) 34 O.R. (2d) 524, and the line of cases that have followed. In *Scopelliti*, the Ontario Court of Appeal held that in cases involving self-defence, previous bad acts of a victim, unknown to the accused, are admissible to show the probability of the deceased having been the aggressor and to support the accused's evidence that he was attacked by the deceased. That evidence, in turn, is relevant to the trier of fact's assessment of the objective reasonableness of the accused's acts.
- [38] I disagree (with one possible exception) that this principle extends to the evidence sought to be introduced here. The evidence permitted under *Scopelliti* relates to the credibility of the accused's evidence. It is not relevant to show the reasonableness of the accused's belief, which is the issue in the present case. As Martin J.A. stated in *Scopelliti* at para. 30:

Obviously, evidence of previous acts of violence by the deceased, not known to the accused, is not relevant to show the reasonableness of the accused's apprehension of an impending attack. However, there is impressive support for the proposition that, where self-defence is raised, evidence of the deceased's character (i.e. disposition) for violence is admissible to show the probability of the deceased having been the aggressor and to support the accused's evidence that he was attacked by the deceased.

- [39] The possible exception is this: if Cst. Tait testifies that at the point he shot at the truck he believed that Mr. Edey was trying to kill him and the Crown attacks the veracity of that evidence, the evidence relating to Mr. Edey's comments regarding hating police and wanting to go out in a blaze of glory may be admissible.
- [40] The defence further argues that the proposed evidence is necessary in order for Cst. Tait to avail himself of the potential statutory defence available to him pursuant to the Motor Vehicle Act, R.S.B.C. 1996, c. 318 (MVA), s. 122, and the Emergency Vehicle Driving Regulations, B.C. Reg. 133/98 (EVDR). Under s. 4(1) of the EVDR, Cst. Tait has to prove that he had reasonable grounds to believe that the risk of harm to members of the public from the driving actions he took in trying to stop Mr. Edey were less than the risk of harm if he had not. As with ss. 25 and 34 of the Criminal Code, this test involves a subjective/ objective analysis. From the cases presented to me it appears that the analysis is much the same as it

is with ss. 25 and 34, with the focus being on the reasonableness of the officer's decision based on what he knew at the time. I fail to see how this potential defence widens the enquiry.

[41] Given the reasons above, I do not find the bulk of evidence sought to be introduced by defence to be admissible.

[42] I am however satisfied that some of the proposed evidence is relevant to the assessment of the objective reasonableness of Cst. Tait's actions. This evidence is admissible, subject to these witnesses being qualified as able to give opinion evidence:

- 1) Evidence of Nizar Shajani, toxicologist, regarding the effects of alcohol, the impact of alcohol on an individual's ability to drive and the dangerousness of impaired driving. As I have ruled that Mr. Edey's blood alcohol level is inadmissible, Mr. Shajani cannot be asked about it;
- 2) Evidence of Dr. Doug Beirness, psychologist, regarding the dangers of impaired driving.

[43] In addition, the evidence on the voir dire was that Cst. Tait accessed Mr. Edey's driving record. If Cst. Tait testifies that he was aware of Mr. Edey's driving record at the time he made his decision, then the evidence of Steve Martin, former Superintendent of Motor Vehicles, regarding the interpretation of the driving record is admissible.

[44] The scope of the evidence sought to be introduced by defence through these witnesses should be reviewed by this court prior to trial.

[45] I distinguish this evidence from the rest as it does not add facts to what Cst. Tait knew at the time he made the decision. In my view it will allow the defence to challenge Mr. Butler's opinion that Mr. Edey did not pose an imminent danger and assist the jury to assess the opinions of the experts regarding the danger posed by Mr. Edey. While there is clear probative value, I see no prejudice in its admission.

Conclusion

[46] With the exception of the evidence outlined in paras. 42 and 43 above, the proposed defence evidence is inadmissible as it is not relevant to an issue in the trial.

[47] As stated at the outset, this ruling may be revisited throughout the trial.

"C. A. Murray, J."

The Honourable Madam Justice Murray

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