

CANADA / JUDGMENT

R. v. Tait

2020 BCSC 1536

COURT

Supreme Court of British Columbia

DECIDED

16 October 2020

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2020 BCSC 1536 R. v. Tait IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: R. v. Tait, 2020 BCSC 1536 Date: 20201016 Docket: 25830 Registry: Nelson Regina v. Jason Tait Restriction on Publication: A publication ban has been automatically imposed under

s. 648(1) of the Criminal Code restricting the publication, broadcasting or transmission in any way regarding any portion of the trial at which the jury is not present. This publication ban applies until the jury has retired to consider its verdict. 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: Defence Application to Recall Cpl. Mager for Re-cross-examination Counsel for the Crown: B. McKinley C. Lo Counsel for Accused: D.G. Butcher, Q.C. C.A. Fleck Place and Dates of Hearing: Nelson, B.C. October 7, 2020 Place and Date of Judgment: Nelson, B.C. October 16, 2020

[1] These are the reasons for the decision I gave October 8, 2020.

[2] Cst. Tait, an RCMP officer, is charged with manslaughter using a firearm in connection with the shooting death of Waylon Edey. At the time of the incident giving rise to the charge, Cst. Tait was on duty in the Castlegar area. During a traffic stop on January 29, 2015, Cst. Tait discharged his service pistol killing Mr. Edey.

[3] In order for Cst. Tait to be found guilty of criminal negligence causing death, the Crown must prove beyond a reasonable doubt that Cst. Tait's actions in implementing a roadblock in front of Mr. Edey's vehicle, thereby putting himself at risk, were a marked and substantial departure from the conduct of a reasonable police officer in the circumstances. As such two things are relevant to the assessment of the jury: first, what information Cst. Tait had at the time he made his decisions and second, what other officers, similarly positioned, would do in the circumstances faced by Cst. Tait.

[4] In this application the defence applies to recall Crown witness Corporal Mager for re-cross-examination.

[5] We are still in the Crown case. Cpl. Mager testified on October 5 and 6.

- [6] After he was excused, the defence team interviewed Cpl. Mager and learned that, in preparation for trial, the Crown had not provided him with details of the incident for which Cst. Tait is charged. Defence wishes to recall Cpl. Mager to ask him whether, now knowing all of the circumstances, the actions Cst. Tait took in attempting to stop Mr. Edey, an impaired driver, were within the range of reasonable options open to a traffic officer in the West Kootenays. The defence stresses that they could call Cpl. Mager in their case but that it makes sense in these unusual times of COVID-19 to recall Cpl. Mager while he is still in Nelson rather than having him travel back again from the Lower Mainland.
- [7] I pause to note that we have only a couple of hours of court time to spare for Cpl. Mager's evidence, if so permitted, before the Thanksgiving break.
- [8] The Crown opposes this application on the basis that it is not proper re-cross-examination. While the Crown agrees that the defence can call Cpl. Mager in their own case, they argue that, in order to give this opinion, Cpl. Mager would have to be qualified as an expert. The Crown further agrees there is some merit in calling Cpl. Mager while he is still in town with the defence questioning him in direct and the Crown having the opportunity to cross-examine him, however they take the position that doing so is not feasible given the time constraints. The Crown intends to challenge Cpl. Mager's ability to be qualified to give opinion evidence on the basis that he is not impartial. They submit that the expertise voir dire would take at least half a day.
- [9] In *R. v. M.D.H.*, [1993] B.C.J. No. 3043, our Court of Appeal held that the general rule is that the right to re-cross-examine arises only when new evidence arises in re-examination on which the party had no opportunity to cross-examine. However the trial judge has the discretion to permit it.
- [10] Re-cross-examination was discussed more recently in *R. v. Barreira*, 2017 ONSC 1585 where the court set out the rule as follows:
- [24] Where re-examination makes certain new evidence relevant for which there was no prior need or opportunity to cross-examine, re-cross-examination is proper. Otherwise, there is generally no need for re-cross-examination. The permission to re-cross-examine is in the discretion of the trial judge. See *R. v. M.D.H.*, [1993] B.C.J. No. 3043 (C.A.) at paras. 19-24, *R. v. Moore*, [1984] O.J. No. 134 (C.A.) at page 22.
- [25] Where nothing new emerges from cross-examination, which has not already been raised during the case for the Crown and the case for the defence, or which could not reasonably have been anticipated by the defence, there is no right to re-cross-examination. Where some new issue or matter has been raised, then it may be appropriate to allow re-cross-examination limited to the new matter. See *R. v. Rochester et al.*, [1984] O.J. No. 3462 (Ont. Co. Ct.) per Borins J. at paras. 7-10.
- [11] The new evidence did not arise from re-examination. It arose from the defence interview of Cpl. Mager. As such, I am satisfied that this is not proper re-cross-examination.

- [12] Further, without definitively deciding the issue, it appears that the evidence the defence wishes to elicit is opinion evidence. While I agree with defence counsel that we should try to limit travel, we do not have the court time to accommodate this evidence before the long weekend.
- [13] The defence application to recall Cpl. Mager for re-cross-examination is dismissed. "C. A. Murray, J." The Honourable Madam Justice Murray
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Prepared on 24 October 2026 · Esheria