

CANADA / JUDGMENT

R. v. Tait

2020 BCSC 1603

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Tait,

2020 BCSC 1603

Date: 20201027

Docket: 25830

Registry: Nelson

Regina

v.

Jason Tait

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Before: The Honourable Madam Justice Murray

Reasons for Judgment re: Defence Application to Call Evidence

re Mr. Edey's Animosity Toward Police

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D.G. Butcher, Q.C.

C.A. Fleck

Place and Date of Application:

Nelson, B.C.

October 26, 2020

Place and Date of Judgment:

Nelson, B.C.

October 27, 2020

- [1] The defence applies to revisit my pre-trial ruling on the admissibility of proposed defence evidence, indexed at 2020 BCSC 1425. They seek to call evidence that Mr. Edey told a former co-worker that he hated police and wanted to go out in a blaze of glory (the "proposed evidence").
- [2] The defence argues that the Crown has opened the door to this evidence in the way they have conducted their case and in what they intend to say to the jury in their closing submissions.
- [3] In the pretrial ruling which was based on anticipated evidence, I ruled that the evidence in issue in this application to be inadmissible as follows:
- [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.
- [4] As with any pre-trial application based on anticipated evidence rather than actual evidence, I made clear at the end of the ruling that it could be revisited at any time throughout the trial.
- [5] The defence say that the evidence in question is now relevant for a number of reasons:
- 1) to answer the Crown theory;
 - 2) to counter the Crown argument regarding self-defence;
 - 3) to address the Crown contention that Cst. Tait was the aggressor; or
 - 4) to use as evidence of an intervening act.
- [6] The Crown has outlined their theory and the pathway to conviction for manslaughter a number of times.
- [7] In their written submissions regarding the charge to the jury the Crown set out their theory for criminal negligence manslaughter as follows:
18. In this case, the Crown theory is that Cst. Tait's actions in overtaking Mr. Edey's vehicle, very quickly blocking a portion of the highway with his police vehicle in front of Mr. Edey, getting out of the police vehicle and moving to a position on foot in the only path available for Mr. Edey to continue driving was a marked and substantial departure from what a reasonable person with his training and experience would have done in the circumstances. And further, those actions show a wanton or reckless disregard for the lives or safety of other persons. Cst. Tait's actions were a significant contributing cause of the death of Mr. Edey. Mr. Edey's actions in not stopping and then turning his vehicle away from Cst. Tait's vehicle and toward Cst. Tait were reasonably foreseeable to Cst. Tait.
19. Based on Mr. Edey's known history, Cst. Tait knew that Mr. Edey was unlikely to stop for the police and, therefore, it was reasonably foreseeable that Mr. Edey would turn his vehicle to the eastbound lane to go around Cst. Tait's vehicle. By moving on foot into the only lane available, Cst. Tait created a situation in which his only option to save himself would be to use deadly force.

[Emphasis added.]

- [8] The Crown set out its theory for unlawful act manslaughter with dangerous driving as the unlawful act this way:
29. In this case, Cst. Tait's conduct in overtaking Mr. Edey's vehicle, and quickly blocking his lane of travel in front of him on a highway when he was driving at highway speed, given the circumstances of the use of the highway at the time was conduct that was a marked departure from the standard of a reasonable person. A reasonable person would have foreseen the risk, i.e. that Mr. Edey would either drive into the police vehicle or try to go around it, putting himself and others in danger. A reasonable person would have taken steps to avoid the risk, either by not overtaking Mr. Edey's vehicle or by not setting up a barrier in the manner that Cst. Tait did.
30. The unlawful act of dangerous driving was a significant cause of Mr. Edey's death. But for Cst. Tait's actions in blocking the roadway, Mr. Edey would not have driven into the eastbound lane and Cst. Tait would not have feared for his life and shot him. As discussed above with respect to criminal negligence, the actions of Mr. Edey were reasonably foreseeable and do not sever the chain of causation.

[Emphasis added.]

- [9] The Crown summarized its argument as to why s. 25 does not apply as follows:
72. In deciding whether the Crown has proven beyond a reasonable doubt that section 25 does not apply in these circumstances, the trier of fact should consider to what extent Cst. Tait's actions in overtaking Mr. Edey's vehicle, quickly setting up a barrier in front of Mr. Edey with very little time or distance for Mr. Edey to decide what to do, getting out on foot and positioning himself in front of the only path available for Mr. Edey to drive was necessary, reasonable and proportionate in the circumstances. If the jury finds that Cst. Tait created his own jeopardy, knowing that Mr. Edey was unlikely to stop and the result was reasonably foreseeable, the justification under section 25 should not apply.

[Emphasis added.]

- [10] Finally, the Crown summarized its argument as to why the defence of self- defence does not apply like this:
79. Cst. Tait's actions leading up to the shooting are particularly important in determining the reasonableness of the shooting. By overtaking Mr. Edey, hastily blocking part of the road, getting out of his police vehicle and placing himself on the road in front of Mr. Edey's approaching vehicle, Cst. Tait unreasonably and unnecessarily created the situation in which he had to use deadly force to defend himself. Mr. Edey's actions were reasonably foreseeable given his history and Cst. Tait should not have put himself in that position. It was not necessary or reasonable.

[Emphasis added.]

- [11] At the outset of this application the Crown confirmed that in their closing address they will be advancing the argument that Cst. Tait should have reasonably foreseen that Mr. Edey would not be able to stop or would drive directly at the police vehicle, and that he, Cst. Tait, would have to get out of his vehicle into the only path left for Mr. Edey to get around the police vehicle.
- [12] As is clear from the above, central to the Crown's case is the assertion that Mr. Edey was fleeing from police when he drove at Cst. Tait. That is why he was driving toward Cst. Tait. The Crown bases all routes to conviction for manslaughter on this premise, and they negate all defences on this premise. Although Crown counsel takes issue with the word "flee" (preferring something more benign like "continue driving" or "go around"), that is precisely what they are describing. And although the Crown states that they are not going to say in their closing submissions that Mr. Edey was trying to flee, that is precisely what is inferred. In fact it is the only reasonable conclusion to be drawn from the Crown's statements. There are only two reasons for Mr. Edey to be driving in that lane--either he is fleeing or he is trying to hit Cst. Tait.
- [13] The defence argues that by advancing this inference of Mr. Edey's intention the Crown has opened the door to the defence calling evidence of an alternative: that Mr. Edey was not fleeing; he was trying to kill Cst. Tait to "go out in a blaze of glory."
- [14] In addition, the defence says that the proposed evidence is necessary to answer Crown assertions that Mr. Edey could not stop because the partial block was set too quickly and to respond to the inference left with the jury in the Crown opening that Cst. Tait was the aggressor when they told the jury that Cst. Tait "confronted Mr. Edey on foot".
- [15] The defence further argues that this is evidence of an intervening act that the jury must be able to consider.
- [16] Finally, the defence submits that it would be unfair to Cst. Tait for the Crown to be able to base their case on the premise that Cst. Tait put himself in the only lane that Mr. Edey could flee from police without allowing the defence to lead evidence of an alternate scenario.
- [17] The importance of trial fairness and the right of an accused person to be given the opportunity to defend oneself by presenting a full defence was addressed by Madam Justice McLachlin, as she then was, in *R. v. Seaboyer*, [1991] 2 S.C.R. 577 when she stated:

32 The right of the innocent not to be convicted is reflected in our society's fundamental commitment to a fair trial, a commitment expressly embodied in s. 11(d) of the Charter. It has long been recognized that an essential facet of a fair hearing is the "opportunity adequately to state [one's] case": *Duke v. The Queen*, [1972] S.C.R. 917, at p. 923, dealing with s. 2(e) of the Canadian Bill of Rights. This applies with particular force to the accused, who may not have the resources of the state at his or her disposal. Thus our courts have traditionally been reluctant to exclude even tenuous defence evidence: *David H. Doherty*, "'Sparing' the Complainant 'Spoils' the

Trial" (1984), 40 C.R. (3d) 55, at p. 58, citing *R. v. Wray*, [1971] S.C.R. 272, and *R. v. Scopelliti* (1981), 34 O.R. (2d) 524 (C.A.). For the same reason, our courts have held that even informer privilege and solicitor-client privilege may yield to the accused's right to defend himself on a criminal charge: *Solicitor General of Canada v. Royal Commission of Inquiry (Health Records in Ontario)*, [1981] 2 S.C.R. 494; *R. v. Dunbar and Logan* (1982), 68 C.C.C. (2d) 13 (Ont. C.A.).

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34 The right of the innocent not to be convicted is dependent on the right to present full answer and defence. This, in turn, depends on being able to call the evidence necessary to establish a defence and to challenge the evidence called by the prosecution. As one writer has put it:

If the evidentiary bricks needed to build a defence are denied the accused, then for that accused the defence has been abrogated as surely as it would be if the defence itself was held to be unavailable to him.

(Doherty, *supra*, at p. 67).

In short, the denial of the right to call and challenge evidence is tantamount to the denial of the right to rely on a defence to which the law says one is entitled. The defence which the law gives with one hand, may be taken away with the other. Procedural limitations make possible the conviction of persons who the criminal law says are innocent.

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43 The Canadian cases cited above all pertain to evidence tendered by the Crown against the accused. The question arises whether the same power to exclude exists with respect to defence evidence. Canadian courts, like courts in most common law jurisdictions, have been extremely cautious in restricting the power of the accused to call evidence in his or her defence, a reluctance founded in the fundamental tenet of our judicial system that an innocent person must not be convicted. It follows from this that the prejudice must substantially outweigh the value of the evidence before a judge can exclude evidence relevant to a defence allowed by law.

[Emphasis added.]

[18] Given this guidance from the Supreme Court of Canada, I am satisfied that the defence must be permitted to call the proposed evidence in order to challenge the Crown evidence, the Crown theory and the arguments the Crown will advance in front of the jury, as well as to advance the defence of an intervening act. To prohibit the defence from calling this evidence would be unfair to Cst. Tait. The result would be to allow a picture to be painted by the Crown while restricting the defence from providing their version of the case to the jury. There is an air of reality to the proposed evidence. It will allow Cst. Tait to fully present his defence. In my view, the probative value much outweighs the prejudicial effect. Any danger that the evidence will arouse prejudice can be dealt with by way of an instruction to the jury.

- [19] In coming to this decision I reject the Crown's argument that the cost of the evidence outweighs its benefit as it may add days to an already lengthy trial. Trial fairness and the ability of Cst. Tait to respond to the Crown's theory and present a defence far outweighs any extra trial time that may be added. Neither do I accept the argument that the proposed evidence will be distracting for the jury. It is relevant to key issues in this trial.
- [20] Finally, I note that the Crown has been aware of this evidence for approximately 20 months. In addition, the Crown was aware that my pretrial ruling was provisional and that the defence was looking for an opening to revisit it. I have no difficulty in finding that the Crown has opened the door to making this evidence relevant to challenge the Crown's case and to present a defence.
- [21] The defence is permitted to call the proposed evidence, subject to it being ruled admissible.
- "The Honourable Madam Justice Murray"
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