

HONG KONG / JUDGMENT

HKSAR v. McCALL HOWARD KENNETH AND ANOTHER

COURT

Court of First Instance

DECIDED

27 October 2017

CASE / FILE NUMBER

HCCC446/2016

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HCCC 446/2016

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE

CRIMINAL CASE NO 446 OF 2016

BETWEEN

HKSAR

and

McCALL, HOWARD KENNETH

1st Accused

LAM, AROON

2nd Accused

Before: Deputy High Court Judge Andrew Bruce SC in Chambers

Date of Hearing: 9 October 2017

Date of Ruling: 9 October 2017

Date of Reasons for Ruling: 27 October 2017

RULING ON ADMISSIBILITY OF EVIDENCE (NO 2):

OPINION EVIDENCE

Ruling

The 1st Accused objects reception into evidence of proposed testimony of and report by Dr Mak Kai Lok a specialist psychiatrist into the consumption rates of certain drugs germane to the 1st and 2nd Counts on the Indictment. A hearing to determine the admissibility of the testimony of Dr Mak was conducted.

At the conclusion of the hearing, I held that his testimony was inadmissible in relation to his proposed evidence concerning consumption rates of drugs in Hong Kong. I indicated at the time of my ruling that I would give my reasons for that ruling at a later date. These are those reasons.

Background

In order to understand the issues which arose on this hearing, it is necessary to recite a small amount of background information. Howard Kenneth McCall and Lam Aroon (the 1st and 2nd Accused respectively) were arraigned on an indictment containing 3 counts. The 1st Count against the 1st Accused alleges trafficking in a quantity of methamphetamine hydrochloride (usually referred to as Ice). He pleaded not guilty to that count but tendered a plea of simple possession in full satisfaction of this count on the indictment. The 2nd Count in the indictment, which is against both Accused, alleges trafficking in dangerous drugs including ice, a small amount of cocaine and 18 g of cannabis resin. To this charge both Accused pleaded not guilty but tendered pleas of guilty to simple possession in full satisfaction of this count on the indictment. The Prosecution was not prepared to accept any of the lesser pleas tendered. In relation to the 3rd Count, which was against the 1st Accused, the indictment alleges trafficking in a dangerous drug namely 756 g of powder containing 462.9 g of cocaine. No alternative plea simple possession of dangerous drugs was offered in relation to this count on the indictment. On the facts of this case it is, to say the least, difficult to see how a jury might convict the 1st Accused of a charge of simple possession.

For reasons which will shortly become apparent, it is also relevant to note that the 1st Accused is a British national and of Caucasian ethnicity. The 2nd Accused is a Thai national.

The objections

Counsel for the 1st Accused objects to the reception into evidence of the average daily consumption rates of the 3 substances which are, in various quantities, the subject of Counts 1 and 2 on the indictment. Indeed, the principal focus of his objection is the consumption rate of ice. He contends that Dr Mak is not qualified to give an expert opinion on this topic. It is accepted that he is a qualified practising psychiatrist but his expertise does not extend to expressing an expert opinion on consumption rates of drugs. Further, it is contended that Dr Mak is not, in reality, expressing his opinion on consumption rates. He is simply reproducing two studies in Taiwan and China respectively. While it is recognised that there are circumstances where an expert can rely on the studies of others, in reality he is simply a conduit for those studies and provides no meaningful expertise himself. It is contended that it not being good enough to simply

reproduce data of asserted consumption rates — a study of this kind to have any meaning must have a statistical validity in terms of, amongst other things, sample size and bias. Apart from a coincidence of ethnicity between the Taiwanese and Chinese studies and the likely majority of drug users in Hong Kong, it is also objected that the opinion of Dr Mak does not demonstrate a relevance for Hong Kong. In other words, it is contended that nowhere in the report does Dr Mak demonstrate the applicability and relevance of these studies to Hong Kong.

Finally, it is contended that even if the studies in Taiwan and China relied upon by Dr Mak are valid for the likely majority ethnicity of Hong Kong drug users, the report of Dr Mak provides no information on the applicability of these consumption rates to drug users who are not ethnic Chinese.

The evidence

The prosecution called Dr Mak to testify in a hearing to determine the admissibility of the proposed evidence on consumption rates. Dr Mak is a holder of medical qualifications having obtained an MBBS from the University of Hong Kong in 2003. In 2011, Dr Mak was admitted to a Fellowship of the Hong Kong College of Psychiatrists. He is a psychiatrist in private practice

Dr Mak told the court that part of the training of a psychiatrist includes training in substance abuse which involves working, in this context, in the outpatient department of hospitals and visiting what he characterised as detox centres. He had conducted no academic research into consumption rates. He said that his 13 years' experience exposed him to substance abuse in practice. (His report reveals that this experience includes residencies at various psychiatric units from 2004 to 2010. It is to be recalled his fellowship of the Hong Kong College of Psychiatrists was awarded in 2011. From then he was a resident specialist from 2011 to 2012. He has an appointment as an associate consultant of the Department of Psychiatry at Castle Peak Hospital between 2012 and 2016. He is in private practice.) Dr Mak testified that he saw patients who were substance abusers in the context of treating them for mental health issues. He did not quantify the number of patients that he had seen in this context. However, he said that when he treated those patients, a critical piece of clinical information that he would need is the rate at which that patient consumed the chemical which was the subject of the substance abuse. He certainly gave no indication as to the number of patients he had seen with a history of abuse of ice. He said that apart from clinical notes he had kept no record dedicated to noting the consumption rates of those whom he had treated for substance abuse where the substance in question was ice.

In his report, Dr Mak referred to and relied on two articles on consumption rates in Taiwan and China. Both of those articles were, he said, peerreviewed. He testified that there is no literature for Hong Kong. He accepted in cross examination that there is such literature in Europe and elsewhere but he had not consulted that. In cross examination, he accepted that he had relied to a substantial degree on the two articles to which I have referred. However, he did not accept the proposition which was put to him to the effect that any person who read those articles could give the same evidence is that which he proposed to do. He said that it was necessary to critically

review what was said in those articles and make judgements about them. In this regard he specifically identified sample size and possible bias as factors which would form part of his evaluation of those articles. Unfortunately, no evidence was adduced as to what if any judgements or critical evaluations he made with respect to those articles. He also said that the articles were consistent with his own clinical experience but, as has already been noted, the precise scope and extent of that clinical experience so far as it provides information about consumption rates of drugs, particularly relating to ice, was not adduced by the prosecution.

Dr Mak was also crossexamined as to the information he had available to him. He accepted that the only information given to him was the Government Chemist Certificate (which, of course, revealed the quantities of the drugs in question) together with the Brief Facts prepared by the police. He was given no information about the height, weight, personal characteristics or ethnicity of the person in respect of whom he was providing the report. When pressed, he accepted that genetic differences as between ethnic Chinese and Caucasians might well significantly affect consumption rates including median consumption rates. This is because these differences may have a significant impact on the ability of such a person to metabolise the drug in question.

Dr Mak testified that he had given evidence before in the High Court on approximately 30 occasions. However, on none of these occasions had his qualifications or experience been the subject of challenge.

I accepted Dr Mak as a witness of truth.

Principles governing reception of expert opinion

The party who seeks to adduce evidence of this nature, in this case the prosecution, bears the burden of establishing the qualifications of the witness that is to be called: *R v Bonython* (1984) 38 SASR 45, 15 A Crim R 364; Phipson on Evidence 18th edition §3362.

The principles which govern the reception into evidence of opinions by an expert are as follows:

(1)

The evidence is relevant to the issues before the court.

(2)

The subject matter is some recognised field of science, art or learning which is capable of being made the subject of study, experience or research and in which a person can by study, experience or research become expert or skilled.

(3)

The person proposing to give the evidence is sufficiently qualified or expert in his field.

(4)

The area for consideration is one that the tribunal requires the assistance of an expert.

The central focus of the present objection is to the sufficiency of qualifications or expertise of Dr Mak to testify as to average consumption rates of the 3 drugs in question.

The basic principles are summarised in *R v Bonython* (1984) 38 SASR 45, 15 A Crim R 364. In that case, King CJ held:

“

The general rule is that a witness may give evidence only as to matters observed by him. His opinions are not admissible. One of the recognized exceptions to this rule is that which relates to the opinions of an expert. This exception is confined to subjects which are not, or are not wholly, within the knowledge and experience of ordinary persons, *Clark v Ryan* (1960) 103 CLR 486. On such subjects a witness may be allowed to express opinions if the witness is shown to possess sufficient knowledge or experience in relation to the subject upon which the opinion is sought to render his opinion of assistance to the court. Before allowing a witness to express such opinions, the judge must be satisfied that the witness possesses the necessary qualifications, whether those qualifications be acquired by study or experience or both.”

The critical issue is whether the court could be satisfied that the witness possesses the necessary qualifications, whether those qualifications be acquired by study or experience or both. Further, critical to the admissibility of such evidence is the scope of the expertise that the proposed witness may bring to bear on the topic.

In *Makita (Australia) Pty Ltd v Sprowles* [2001] NSWCA 305, (2001) 52 NSWLR 705, Heydon JA held that in order to be admissible, the evidence had to demonstrate that the opinion expressed is wholly or substantially based upon the expert training, study or experience of the witness and that the reasoning process of the witness should be sufficiently exposed to enable an evaluation as to how the witness used his expertise in reaching his opinion.

Further, the opinion, in order to be admissible must be confined to one which is within the expertise of the witness and expressions of opinion outside of that expertise are inadmissible: *HG v R* [1999] HCA 2, (1999) 197 CLR 414, Gleeson CJ said (427 – 428):

“

It is not in dispute that psychology is a field of specialised knowledge, and that a psychologist may be in a position to express an opinion based on his or her specialised knowledge as a psychologist. However, the witness had to identify the expertise he could bring to bear, and as *Clark v Ryan* [1960] HCA 42; (1960) 103 CLR 486 illustrates, his opinions had to be related to his expertise.”

[my emphasis]

Not only that, but the report must demonstrate how the opinions are related to his expertise. This may be seen in *R v Atkins & Atkins* [2010] 1 Cr App R 8; *R v Reed* [2010] 1 Cr App R 23 and *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588. These authorities demonstrate that this is an issue of admissibility and not weight. Further, expert evidence of a scientific nature is not admissible where the scientific basis on which it is advanced is insufficiently reliable for it to be put before the jury: *R v Reed* [2010] 1 Cr App R 23, §110. That the evidence may in fact be sufficiently scientifically based is not to the point. That must be demonstrated before the report is admitted. Even if the scientific basis is sufficiently reliable, the evidence is not admissible unless it is within the scope of evidence an expert can properly give: *R v Atkins & Atkins* (above); *R v Reed* (above) and *Dasreef Pty Ltd v Hawchar* (above). More recently, this point was made in the Court of Final Appeal in *Fu Kor Kuen Patrick v HKSAR* (2012) 15 HKCFAR 524, [2012] 5 HKC 189, §49.

It is well established that, within limits, an expert may rely on studies or tests done by others: *English Exporters (London) Ltd v Eldonwall Ltd* [1973] 1 Ch 415, 420; *H v Schering Chemicals* [1983] 1 WLR 143; *HKSAR v Kissel* [2014] 1 HKLRD 460, 487; *Myers v R* [2016] AC 314, [2015] UKPC 40. The information upon which the expert relies may be general works of reference, other studies whether published or unpublished. To an extent, it is left to the expert to evaluate that upon which he or she relies which comes from others. When an expert witness bases evidence on data in an authoritative scientific publication it is the evidence of the witness which is thus put before the court. The publication itself is not evidence of the truth of statements it makes as to data. If the witness refers to or quotes from an authoritative publication as correctly stating a fact, what is referred to or quoted is part of the testimony of the witness: *PQ v Australian Red Cross Society* [1992] 1 VR 19, 34; *R v Fazio* (1997) 69 SASR 54, 93 A Crim R 522 and *R v Cluse* [2014] SASFC 97, (2014) 120 SASR 268, 244 A Crim R 349. In other words, the person relying on the published works has to be the expert.

In *Archbold Hong Kong* 2017, 1039A the learned editors refer to the court's gatekeeping role in the reception of expert evidence. In this regard they cite *R v JLJ* [2000] 2 SCR 600, (2000) 192 DLR (4th) 416, 148 CCC (3d) 487 which is a decision of the Supreme Court of Canada. The entry in *Archbold* is a quotation from Binnie J in that case and is as follows:

“

In the course of *Mohan* and other judgments, the Court has emphasized that the trial judge should take seriously the role of ‘gatekeeper’. The admissibility of the expert evidence should be scrutinized at the time it is proffered, and not allowed too easy an entry on the basis that all of the frailties could go at the end of the day to weight rather than admissibility.”

The concept of “gatekeeper” referred to in *R v JLJ* (above) was more fully articulated by the Supreme Court of Canada in *White Burgess Langille Inman v Abbott & Haliburton Co* [2015] 2 SCR 182. In the context of criminal law, the principles thus articulated were, perhaps, best summarised in *R v Abbey* [2017] ONCA 640. In that case on a charge of murder the prosecution sought to adduce expert evidence on the significance of a particular tattoo. The admissibility of such evidence was hotly contested. On appeal, Laskin JA held that:

“

The test may be summarized as follows:

Expert evidence is admissible when:

(1)

It meets the threshold requirements of admissibility, which are:

a.

The evidence must be logically relevant;

b.

The evidence must be necessary to assist the trier of fact;

c.

The evidence must not be subject to any other exclusionary rule;

d.

The expert must be properly qualified, which includes the requirement that the expert be willing and able to fulfil the expert's duty to the court to provide evidence that is:

i.

Impartial,

ii.

Independent, and

iii.

Unbiased.

e.

For opinions based on novel or contested science or science used for a novel purpose, the underlying science must be reliable for that purpose,

and

(2)

The trial judge, in a gatekeeper role, determines that the benefits of admitting the evidence outweigh its potential risks, considering such factors as:

a.

Legal relevance,

b.

Necessity,

c.

Reliability, and

d.

Absence of bias.

In short, if the proposed expert evidence does not meet the threshold requirements for admissibility it is excluded. If it does meet the threshold requirements, the trial judge then has a gatekeeper function. The trial judge must be satisfied that the benefits of admitting the evidence outweigh the costs of its admission. If the trial judge is so satisfied then the expert evidence may be admitted; if the trial judge is not so satisfied the evidence will be excluded even though it has met the threshold requirements.”

I do not understand Laskin JA’s reference to the relationship between costs and benefits of admitting or not admitting the evidence to be referring in any narrow sense to financial costs relating to the calling of expert evidence although it is true to say that a review of *White Burgess Langille Inman v Abbott & Haliburton Co* (above) reveals an anxiety on the part of the Supreme Court of Canada in relation to that specific topic. The essence of what is being said in these authorities is that it is simply not good enough to permit the reception into evidence of problematic expert evidence on the basis that all of the frailties are susceptible to cross-examination and could go, at the end of the day, to weight rather than admissibility. I interpret the passage in which Laskin JA articulates the court’s gatekeeping role in this regard as being wider than the issue of whether the proposed evidence is more prejudicial than probative. To the extent that that is not articulated as a basis for the operation of the gatekeeper role so described, I respectfully suggest that that this basis for objection ought to be added to the list of considerations which would trigger the gatekeeping role of the court even if the proposed evidence has met what is characterised as the threshold requirements for admissibility. It may be objected that cross-examination and the ability of a judge to give directions to a jury may meet the problem. Cross-examination and the ability of a trial judge to give proper directions to the jury are well recognised weapons in the armoury of a criminal court. Weapons, in this context, do not necessarily equate to solutions. Further, in *R v Turner* [1975] QB 834, Lawton LJ observed:

“

Before a court can assess the value of an opinion it must know the facts upon which it is based. If the expert has been misinformed about the facts or has taken irrelevant facts into consideration or has omitted to consider relevant ones, the opinion is likely to be valueless. In our judgment, counsel calling an expert should in examination in chief ask his witness to state the facts upon which his opinion is based. It is wrong to leave the other side to elicit the facts by cross-examination.”

[my emphasis]

See, to similar effect, HKSAR v Tang Yuet Ming [2012] 5 HKLRD 1.

Discussion

Although the two studies from Taiwan and China are buried in the section of the report headed “References” it is plain that they are the primary expressions of opinion upon which the prosecution relies. It is not the authors of those studies who are coming to court. They will not be attending the court to explain their methodology and the scope of the reports and whether the opinions that they express (that is, the consumption rates) are expressions of opinion within the scope of their expertise. Whether these reports are published works of authority within the scope of authorities such as *H v Schering Chemicals* (above) and *HKSAR v Kissel* (above) is also not revealed. I suspect that they are but that is not good enough. Simply because Dr Mak relies upon them does not give them that status. Given that the law requires that those who rely on published works must themselves be suitably qualified to say that the studies are worthy of adoption, it is critical to see what standing of Dr Mak has. In other words, the issue is whether is he suitably qualified on the topic of consumption rates of drug abusers in Hong Kong such that the court can treat him as speaking within the scope of his own expertise on that specific topic.

It is not doubted that Dr Mak is a suitably qualified and experienced psychiatrist. Whether that expertise extends to the topic of his report and whether he is speaking within his expertise when he expresses opinions on the consumption rates of drug abusers in Hong Kong is open to question. Certainly, it was never proved to be the case and certainly does not appear in his report.

Dr Mak said that in his evaluation of the articles dealing with consumption rates in Taiwan and China said that critical to his evaluation of the validity of those articles was sample size and bias. These considerations are hallmarks of statistical analysis. This has two important components. Plainly, the validity of one or both of the two studies upon which Dr Mak relied depends on their statistical validity. Whether Dr Mak is equipped by training or experience to make that evaluation was not revealed in either his report or his testimony. Further, in making the evaluation of the relevance of these two studies for Hong Kong, there has to be a connection which is beyond mere hypothesis. To this end, Dr Mak testified that he had come across substance abusers in his clinical work. However, given the self-evident importance of evaluating the two studies to which Dr Mak refers, in order for the study is to have even the beginnings of validity for Hong Kong would be necessary for the Hong Kong expert to be in a position to articulate that relevance. Plainly, the evaluation of the validity and relevance of these studies for Hong Kong would not be met simply by some anecdotal experience which accords with the studies in China and Taiwan. There would have to be a sufficient body of Hong Kong experience to justify acceptance of these two studies as relevant and valid for the Hong Kong situation. It may be that that Hong Kong experience which might provide the appropriate connection with the two studies and Hong Kong does not have to elevate itself to statistical validity. It is not necessary to consider that in detail. There is nothing in the report of Dr Mak to articulate why he considered that these studies adequately and accurately reflect the Hong Kong experience. He simply cites them. True it is that

it is likely (although Dr Mak did not expressly say so) that the majority of all 3 places would have ethnicity in common. It seems to me that this is the start of the conversation and not the conclusion.

In his testimony in court, Dr Mak said that his experience with substance abusers came in the context of treating them for mental illness. The daily experience of the courts of Hong Kong would demonstrate that by no means all and, may be, not even the majority, of drug abusers have a mental illness of the kind or degree which would normally attract psychiatric intervention. In other words, Dr Mak's experience when viewed as a sample is likely to be unwittingly but hopelessly biased in the statistical sense.

A secondary concern is that Dr Mak did not assert any expertise in evaluating the statistical validity of the two studies. He said that he considered this issue but whether or not he is equipped to do so was not established in the evidence or articulated in his report.

In simple language, the report is missing critical aspects of the methodology adopted by Dr Mak. I am far from saying that these things could not be established. A report which observed even the most fundamental standards of the requirement to set out methodology might have solved the problem. This report falls below that standard by a clear margin. It may have been that the problem could have been ameliorated by oral testimony as a precondition to the reception into evidence of the report. The report, after all must be, in essence, an expression of Dr Mak's opinion as to the relevant consumption rates in Hong Kong. What is lacking is any basis (either in the report itself or in the oral testimony that Dr Mak gave) for evaluating the bland assertion in the report of an opinion unfettered by explanation of how and why he considered that he could derive from the Taiwanese and mainland Chinese study consumption rates which were valid and reliable in Hong Kong.

Dr Mak accepted in his oral testimony that he had not considered studies done in Europe and elsewhere where the ethnicity of the sample of drug abusers which formed the basis for the statistical analysis was appropriate. That is important given that neither of the accused in the present case were ethnic Chinese. Dr Mak accepted that the ability to metabolise ice is different for Europeans. He made no observations, because he was not asked, what the position might be for persons whose origin is Thailand. Thus, even if Dr Mak would make an assertion about the consumption rates of Hong Kong people who were ethnically Chinese, the study does not address the issues in the present case.

Adopting the analysis of Laskin JA in *R v Abbey* (above), whether or not a trial judge could be properly characterised as a "gatekeeper" or not, the potential benefits of the reception into evidence of this evidence are dramatically outweighed by the potential risks. This is because:

the validity of the two studies has not been established;

Dr Mak has not been proved to be sufficiently expert to demonstrate that even if the two studies are valid, that they are relevant and applicable to Hong Kong; and

given the difference in ethnicities of the studies the relevance of Dr Mak's opinions render the relevance of the proposed evidence to be is at best marginal and it is of dubious reliability.

It is simply not good enough to let this report go to the jury and ask them to determine whether it is any good or not. It is for the expert to supply in the report a proper basis upon which the triers of fact can be confident that the report is a truly expert report.

There are is a footnote to the consideration of the reception into evidence of this report but which formed no part of the decision to refuse to admit the proposed evidence. The footnote is that even if the report was to be admitted the prosecution never addressed the assumptions which underlie its use. In particular, I have in mind what Dr Mak did in the report was simply to say that quantity "X" divided by the average daily consumption rate "Y" we have the number of days for which this quantity of drug would have lasted. What implications that carries for the issue of whether an inference of possession for unlawful trafficking could be drawn from the outcome of that equation would need to be addressed. (This is no criticism of Dr Mak. He simply provided what he believes are the daily consumption rates and then did the math.) The implications of this as a means of assisting the prosecution to prove that the drugs in the possession of an accused were for unlawful trafficking was not a matter for him and (quite properly) he never expressed an opinion in that regard. This is a matter for the prosecution. This might work out perfectly well for quite large quantities and quite small ones. The problem of quantities in the middle of that spectrum is more problematic. The assumption that a drug user only buys a small quantity at any one time for personal consumption is not an assumption which is necessarily valid. In other words, even if admitted, Dr Mak's information is merely the start of the debate and is in no way its conclusion. The issue is the conversion of speculation to into evidence capable of proof to the criminal standard.

The issues which arose in the case demonstrate how important and how great is the need for an authoritative study on consumption rates in Hong Kong.

Conclusion

The report written by Dr Mak and the proposed evidence to be given by him is inadmissible. It was the 1st Accused who objected to the reception into evidence of this report. Given the deficiencies of the report, I do not think it is fair to admitted against the 2nd Accused.

(Andrew Bruce SC)

Deputy High Court Judge

Mr Ian H Polson, Counsel on fiat, instructed by the Department of Justice,
for HKSAR

Mr John Patrick McNamara, instructed by Morley Chow Seto,
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