COURT OF APPEAL OF YUKON

Citation: *R. v. Cornell*,
2017 YKCA 12

Date: 20170803
Docket: 14-YU748

Between:

Regina

Respondent

And

Christopher Jonathan Dale Cornell

Appellant

Before: The Honourable Chief Justice Bauman
The Honourable Mr. Justice Donald
The Honourable Madam Justice Tulloch

On appeal from: An order of the Supreme Court of Yukon, dated October 3, 2013 (*R. v. Cornell*, Whitehorse Docket 12-01510).

Counsel for the Appellant:	J. D. Tarnow
Counsel for the Respondent:	N. Sinclair
Place and Date of Hearing:	Whitehorse, Yukon May 15, 2017
Place and Date of Judgment:	Vancouver, British Columbia August 3, 2017

Written Reasons by:
The Honourable Mr. Justice Donald

Concurred in by:
The Honourable Chief Justice Bauman
The Honourable Madam Justice Tulloch

Summary:

Appeal from a jury conviction for eight charges, including attempted murder of a police officer. The appellant argues that Crown counsel at trial misused his peremptory challenges to exclude Indigenous persons from the jury, that an in-chambers conversation in his absence invalidated the trial, and that the judge erred in refusing to grant a mistrial application when cross-examination yielded highly prejudicial evidence. Held: appeal dismissed. The appellant must show a foundation in the record to require counsel to justify their peremptory challenges, and there is no evidence that counsel strategically challenged Indigenous persons or that jury selection was unfair or produced an unrepresentative jury. The in-chambers discussion was not part of the trial for purposes of s. 650 of the Criminal Code because it was a preliminary conversation and did not implicate the vital interests of the accused. Finally, the judge instructed the jury twice regarding the prejudicial evidence, and his determination that it did not fatally wound the fairness of the trial is entitled to deference.

Reasons for Judgment of the Honourable Mr. Justice Donald:

[1] A jury in Whitehorse found that the appellant fired a rifle into the windshield of an RCMP vehicle in hot pursuit after a robbery. He was convicted of all eight counts of an indictment charging him with offences related to the robbery and the shooting, including attempted murder of Corporal Kim MacKellar and of the passenger in the police vehicle, a deputy conservation officer. He was sentenced to 11 1/2 years' imprisonment and to a 10-year period of supervision as a Long Term Offender.

[2] The appeal concerns an allegation of racially biased jury selection. It is also alleged that a meeting with the trial judge during jury selection, in which defence counsel voiced a concern that Crown counsel was using his peremptory challenges to exclude Indigenous persons from the jury, invalidated the trial because the appellant was not present at the meeting. The appellant further challenges the refusal of the trial judge to grant a defence motion for a mistrial when cross-examination by Crown counsel revealed the appellant wore a tattoo that said "Fuck the Police".

[3] In my opinion, there is no basis for the allegation that Crown counsel at trial employed a strategy to challenge Indigenous persons or that jury selection was racially flawed. As nothing came of the informal meeting with the judge, it did not form part of the trial such that the appellant was required to be present. In addition, the trial judge gave an unequivocal mid-trial instruction and a direction in the charge to ignore the tattoo evidence. He found that the evidence did not "fatally wound" the fairness of the trial. I am not persuaded that the judge erred in his judgment on the impact of the evidence. Accordingly, I would dismiss the appeal.

Facts

[4] The trial judge described the incident in his reasons for sentencing (2014 YKSC 54):

> [3] Pursuant to s. 724 of the *Code*, I make the following findings of fact.
>
> [4] On September 26, 2011, Frank Parent, then in his mid-60s, attended at Madley's General Store (the "General Store") in Haines Junction at about 5:45 AM to perform his normal janitorial duties. After mopping the floor of the store for about 15 minutes, he noticed someone going into the stock area of the store, wearing a light blue parka with a hood. Mr. Parent is 5'11" and he described the person in the stock room as being of small stature. He put his arms around the shoulders of the individual, lightly holding the person with the intention of restraining them, while that person was facing the exit door.
>
> [5] Mr. Parent then noticed a second person out of the corner of his eye, also short in stature, wearing a light brown jacket, which was zipped up with the hood covering the person's face. Mr. Cornell was between 5'7" and 5'8" at the time and weighed approximately 140 pounds. This second person almost immediately struck Mr. Parent in the face with a closed fist breaking his nose and sending his eyeglasses to the floor. Mr. Parent began to bleed profusely from his nose. A few seconds later, he heard a male voice say something about bear spray and saw a yellow mist in his face which caused his eyes to instantly burn and sting. Mr. Parent was totally incapacitated by this bear spray and went to the washroom to wash his face for about 10 to 15 minutes. At about 6:10 or 6:20 AM, he called the police from a phone in the main office of the General Store. As his eyes and face were still burning, he continued to flush them with water for a further period of about 10 minutes.
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> [6] I find that the person restrained temporarily by Mr. Parent was Ms. Johnson and the person who broke Mr. Parent's nose and bear sprayed him was Mr. Cornell.
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> [7] After Mr. Parent had largely recovered from the bear spray, he went to the front door of the General Store and saw two people with parkas in the

parking lot attempting to load a safe taken from inside the store into a dark-coloured SUV. He then made a second call to the police.

[8] CpI. Kim MacKellar, a member of the Royal Canadian Mounted Police, and Shane Oakley, a deputy conservation officer accompanying CpI. MacKellar, arrived at the parking lot of the General Store shortly after 6:30 AM. Mr. Oakley observed a male person wearing a tan-coloured hoodie in the driver's seat of the SUV, and a female with a wisp of pink or orange-coloured hair in the passenger seat. I find that these people were Mr. Cornell and Ms. Johnson, respectively.

[9] As soon as CpI. MacKellar got out of the police vehicle, the SUV reversed and then drove onto the Alaska Highway, heading north. CpI. MacKellar and Mr. Oakley gave chase in the police vehicle, which was a fully marked and equipped RCMP truck. CpI. MacKellar activated the police truck's emergency lights and sporadically turned on the siren. He and Mr. Oakley never lost sight of the SUV. The vehicles were travelling at speeds above the posted speed limit, up to 130 km/h. CpI. MacKellar and Mr. Oakley observed items being thrown out of the SUV onto the highway, including power tools, road safety markers, a generator, gas jugs and a hind-quarter of deer meat. The SUV slowed down to about 90 to 100 km/h at one point, and then began to speed up again. I find that this was when Ms. Johnson switched positions with Mr. Cornell, taking over from him in the driver's seat.

[10] The rear window of the SUV then shattered and blew out. Mr. Oakley could see a male person wearing a tan hoodie rolling around in the back of the SUV. Again, I find that this was Mr. Cornell. Almost immediately afterwards, a bullet came through the windshield of the police truck, striking the satellite radio situated on the dashboard in front of the driver, and then the driver's side window, blowing that out. I find that this bullet was fired by Mr. Cornell from the back of the SUV.

[11] The bullet hole in the windshield was about 8-to-10 inches to the right of the center of the windshield, while facing it from the front of the truck, and about 6-to-8 inches from the bottom, at dashboard level. Particles of glass, plastic and metal fragments hit and penetrated CpI. MacKellar in the face, eyes and body. While CpI. MacKellar was wearing a flack jacket which protected his torso, he was injured by flying pieces of metal which penetrated his exposed left shoulder.

[12] CpI. MacKellar brought the police truck to a stop. Mr. Oakley checked him over and placed him in the passenger seat. Mr. Oakley himself had no injuries, although he noticed blood running down CpI. MacKellar's face.

[13] The SUV continued north on the Alaska Highway. Mr. Oakley noticed another vehicle parked on the side of the Alaska Highway about 76 m from where they were stopped. He investigated and discovered what appeared to be an intoxicated male behind the driver's wheel. Mr. Oakley placed this individual in the rear of the police truck, and drove back to Haines Junction with CpI. MacKellar in the passenger seat. Enroute, CpI. MacKellar radioed the RCMP dispatcher about the shooting. Upon arrival in Haines Junction, Mr. Oakley took CpI. MacKellar to the Nursing Station to receive medical

> treatment, and then took the intoxicated male to the RCMP detachment. After that, he returned to the General Store to offer his assistance to those present.
>
> [14] Later on September 26, 2011, Cpl. MacKellar was transported to Whitehorse, where he received further medical treatment. After that, he was medivaced to Vancouver where he underwent an operation to remove metal and plastic fragments from his eyes, face, chest and left shoulder. He had a follow-up operation on October 3, 2011 to remove fragments from his eyes. In total, he was off work for approximately three months. At the time of trial, he considered himself to be in "pretty good health", although he still has fragments of metal in his shoulder and eyes.

[5] The appellant is a member of the Kwanlin Dün First Nation. His defence counsel, David Tarnow, brought a pre-trial application for an order that at least 25 per cent of the jury panel returned for the purpose of the trial consist of Indigenous persons, with the object of ensuring that Indigenous representation on the panel was representative of the Indigenous population in the community. Mr. Justice Veale dismissed the application for reasons indexed as 2013 YKSC 96. The ruling is not questioned on this appeal. It is mentioned for context only. In brief, Veale J. found that the system used in the Yukon to assemble a jury (random selection from the medical insurance list), used in many other Canadian jurisdictions, adequately serves the purpose of providing representative juries. As for setting a fixed percentage, Veale J. relied on the reasoning in *R. v. Kokopenace*, 2013 ONCA 389:

> [22] As noted, the right to a representative jury is a qualified one. Contrary to Mr. Tarnow's submission, I do not think the law entitles his client to a jury panel whose Aboriginal composition exactly mirrors the composition of Whitehorse or Yukon. This was very succinctly stated by LaForme J. in *Kokopenace*:
>
> > [43] ... <u>The right to a representative jury roll is an inherently qualified one. It does not require a jury roll in which each group is represented in numbers equivalent to its proportion of the population of the community as a whole</u>. As Rosenberg J.A. said [in *R. v. Church of Scientology* (1997), 33 O.R. (3d) 65 (C.A.)], there are practical barriers that render this impossible to achieve and the attempt to do so would require undesirably invasive inquiries of potential jurors. Moreover, a fully representative jury roll cannot be squared with the random selection process used to choose those who are to receive jury service notices.
> >
> > [44] In my view, therefore, in creating the jury roll, the test for the state's compliance with the representative right cannot simply look to the composition of the jury roll that results. ...

> [45] Rather, the focus must be on the steps taken by the state to seek to prepare a jury roll that provides a platform for the selection of a competent and impartial petit jury that will ensure confidence in the jury's verdict and contribute to the community's support for the criminal justice system.
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> [Emphasis added.]

[6] Jury selection occurred 9 September 2013 at the Mount McIntyre arena, a hall large enough to accommodate a panel of about 400 persons. Tables for the judge and counsel were set in front of seating for the panel. A curtained-off alcove at one end of the hall served as the judge's makeshift chambers. At an early stage in the selection process, Mr. Tarnow asked for an adjournment to raise a matter with the court. Counsel and the trial judge gathered in his chambers where Mr. Tarnow complained that Mr. Parkkari, Crown counsel, was challenging all the Indigenous persons as they were called. Mr. Tarnow and Mr. Parkkari have different recollections as to what was said after that. They were cross-examined before us on their affidavits. In my view, Mr. Parkkari has a more detailed and complete memory of the meeting but the differences are, in the end, not material. What is significant, and not in controversy, is that the judge listened to Mr. Tarnow's complaint, and without making a ruling or direction (Mr. Tarnow did not request any remedy), he concluded the meeting after about 10 minutes and resumed jury selection.

[7] As mentioned, the fact that the appellant was not present at the meeting is a ground of appeal. As no court reporter was present at the meeting, we have no official record of what took place. The appellant takes issue with the fact that the judge put nothing on the record about the meeting when court reconvened.

[8] The appellant's defence was alibi. He testified and was cross-examined. At the end of the cross-examination, this exchange occurred:

> Q How do you feel about the police?
> A What do you mean?
> THE COURT: Pardon?
> THE WITNESS: I said, What do you mean.
> MR. PARKKARI:
> Q Do you like the police?
> A Nothing against them, I --
> Q You got nothing against them? Do you respect them?

A I don't associate with them, so I don't know nothing about them.
Q You don't know anything about the police?
A Well, I know what they do. That's about it. I don't hang around with them or nothing like that.
Q You don't dislike the police in any way?
A I don't know.
Q Isn't a more accurate sentiment about how you feel about the police is something along the lines of "fuck the police"?
A Why, because I have a tattoo that says "fuck the police"?
Q I don't know. Do you?
A Yes.
Q I put it to you that it was you that shot at the police vehicle.
A No.
Q And your intention was to try and kill the officers.
A I don't think so.
Q But you don't know because you weren't even there?
A Yeah.

[9] The defence moved for a mistrial. The trial judge was satisfied that something had to be done about the tattoo evidence but needed more time to consider the remedy and so at the end of the day, he gave the jury this instruction:

> THE COURT: Ladies and gentlemen, I have a mid-trial -- it's called a mid-trial instruction to give you. And this is based on certain evidence that you heard at the end of the Crown's cross-examination of the accused. And there was a series of questions and answers that you'll recall, beginning with Mr. Parkkari asking the question "How do you feel about the police," and the answers ending with the accused admitting to having a tattoo that says "fuck the police."
>
> You must disregard this evidence entirely and not consider it further. Specifically, you must not conclude from this testimony that the accused is a person of bad character and was therefore more likely to have committed the offences with which he stands charged. Also you must not consider from this testimony that the accused had the intention to kill Corporal MacKellar or Shane Oakley.
>
> I have an application which I have to consider overnight, ladies and gentlemen, so I'm going to release you now until 10:00 tomorrow morning. Thank you.

[10] On 27 September 2013, the trial judge gave an oral ruling, indexed as 2013 YKSC 104, dismissing the application for a mistrial. The gist of the decision is in this paragraph:

> [6] This is an extremely close case, especially given what is essentially a concession by the Crown that the evidence should be entirely disregarded by the jury. Like defence counsel, I am also troubled by the fact that there was an audible reaction by some jurors to the evidence. I am also concerned that

> we are virtually at the conclusion of the evidentiary portion of this relatively lengthy trial and only a very few days away from closing addresses and my final charge, today being a Friday. After considerable reflection, I conclude that the tattoo evidence is not a fatal blow to the fairness of this trial.

[11] The judge expressed an intention to instruct the jury again during his final charge. He did so in these terms:

> Inadmissible character evidence. I have already given you a mid-trial instruction on disregarding the evidence that the accused has a tattoo which says "fuck the police". I tell you again that you must disregard this evidence entirely as it has no probative value.
>
> Many of you will be familiar with the common example of someone who gets a tattoo that pledges their love or devotion to a particular individual and over time those feelings can change. In other words, the reasons and circumstances under which one gets a tattoo can be many and varied and can change over time. In Mr. Cornell's case we have no evidence about the circumstances under which he got the tattoo. You can draw no inference from the existence of the tattoo whatsoever. In particular, you must not use that evidence to conclude that Mr. Cornell is a person of bad character and therefore more likely to have committed the offences with which he is charged. Also, you must not conclude from this tattoo that Mr. Cornell had the intention to kill Corporal MacKellar or Shane Oakley.

Issues

[12] I would frame the issues this way:

1. Was jury selection racially flawed?
2. Did the meeting with the trial judge during jury selection violate the appellant's right, pursuant to s. 650 of the *Criminal Code*, R.S.C. 1985, c. C-46, to be present at his trial?
3. Did the trial judge exercise his discretion wrongly in refusing a mistrial on the tattoo evidence?

Discussion

1. Jury Selection

[13] Much of the new evidence regarding jury selection addressed an underlying premise in the appellant's case: his jury was unrepresentative. Mr. Tarnow's

affidavits suggest this or that person on the panel was Indigenous in order to demonstrate a pattern that Crown counsel used his peremptory challenges to eliminate Indigenous persons; Mr. Parkkari's reply affidavit carefully responds by explaining why someone whose name or appearance suggested Indigenous heritage was challenged or accepted. He said his choices had nothing to do with their heritage.

[14] Mr. Justice Sharpe reviewed the nature of peremptory challenges in *R. v. Gayle* (2001), 54 O.R. (3d) 36 (C.A.):

> [59] An important part of the jury selection process is the right of both the Crown and the defence to exercise peremptory challenges. The very essence of a peremptory challenge is that its exercise requires no justification or explanation. Peremptory challenges ordinarily may be exercised on grounds that are not provable and unable to withstand objective scrutiny: *Cloutier v. The Queen*, [1979] 2 S.C.R. 709, 48 C.C.C. (2d) 1 at pp. 720-21 S.C.R., pp. 20-21 C.C.C. …

[15] However, Sharpe J.A. held that a court may review and constrain the exercise of the Crown's right of peremptory challenge where it is inconsistent with the quasi-judicial nature of the Crown's duty or with the *Charter*.

[16] It must be said definitively that there is no credible evidence that the jury selection was unfair or produced an unrepresentative jury. Veale J.'s pre-trial ruling held that the system for assembling the panel meets the representational requirements of the law.

[17] As to the outcome of the selection process in this particular case, the three counsel who testified before us all agreed that names and appearances are uncertain identifiers as to Indigenous heritage. In Mr. Tarnow's cross-examination, he agreed that he did not know who on the panel was Indigenous. Christiana Lavidas, who acted as junior Crown counsel at trial, also said she did not know the ethnicity of the panel. Unless that is known, it is impossible to establish that the jury was unfairly constituted as to race. The point is that there is no basis for the premise that the appellant had an unfair jury.

[18] I now turn to what became the real focus of the jury selection issue: the conduct of Crown counsel. The respondent argues that the accusation against Mr. Parkkari was of such a serious nature, potentially very damaging to a lawyer practising in the Yukon with a large Indigenous population, that the claim of racial exclusion should be tested on a threshold basis. There must be, it is argued, a foundation of prosecutorial misconduct in the record to require a justification for the Crown's exercise of its peremptory challenges: *R. v. Felderhof* (2003), 68 O.R. (3d) 481 at para. 88 (C.A.).

[19] I agree with that approach. On that basis, the claim that Mr. Parkkari employed a strategy to exclude Indigenous persons from the jury fails the test. Mr. Tarnow offers impressions and suppositions without any concrete facts. He cannot say what the racial makeup of the jury was. Had there been a solid foundation for his concerns, I am satisfied he would have taken more formal and assertive steps to get relief from the perceived misconduct at the trial. What was merely a grumble at trial became a major ground of appeal.

[20] In my view, the appellant has failed to produce any cogent evidence of improper prosecutorial conduct. Mr. Parkkari has provided a full explanation of his challenges at jury selection, which I accept without reservation, but he should not have been placed in a position where he felt he had to justify himself and protect his reputation.

2. Chambers meeting

[21] Section 650(1) of the *Criminal Code* reads in relevant part: "an accused … shall be present in court during the whole of his or her trial." This point was raised for the first time at the end of David Tarnow's submissions when the appeal came before a differently constituted division in Vancouver on 24 January 2017. He said that the issue had occurred to him the previous night and should be added to the case. This took the respondent by surprise and an adjournment was necessary. The matter was put over to the May 2017 list of the Court in Whitehorse. As David Tarnow was to be cross-examined on his affidavit, he engaged his son Jason to act

as counsel for the May hearing. Although he filed another affidavit before the May hearing, David Tarnow offered no explanation why he did not arrange for his client to be present at the meeting with the trial judge.

[22] The question is whether that meeting was part of the trial within the meaning of s. 650, such that the appellant was entitled to be present. The jurisprudence in this area is well-developed in Ontario, where a distinction is drawn between discussions of a preliminary nature and those amounting to a formal inquiry: *R. v. Hertrich, Stewart and Skinner* (1982), 67 C.C.C. (2d) 510 (Ont. C.A.); *R. v. Simon*, 2010 ONCA 754; *R. v. Sinclair*, 2013 ONCA 64. Mr. Justice Watt summarized the relevant principles regarding whether a particular proceeding forms part of the trial in *Simon*:

> [114] Section 650(1) of the *Criminal Code* requires that, apart from some exceptions that have no place here, an accused must be "present in court during the whole of his … trial". Apart from the obvious, such as the introduction of evidence before the jury, counsel's addresses and the trial judge's charge, not everything that happens during a trial is part of the "trial" for the purposes of s. 650(1) and, thereby the requirement that the accused be present: *R. v. Hertrich*, *Stewart and Skinner* (1982), 67 C.C.C. (2d) 510 (Ont. C.A.), at p. 529; *R. v. Grimba* (1980), 56 C.C.C. (2d) 570 (Ont. C.A.), at p. 574.
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> [115] The watershed case on what constitutes part of the "trial" for the purposes of the presence requirement in s. 650(1) is the decision in *Hertrich*. There, Martin J.A. made it clear that the term "trial" in s. 650(1) reaches beyond those proceedings that form part of the procedure established for determining guilt or innocence and the imposition of the sentence to include at least some proceedings conducted by the judge during the trial for the purpose of investigating things that have occurred outside the trial but may affect its fairness: *Hertrich* at pp. 527-537.
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> [116] To determine whether something that happened during the course of a trial is part of the "trial" for the purposes of s. 650(1), we ask whether what occurred involved or affected the vital interests of the accused or whether any decision made bore on "the substantive conduct of the trial": *Hertrich* at p. 539; *R. v. Vézina and Côté*, [1986] 1 S.C.R. 2, at pp. 10-11; *R. v. Barrow*, [1987] 2 S.C.R. 694, at pp. 707-08.
>
> [117] Discussions in chambers can be part of the "trial" for s. 650(1) purposes: *Hertrich* at p. 539; *R. v. Laws* (1998), 128 C.C.C. (3d) 516 (Ont. C.A.), at p. 521; *R. v. James* (2009), 244 C.C.C. (3d) 330 (Ont. C.A.), at para. 17. But not every in chambers discussion is part of the trial for the purposes of s. 650(1), especially if the discussion is of a preliminary nature, does not involve any final determination and is recounted in open court in the

> presence of the accused: *R. v. Dunbar* (1982), 68 C.C.C. (2d) 13 (Ont. C.A.), at p. 31; *R. v. Chaudhary*, [1988] O.J. No. 1857 (C.A.), at para. 3.

[23] In *Hertrich*, Mr. Justice Martin distinguished between a preliminary conference with counsel to determine the necessity of an inquiry into juror impartiality and the form that it should take, and the examination of the jurors under oath to determine the issue. In doing so, he remarked that the former "clearly did not constitute part of the trial" (at 539), but held that the latter was part of the trial because it involved the vital issue whether the jurors were impartial and whether the appellants could receive a fair trial. In *Vézina and Côté v. The Queen*, [1986] 1 S.C.R. 2 at 12-13, Mr. Justice Lamer, as he then was, similarly held that where it is uncertain whether an accused's vital interests are involved, the judge may investigate the matter in the absence of the accused. As of the moment it appears those vital interests are in issue, the matter must be determined in the presence of the accused.

[24] The respondent's position is set out in its factum in this way:

> 72. The Respondent submits that the in-chambers meeting here should properly be characterized as a preliminary meeting wherein no specific remedy, direction or order was sought, but rather as one where Crown counsel and the Court were simply put on notice of the concerns of Appellant's trial counsel, based on his then perceptions or feelings about opposing counsel's tactics or conduct.

[25] This view of the meeting is supported by the very informal way in which Mr. Tarnow approached the meeting, neither getting his client or a court reporter there, nor even framing a request for an order or direction by the trial judge. Mr. Tarnow was not looking for a remedy; he was, as the respondent submits, venting his feelings and drawing attention to what could emerge as a pattern of conduct. In that sense, it was preliminary to what could have become a more formal objection to the selection of the jury, and did not affect the appellant's vital interests.

[26] It follows that in my view, the meeting was not part of the trial for purposes of s. 650(1). I cannot give effect to this ground of appeal.

3. Mistrial: Tattoo Evidence

[27] This ground attacks the exercise of the trial judge's discretion in refusing a mistrial on the tattoo evidence.

[28] At the heart of the matter is the effect of the evidence on the trial. The trial judge found that the evidence did not fatally wound the fairness of the trial.

[29] In *R. v. Cawthorne*, 2016 SCC 32, the Chief Justice wrote:

> [39] The legal principles on the granting of a mistrial were discussed by LeBel J. in his reasons in *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823. Once an error has occurred at trial, a trial judge may, in deciding whether to grant a mistrial, consider whether the error has been or can be remedied at trial: para. 79. The decision of whether to grant a mistrial "falls within the discretion of the judge, who must assess whether there is a real danger that trial fairness has been compromised": *ibid*. That discretion is not absolute, but "its exercise must not be routinely second-guessed by the court of appeal": *ibid*.
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> * * *
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> [42] Here, the decision not to grant a mistrial was within the military judge's discretion. He made a reasonable attempt to remedy the error through two instructions, one immediate and another mid-trial. In his mid-trial instruction, he instructed the panel to disregard the evidence because it was both "unreliable and prejudicial". Nothing suggested to the judge that the panel was unwilling or unlikely to follow his instruction. I would not interfere with his decision.
>
> [Emphasis added.]

[30] The trial judge was in a better position than we are to gauge the impact of the tattoo evidence on the fairness of the trial and the remedial effect of the instructions. That advantage is one of the principal reasons why appellate courts are cautioned not to readily interfere with a judge's discretion.

[31] It cannot be said that no jury could put the evidence out of their minds after hearing the judge tell them twice to ignore it in the clearest of language. The appellant advances no persuasive argument why we should substitute our discretion.

Conclusion

[32] For the foregoing reasons, I would dismiss the appeal.

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The Honourable Mr. Justice Donald

I agree:

_____
The Honourable Chief Justice Bauman

I agree:

_____
The Honourable Madam Justice Tulloch