SUPREME COURT OF YUKON

Citation: *R. v. Sheepway*, 2018 YKSC 13

Date: 20180316
S.C. No.: 16-01511
Registry: Whitehorse

BETWEEN:

HER MAJESTY THE QUEEN

AND

DARRYL STEVEN SHEEPWAY

Before: Mr. Justice L.F. Gower

Appearances:
Jennifer Grandy and Leo Lane — Counsel for the Crown
Lynn MacDiarmid and Vincent Larochelle — Counsel for the Defence

RULING
(Admissibility of Dr. Klassen's expert opinion)

INTRODUCTION

[1] This is an application by the Crown to call forensic psychiatrist, Dr. Philip Klassen, as an expert witness in rebuttal. The accused is charged with the first-degree murder of Christopher Brisson in Whitehorse on August 28, 2015. With the consent of the Crown, the accused has chosen to proceed with a trial by judge alone. The Crown has closed its case, however the defence has yet to do so. The *voir dire* on the issue of the admissibility of Dr. Klassen's expert opinion was held slightly out of sequence (on November 30, 2017) in order to make the best use of court time and to accommodate

Dr. Klassen's potential travel to Whitehorse for the trial. As time was of the essence, I gave my oral ruling on December 1, 2017, with written reasons to follow.

[2] Mr. Sheepway admits shooting Mr. Brisson with a shotgun, after struggling with him for control of the gun, from a distance of about two meters, and killing him. He also admits responsibility for manslaughter, but denies that he had the intention to murder Mr. Brisson, in part because he was under the influence of crack cocaine.

[3] The only issues at trial are: (1) whether Mr. Sheepway had the intent to murder, i.e. that he intended to kill or that he intended to cause bodily harm that he knew was likely to cause death; and (2) whether the murder was planned and deliberate.

[4] The Crown submits that Dr. Klassen's evidence goes to Mr. Sheepway's mental state at the time of the shooting. The defence objects to the Crown calling Dr. Klassen on the basis that his evidence does not meet the relevance and necessity criteria set out in the leading case of *R. v. Mohan*, [1994] 2 S.C.R. 9 ("*Mohan").*

[5] I previously allowed an application by the defence to introduce the expert psychiatric opinion of Dr. Shabehram Lohrasbe on the impact of addiction and intoxication by cocaine and crack cocaine on Mr. Sheepway's mental state at the time of the shooting. More specifically, he was qualified as a forensic psychiatrist testifying on the formation of intent and the impacts of intoxication and dependence on crack cocaine, as well as the causes and consequences of abnormal mental states. This evidence was adduced both by Dr. Lohrasbe's written report and his oral testimony. My written reasons for that decision are cited as 2018 YKSC 12.

[6] The Crown essentially seeks to have Dr. Klassen qualified to testify in the same areas as Dr. Lohrasbe.

[7] I allowed Dr. Klassen to testify about the matters in his written report of November 11, 2017 (Exhibit 3 on the *voir dire*), although I ruled that he not give direct testimony about the middle four paragraphs on page 27 of the report, which have to do with Mr. Sheepway's conduct and behaviour before and after the homicide. That said, the defence did not object to the Crown asking Dr. Klassen questions about Dr. Lohrasbe's opinions on Mr. Sheepway's conduct and behaviour.

[8] These are my written reasons. Because this application and the earlier one involving Dr. Lohrasbe have many similarities, there is also a significant overlap in my reasons here and those cited earlier. However, for the sake of convenience, I will repeat here much of what I said there.

ANALYSIS

1. The Threshold Criteria

[9] The law governing the admissibility of expert opinion evidence is well-established. It depends firstly upon the application of the criteria set out in *Mohan*, cited above:

1) relevance;

2) necessity in assisting the trier of fact;

3) the absence of any exclusionary rule; and

4) a properly qualified expert.

These are referred to as the threshold requirements of admissibility: *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 ("*White*"), at para. 23. The defence does not assert the existence of any exclusionary rule; nor does it submit that

Dr. Klassen is not a properly qualified expert. The defence only takes issue with the first two criteria.

[10] Even if the threshold criteria are all met, the court may also be required to engage in a second discretionary gatekeeping step, whereby the judge determines if the evidence is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from that admission (e.g. overwhelming or confusing the jury, or unduly lengthening the trial process): *White*, at para. 24; and *R. v. Abbey*, 2009 ONCA 624 ("*Abbey*").

[11] Defence counsel did make a submission that it would be prejudicial to Mr. Sheepway to admit Dr. Klassen's evidence in rebuttal. I will deal with that under the heading "Second Discretionary Gatekeeping Step".

2. Relevance

[12] Relevance at this threshold stage refers to "logical relevance": *White*, at para. 23. Evidence is logically relevant if it is so related to a fact in issue that it tends to establish its existence or non-existence: *Mohan*, cited above, at p. 21; and *Abbey*, cited above, at para. 82.

[13] Neither Dr. Lohrasbe nor Dr. Klassen are particularly of the view that Mr. Sheepway was intoxicated by cocaine at the time of the shooting. Nevertheless, both diagnosed him as having a substance use disorder for cannabis and also for cocaine. Having said that, both essentially agreed that Mr. Sheepway's cannabis use did not play a significant role in this homicide. Rather, both focused on his cocaine use disorder.

[14] Dr. Lohrasbe gave evidence that it was "reasonable to hypothesize" that Mr. Sheepway was in an abnormal mental state in the days and hours before the homicide, and that his higher mental functions, including insight, perspective taking, judgment, and awareness of consequences, were likely impaired. Further, Dr. Lohrasbe opined that Mr. Sheepway would have been in a hyper-reactive state during the struggle with the gun, and that his capacity for making quick "rational" decisions, as well as for reflective thought, was almost surely very impaired.

[15] In his report, Dr. Klassen focused on Mr. Sheepway's conduct and behaviour immediately before and after the shooting, as well as on what he was thinking at the material times. He concluded that while Mr. Sheepway was under a great deal of stress at the time of the shooting, he was not suffering from any abnormal psychiatric or psychological state, such as hallucinations or delusions. Accordingly, in the absence of abnormal psychological phenomena, he candidly stated that his input as a forensic psychiatrist was neither relevant nor necessary. In other words, the Court could draw its own conclusions and inferences from its examination of Mr. Sheepway's words and acts, and that expert opinion in that regard is not required.

[16] That, submits defence counsel, is sufficient reason to deny the admissibility of Dr. Klassen's opinion. I disagree.

[17] First, it is not for Dr. Klassen to determine the admissibility of his evidence. Rather, that is my task.

[18] Second, as Dr. Lohrasbe's evidence unfolded, it became more and more obvious that the defence was not relying upon him to raise a simple intoxication defence. Rather, defence counsel asked Dr. Lohrasbe to focus more on the extent to which

Mr. Sheepway was hyper-reactive as a result of his cycles of binging and craving cocaine both before and after the shooting. In my ruling admitting Dr. Lohrasbe's evidence, I concluded that, as a matter of human experience and logic, his expertise on how crack cocaine misuse can lead to acutely abnormal mental functioning had a tendency to make the non-existence of the intent to murder more likely (para. 9). Dr. Klassen appears to have the same expertise and therefore his evidence is similarly logically relevant. Even if Dr. Klassen opines that at the end of the day that Mr. Sheepway was not suffering from an abnormal mental functioning at the time of the shooting, it is very relevant to me why he might arrive at that opinion. Further, even if Dr. Klassen's evidence in this regard potentially proves a negative, it is nevertheless logically relevant to the existence or non-existence of the intent to murder.

[19] Third, having admitted Dr. Lohrasbe's opinion, which favours the defence, it seems only fair that I allow the Crown the opportunity to introduce the counterpoint through Dr. Klassen, as well as giving Dr. Klassen the opportunity to explain his rather different methodology.

[20] Fourth, it must be remembered that the extent to which Mr. Sheepway was suffering from a cocaine use disorder at the time of the shooting is potentially relevant both to the issue of the intent to murder and the issue of planning and deliberation, which is required for a conviction on first-degree murder. Cocaine use, abuse, intoxication and craving apply separately to the issue of intent and the issue of planning and deliberation: *R. v. Brown*, 2015 ONCA 782, at para. 18. The degree of intoxication required to negative the capacity to plan and execute a murder may be less than the

degree required to negative intent to kill: *R. v. Wallen*, [1990] 1 S.C.R. 827, at para. 38.

This issue was not addressed by either Crown or defence counsel.

3. Necessity

[21] The nature of this criterion is described in *Mohan* as follows:

> This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provides information "which is likely to be outside the experience and knowledge of a judge or jury"… In order for expert evidence to be admissible "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if I am assisted by persons with special knowledge" … (my emphasis)

[22] Absolute necessity is not required: *R. v. Violette*, 2008 BCSC 920, at para. 45.

[23] In *R. v. K. (A.)* (1999), 45 O.R. (3d) 641 (C.A.), Charron J.A. (as she then was) explained the necessity criterion, at para. 93, as follows

> [93] Where the subject matter of the opinion evidence is technical in nature, it is usually easy to meet the criterion of necessity. No one would dispute that the trier of fact is likely to need expert assistance in understanding the engineering principles involved in the construction of a bridge. However, in cases such as this one, where the proposed opinion evidence is about human behaviour, it is much more difficult to decide whether the opinion will provide information which is likely to be outside the experience of the trier of fact, or whether the trier of fact is unlikely to form a correct judgment about the matter in issue. It is up to the trial judge in each case to make a judgment call on this issue in the context of the particular case and his or her judgment is entitled to deference. … (my emphasis)

[24] Once again, defence counsel relies heavily on the fact that Dr. Klassen candidly stated in his written report that he did not feel his input as a forensic psychiatrist is necessary to interpret Mr. Sheepway's words and actions, as they did not fall within the

realm of abnormal psychological phenomena. In my view, this oversimplifies the matter. It is my job, and not Dr. Klassen's, to determine whether, as a matter of trial fairness, his opinion is admitted. I repeat, having admitted Dr. Lohrasbe's evidence on the basis that it is both relevant and necessary, it seems only fair to allow the Crown to adduce the counterpoint through Dr. Klassen.

[25] Further, I repeat that even if Dr. Klassen is of the opinion at the end of the day that Mr. Sheepway was not suffering from an abnormal psychological or psychiatric state at the time of the shooting, given his significant expertise in this area, which is outside my experience as a trier of fact, I am curious to understand more about why he comes to that conclusion, notwithstanding the evidence of cocaine abuse and craving.

[26] Finally on this point, I did not understand Dr. Klassen to opine expressly on whether Mr. Sheepway's cocaine abuse and craving had any impact upon his ability to plan and deliberate this homicide, as that is directly relevant to the charge of first-degree murder. Presumably, he could be asked more about this issue during his testimony. I certainly do not have the experience to draw any conclusions in that regard without the assistance of an expert.

4. The Secondary Gatekeeping Step

[27] Defence counsel submitted that if Dr. Klassen offers an expert opinion based principally upon his observations of Mr. Sheepway's words and conduct, in the absence of any abnormal psychiatric or psychological phenomena, then Dr. Klassen will be usurping my function as a trier of fact. In other words, counsel submitted that Dr. Klassen's conclusions in his written report essentially make the Crown's final

submissions for them. Finally, to allow this evidence to come in by way of rebuttal, said defence counsel, is extremely prejudicial.

[28] Once again, I disagree. First, *White* and *Abbey*, in relation to this issue, speak about the potential harm to the trial process that may flow from the admission of such expert evidence, using examples such as overwhelming or confusing the jury, or unduly lengthening the trial process. I am confident, as the trier of fact, that I am unlikely to be overwhelmed by this evidence. Indeed, rather than being left in a potential state of some confusion based upon solely having heard Dr. Lohrasbe's evidence, I expect it will likely be edifying to hear the counterpoint from Dr. Klassen. Second, this is especially the case in light of the direction this trial has taken to broaden the issue from simple intoxication to the potential for abnormal states arising from binging and craving. Third, allowing Dr. Klassen to testify will not significantly lengthen the trial process. Finally, I am restricting Dr. Klassen from testifying directly on the behavioural observations that he made in the middle four paragraphs on page 27 of this report. That should go some distance to alleviating the kind of prejudice that defence counsel alluded to here.

CONCLUSION

[29] I allow the application of the Crown to call Dr. Klassen to give expert opinion evidence in the formation of intent, the impacts of intoxication and dependence on cocaine, and the causes and consequences of abnormal mental states, subject to the restrictions stated above.

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GOWER J.