SUPREME COURT OF YUKON

Citation: *R. v. Sheepway*, 2018 YKSC 12

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. Lohrasbe's expert opinion)

INTRODUCTION

[1] This is an application by the defence to call forensic psychiatrist, Dr. Shabehram Lohrasbe, as an expert witness. 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. The defence indicated it would be calling two witnesses, the accused and Dr. Lohrasbe, and the accused has completed his testimony. He admits shooting Mr. Brisson with a shotgun, from a distance of about two metres, 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. The only issues at trial are: (1) whether the accused 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. The defence submits that Dr. Lohrasbe's evidence goes to the accused's mental state at the time of the shooting. The Crown objects to the defence calling Dr. Lohrasbe 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*").

[2] I heard the application on November 24, 2017, and, so as to not delay the trial, I gave my oral decision on November 27th, indicating that my written reasons would follow. These are those reasons.

ANALYSIS

1. The Threshold Criteria

[3] 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 Halliburton Co.*, 2015 SCC 23 ("*White*"), at para. 23. The

Crown does not assert the existence of any exclusionary rule; nor does it submit that Dr. Lohrasbe is not a properly qualified expert. The Crown only takes issue with the first two criteria.

[4] 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*").

[5] As I understood him, Crown counsel did not argue that the evidence should be excluded because it is more prejudicial to the trial process than probative in this second discretionary gatekeeping step. Rather, I understand the Crown to be relying exclusively on its assertion that Dr. Lohrasbe's evidence does not get past the first threshold because it is not relevant and not necessary. Indeed, the Crown made no mention whatsoever of any prejudice or potential harm to the trial process that may flow from the admission of this evidence.

2. Relevance

[6] 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.

[7] The Crown submits that expert evidence on the psychoactive (or psychotropic) effects of excessive crack cocaine use would only be relevant if the accused actually

exhibited some of the abnormal effects that might result from such usage, such as auditory hallucinations or dissociative amnesia. However, the Crown submits that the behaviour of the accused both before and after the shooting was within the limits of normality. Therefore, Dr. Lohrasbe's expertise in how one's behaviour and intentionality might be adversely affected by crack cocaine use is irrelevant.

[8] The Crown also asserts that, to the extent that the accused appears to be raising an intoxication defence, the degree of intoxication required to succeed with such a defence in this case, given the shotgun shooting at relatively close range, would be "a particularly advanced degree of intoxication" (*R. v. Daley*, 2007 SCC 53, at para. 42), which does not exist on the proven facts. In my view, this is an argument that should be reserved until the end of the trial, because it is not one that goes to the admissibility of the proffered expert evidence.

[9] Returning to the question of whether the accused's crack cocaine use could have impaired his intentionality, I am satisfied on a balance of probabilities that Dr. Lohrasbe's evidence is logically relevant: *R. v. Violette*, 2008 BCSC 920, ("*Violette*") at para. 25. As a matter of human experience and logic, Dr. Lohrasbe's expertise on how crack cocaine misuse can lead to acutely abnormal mental functioning has a tendency to make the non-existence of the intent to murder more likely: *R. v. Giles*, 2016 BCSC 294, at para. 36.

[10] Further, it must be remembered that the accused's intoxication by crack cocaine goes both to the issue of the intent to murder and to the issue of planning and deliberation, which is required for a conviction on first-degree murder. Intoxication applies 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 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

[11] The thrust of the Crown's submissions opposing the admission of Dr. Lohrasbe's testimony were based on the *Mohan* criterion of necessity. 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)

[12] Absolute necessity is not required: *Violette*, cited above, at para. 45.

[13] 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)

[14] Once again, the Crown's argument here is that the words and actions of the accused before and after the shooting appeared to exhibit behaviour within the limits of normality, notwithstanding his crack cocaine consumption. Accordingly, counsel urges that this Court can form its own conclusion on the accused's intentionality without expert assistance, and thus Dr. Lohrasbe's opinion is unnecessary.

[15] The Crown relies on a number of cases where the admissibility of expert opinion has been refused because of the necessity criterion. However, all of them are distinguishable, as they tend to consider matters of human nature and behaviour which are much more clearly within the limits of normality than in the case at bar.

[16] In *R. v. Liard*, 2013 ONSC 5457, the offender was co-accused with her boyfriend, Mr. Lasota, who had killed the victim by stabbing and slashing her 37 times with a knife in his bedroom. Ms. Liard admitted to helping Mr. Lasota clean up the blood and dispose of the body. At their trial, Mr. Lasota attempted to adduce the evidence of a forensic psychiatrist on the issue of his capacity to form the intent for murder. The psychiatrist's opinion was that Mr. Lasota "snapped" because of a confluence of events:

a) he was intoxicated from alcohol and marijuana;

b) he was fearful, because of a recent knife attack upon him in which he had been wounded;

c) he was anxious;

d) he was angry; and

e) he overreacted when the victim picked up a pair of scissors and threatened him with them (para. 355).

However, with respect to his degree of intoxication, it was not clear that there was evidence of Mr. Lasota being significantly under the influence of alcohol (para. 347).

[17] The court stated that the expert opinion was "not a psychiatric diagnosis", but rather "a description of events, offered by a psychiatrist" (para. 362). In other words, the expert was "basically repeating the accused's testimony, with a professional gloss", and therefore amounted to oath helping (paras. 366 and 367). In conclusion, the court rejected the expert's opinion because it was on matters of human nature and behaviour within the limits of normality, such as fear, anxiety, anger and overreaction (para. 365).

[18] In *R. v. Ryan* (1998), 104 B.C.A.C. 48 ("*Ryan*"), the accused had been convicted of one count of attempted murder and one count of arson. There was evidence from a number of witnesses that he was very intoxicated on the night in question. The Crown called a psychiatrist to give evidence with regard to the general psychological effect of alcohol, which the accused agreed was properly admitted (para. 18). However, the Crown went further and asked the expert a number of hypothetical questions about the accused's behaviour and statements, which went beyond the scope of his expertise and resulted in the expert expressing opinions as to the accused's credibility and motives (para. 19). Indeed, the Crown conceded on the appeal that the expert's statements in this regard were inadmissible.

[19] In the case at bar, the defence does not seek to adduce Dr. Lohrasbe's opinion on the accused's credibility or motives.

[20] In *R. v. Suarez-Noa*, 2017 ONCA 627, the accused was charged with second-degree murder for stabbing and killing the female victim. At trial, the accused admitted to the killing, but claimed that he did not have the intent for murder. The jury returned a

verdict of guilty to manslaughter. The Crown appealed from the acquittal. One of the grounds of appeal was that significant portions of the evidence of the accused's expert witness, incidentally the same psychiatrist who testified in *Ryan*, cited above, were inadmissible. The Ontario Court of Appeal's central concern was the expert's opinion that "stress, anxiety and depression … could have triggered a sudden outburst of intense emotion from Mr. Suarez-Noa culminating in a spontaneous impulsive act of violence" (para. 56). The Court concluded that the expert's opinion on this point was unnecessary because it was based upon feelings that fell within the normal range of human emotions and was not based on a diagnosis of the accused's mental state:

> 83 Dr. Gojer did not suggest that Mr. Suarez-Noa fell into any "distinctive group" from a psychiatric point of view. To the contrary, he described Mr. Suarez-Noa as under stress, depressed, anxious, and distrustful, all feelings that fall within the normal range of human emotions. Dr. Gojer's opinion was not based on a diagnosis or characterization of Mr. Suarez-Noa's mental state as reflecting some recognized psychiatric disorder or condition. Instead, Dr. Gojer's evidence reflected his personal opinion on what may have been in Mr. Suarez-Noa's mind, based on Dr. Gojer's assessment of Mr. Suarez-Noa's mental makeup. (my emphasis)

[21] In the case at bar, Dr. Lohrasbe's opinion is not based solely upon the accused's stress, depression or anxiety. Further, he specifically makes diagnoses of cannabis and cocaine dependency, which are "central" to his opinion.

[22] In *R. v. Thandapanithesigar*, 2017 QCCS 1870, the accused was charged with first-degree murder for stabbing the victim to death in a Montréal back alley. The defence sought to introduce the evidence of an expert psychiatrist that the accused never formed the intent to cause the death of the victim. The Crown objected on the basis that the *Mohan* criterion of necessity had not been met. Although there was some

evidence of alcohol intoxication and impaired judgment, the problematic portion of the expert's opinion was her conclusion that the accused never intended to cause the death of the victim based upon her assessment of "personal stressors, interpersonal stressors and cultural factors", which the court felt the jury could assess perfectly well without the expert evidence (para. 25). Further, the opinion was "a mere psychiatric restatement of the [accused's] statement of his own feelings" and did not constitute a diagnosis. It basically repeated the accused's anticipated testimony, with a professional gloss (para. 31). Accordingly, it was rejected as unnecessary.

[23] In *R. v. Whiteway*, 2015 MBCA 24, the accused and one T.S. were charged with two counts of first-degree murder and one count of attempted murder. The accused had returned to a house party after a dispute and rapidly shot, in execution style, three young men, killing two and permanently maiming the third. The trial judge found that, while there was no direct evidence of planning and deliberation, Mr. Whiteway had brought a loaded gun to the party, which disclosed a clear plan to shoot and kill people.

[24] Neither accused testified. However, Mr. Whiteway called an expert psychiatrist to testify that, because Mr. Whiteway was aggrieved by the recent murder of a friend, he "was not capable of organizing his thoughts and contriving to consider a plan of action" (para. 25). The psychiatrist also testified that, although Mr. Whiteway had an "acute grief reaction" to his friend's murder, it was not "abnormal". The court concluded that the expert's opinion did not meet the *Mohan* criterion of necessity because the effect of grief on normal persons is not beyond the knowledge or experience of a judge or jury:

> 42 As a general rule, expert evidence from a psychiatrist following recognized psychiatric procedures is receivable on a person's mental capacity and state of mind … However, in circumstances such as these, the judge did not need the

> specialized assistance of a psychiatrist to consider Whiteway's reaction to ordinary stress from an external cause, because the effect grief plays on normal persons is not beyond the knowledge and experience of a judge or a jury … Therefore, I seriously doubt that Dr. Hershberg's opinion was admissible at all in this trial, because the expert evidence did not meet the *Mohan* criterion of necessity … (citations omitted) (my emphasis)

[25] In the case at bar, much of the Crown's submission on this point turned on the probable amount of crack cocaine that was in the accused's system at the time of the shooting, which the Crown suggests was likely

[26] minimal. In addition, the Crown focused on various actions and decisions of the accused which appear to indicate linear rational thinking, and are thus inconsistent with intoxication by crack cocaine. Once again, in my view, these arguments will be more relevant at the end of the trial and are less pertinent to the question of the admissibility of Dr. Lohrasbe's opinion. Indeed, the Crown submitted that there is not enough of a correlation between "the usual effects of cocaine", including some of the abnormal mental phenomena caused thereby (e.g. hallucinations, amnesia and psychosis) and the accused's relatively rational behaviour in this case. The problem with this submission is that I do not know what the usual effects of cocaine are. Rather, that information is outside my experience and knowledge, and I require the assistance of an expert in order to properly assess the extent to which the accused was under the influence of the drug.

[27] Further, I agree with defence counsel that the issue here is not simply about the amount of crack cocaine consumed by the accused before the shooting. Rather, it is important to keep in mind that the accused had been binging on crack cocaine for about three weeks prior to the killing of Mr. Brisson, and immediately before the shooting, he

was also suffering the effects of “coming down” from the cocaine high and starting to experience significant cravings for more crack. In my view, it will be necessary to hear from Dr. Lohrasbe how all of these aspects of the accused’s addiction combined to affect his mental state at the material time. It is not just a matter of being helpful to my deliberations; I simply do not have the experience or knowledge in this area to make such a determination without the assistance of an expert.

[28] Finally, it is again important to remember that any adverse impact on the accused’s mental state at the time of the shooting may go to both the issue of whether the accused intended to commit the murder and the issue of planning and deliberation.

CONCLUSION

[29] I allow the application of the accused to call Dr. Lohrasbe to give opinion evidence generally on the impact of intoxication and addiction by cocaine and crack cocaine on his mental state at the time of the shooting. I will leave it to counsel to propose more specific wording to properly encapsulate the parameters of this opinion.

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GOWER J.