R. v. Shaw

Ontario Judgments

Ontario Superior Court of Justice

R.A. Clark J.

Heard: May 1, 2019.

Judgment: June 4, 2019.

Court File No.: CR-18-50000107

[2019] O.J. No. 3169 | 2019 ONSC 3418

Between Her Majesty the Queen, Respondent, and Lenneil Shaw, Applicant

(31 paras.)

Case Summary

Criminal law — Evidence — Hearsay rule — Application by accused for redaction of alleged hearsay from phone download report dismissed — Applicant and two co-accused were charged with first degree murder — P, now main Crown witness, had also been at murder scene and implicated the three accused — Police found evidence on P's phone that he had received calls from D — P knew applicant as D — Mention of D in conjunction with the 226 number did not constitute an implied assertion — What mattered here was not the substance of the contacts but the fact that there was contact between the two phones.

Application by the accused for redaction of alleged hearsay from a phone download report. The applicant and two co-accused were charged with first degree murder. P, now the main Crown witness, had also been at the murder scene and implicated the three accused. P had used a cell phone at the time of the murder. Police found evidence on P's phone that D had contacted P three items around the time of the homicide. P knew the applicant as D. The applicant argued that, insofar as the phone download report from P's phone associated the 226 number with D, it was hearsay because it amounted to an implied assertion that the applicant made the calls from that number to P's phone on the dates in question.
HELD: Application dismissed.

The mention of D in conjunction with the 226 number did not constitute an implied assertion. The importance of this evidence was not that it implicitly asserted that the applicant made the phone calls in question but, it simply tended to circumstantially link the co-accused to the applicant and to P at points in time close to the homicide. What matters here was not the substance of the contacts but the fact that that there was contact between the two phones. It was not a question of asking the jury to believe an implied assertion. The jury was being asked to infer a fact that P was telling the truth about the identities of the persons he was with at the time of the homicide from other undisputed facts.

Counsel

David Tice and *Michael Coristine*, for the Crown.

Boris Bytensky, for the Defendant Lenneil Shaw.

Application #8

Re: Redaction of Alleged Hearsay

from Phone Download Report

Reasons for Decision

R.A. CLARK J.

INTRODUCTION

1 On October 16, 2016, at approximately 1:40 a.m., Jarryl Hagley was shot to death in a Pizza Pizza restaurant on Weston Rd. near Lawrence Ave., in Toronto.

2 On January 5, 2017, Shakiyl Shaw was arrested in relation to the homicide; his twin brother, Lenneil Shaw, and Mohamed Ali-Nur, were arrested the next day. All were charged with first degree murder and are now on trial before this court sitting with a jury.

3 On May 1, 2019, Mr. Bytensky, counsel for the applicant Lenneil Shaw, sought by way of this application to have the court order the respondent to redact several entries that appear in a phone download report prepared by D/C Manuel Flores of the Toronto Police Technical Crimes Unit ("TCU"). The report[1] relates to a cellular telephone used at the time of the homicide by a Crown witness, Winston Poyser. After hearing oral argument, in a brief oral pronouncement I ruled that the report was admissible without redaction. I indicated at that time that I would provide written reasons for that decision as soon as time might permit; these are those reasons.

THE FACTS

4 Poyser said that on October 15, 2016, he went to a housing complex, situate at Scarlettwood Ct., in Toronto, to find Lenneil Shaw because he knew that he lived there. His objective was to try to recover a cellular telephone that belonged to his cousin, Chyanne Howell. Howell had told Poyser that two women had stolen her phone and that a man she knew as "Dozey" was present at a time. It is not disputed that the applicant is known by that sobriquet. Howell enlisted Poyser's help because she knew that he had been friends with Dozey.

5 Once at Scarlettwood, Poyser met a man he now identifies as Ali-Nur. According to Poyser, Ali-Nur told him the twins were not at Scarlettwood, but he knew where they were and would lead Poyser there if he cared to follow him. Poyser followed this man to a townhouse, situate at 1 Shendale Dr., in Toronto, where he met the twins. After briefly discussing his cousin's stolen

phone, Poyser said, he remained at the townhouse for many hours drinking and consuming drugs with the twins, Ali-Nur, and several other people, but left the townhouse on three occasions. On the first, he went to buy more liquor; on the second, to buy marijuana; and, on the third, to buy a drug he referred to as "Molly", which he understood to be a form of Ecstasy. On each occasion, he said, he went in company with Shakiyl Shaw and a woman who was present at the townhouse. According to Poyser, each time he left Shendale, Lenneil Shaw and Ali-Nur remained behind.

6 Poyser was present at the scene of the homicide. Sometime either on or after October 16, in order to distance himself from that event, he deleted all the personalized data from his phone, including one or more contacts and related numbers he had for "Dozey". He then gave the phone to his girlfriend, Shanae Keith, and acquired another phone for himself.

7 On December 28, 2016, Poyser turned himself in to police and was charged with first degree murder. Notwithstanding he was charged, Poyser agreed to cooperate with the police in return for possible consideration concerning how the Crown would eventually proceed against him.[2] As part of this arrangement, Poyser told police where they could recover his phone.

8 By February 2017, the homicide investigators had acquired Poyser's phone and submitted it to TCU for a forensic extraction and analysis of all data on the phone. As noted above, Flores, performed this task. Because Poyser had deleted all his data from the phone, before extracting data from Poyser's phone, Flores had to first retrieve it. This, according to Flores' evidence, impaired somewhat his ability to analyze some of what he retrieved.

9 In Poyser's phone, Flores found a phone number (226) 505-5146 ("226"), which number was associated to a contact (or contacts)[3] entitled "Dozey."[4] Flores further discovered that Poyser's phone received three telephone calls from 226, one late on October 15, 2016, the night before the homicide, and two on October 16, approximately one hour before the homicide.

10 The service provider for 226 was Freedom Mobile Inc. ("Freedom"). A Freedom[5] business record lists the subscriber for the 226 number at the material time as "MOHAMED ALINUR." The only differences between the information admitted to be true[6] about the accused, Mohamed Ali-Nur, and the information recorded in the subscriber information document is that in the document his surname is spelled without a hyphen, whereas he spells it with a hyphen, and the address listed does not include an apartment number, whereas Ali-Nur lives in an apartment at that street address.

11 Poyser said that, as of the time of the homicide, he had known the Shaw twins for some years and, in his experience, they did not have their own cellular telephones; rather, they were in the habit of using other people's phones. In his evidence, Poyser said that he knew Lenneil Shaw as "Dozey" and, before October 16, 2016, had "a couple" of numbers for him in his phone. He saved those numbers, he said, using the nickname "Dozey."

POSITION OF THE APPLICANT

12 It is the position of the applicant that, insofar as the phone download report associates the

226 number with the name "Dozey", it is hearsay because it amounts to an implied assertion that Lenneil Shaw made the calls from that number to Poyser's phone on October 15 and 16, 2016. The hearsay problem is exacerbated, Mr. Bytensky says, because Poyser testified that he can neither recall creating the "Dozey" contact(s) nor receiving any calls from Lenneil Shaw on October 15 or 16, such that, despite the Crown seeking to adduce these calls for the truth of what Mr. Bytensky contends is the implied assertion, Poyser cannot be meaningfully cross-examined in this behalf.

13 In the alternative, inasmuch as he anticipates that the Crown will ask the jury to infer that Lenneil Shaw made the three calls to Poyser, Mr. Bytensky asserts that there is no evidence of authentication sufficient to support the conclusion that, as opposed to someone else, it was actually Lenneil Shaw who made the calls.

POSITION OF THE RESPONDENT

14 It is the position of the respondent that the phone download report contains no implied assertion, such that the there is no hearsay difficulty. Rather, the report simply states facts, which are some circumstantial evidence from which the jury will, in turn, be asked to draw an inference.

15 As for the issue of authentication, Mr. Tice submits that Poyser's evidence (to wit: (i) that he had several numbers in his phone for Lenneil Shaw, (ii) that those numbers were saved under the name "Dozey," and (iii) that he knew that Lenneil Shaw was in the habit of using other people's phones) is sufficient authentication to make the evidence admissible.

DISCUSSION

16 To begin, I note that there is no complaint concerning the accuracy of the information in the phone download report. Rather, it is the implicit assertion that Mr. Bytensky says arises from the association in the report of certain pieces of that information with which he takes issue.

17 As for authentication, if the evidence were being introduced for the purpose of proving that Lenneil Shaw made the three calls in question, which Mr. Bytensky suggests is the only purpose for which the Crown hopes to adduce it, I would tend to agree with Mr. Bytensky that there is insufficient authentication to permit such an inference; see *R. v. Seruhungo*, *2016 SCC 2*.[7] But I distinguish *Seruhungo* from this case on the basis that, whereas in that case it was the substance of certain text messages upon the Crown sought to rely, in this case the Crown seeks to introduce the phone calls, not for their substance,[8] but, rather, for the fact that they were made.

18 Turning to the hearsay issue, in *R. v. Baldree*, *[2013] 2 S.C.R. 520*, thinking he was talking to the appellant, when he was actually talking to a police officer, a caller attempted by telephone to arrange to buy drugs. Albeit the caller did not expressly declare that he believed Baldree to be a drug dealer, the court held that, if the trier of fact were to act on what the caller said to infer that Baldree was a drug dealer, the trier would be relying on the caller's belief that Baldree was a drug dealer. Since the tacit belief was expressed in an out of court statement that could not be

tested by cross-examination, the court further held that the caller's utterance was an implied assertion and, thus, inadmissible hearsay.

19 Mr. Bytensky relies on *Baldree*, for the proposition that, to the extent that it associates the "Dozey" contact(s) to the 226 number, Flores' report amounts to an implied assertion.

20 I see this case as distinguishable from *Baldree*. Here, in my view, there is no assertion as such, either explicit or implicit. There are, rather, only the following mainly[9] undisputed facts:

(i) that Poyser knew Lenneil Shaw;

(ii) that Poyser had several numbers in his phone for Lenneil Shaw;

(iii) that, although he could not remember when he entered the numbers, Poyser named the contact for those numbers "Dozey";

(iv) that Lenneil Shaw did not have his own phone, but, rather, was in the habit of using other people's phones;

(v) that the contact name for 226 in Poyser's phone was "Dozey;"

(vi) that the subscriber for the 226 number was one "MOHAMED ALINUR";

(vii) that the accused, Mohamed Ali-Nur, has the same name, address, and date of birth as the subscriber;[10] and

(viii) that the 226 phone was used (by someone) to place three calls to the Poyser phone at times material to the homicide;

21 The importance of this evidence, to my mind, is not, as Mr. Bytensky suggests, that it implicitly asserts that Lenneil Shaw made the phone calls in question. Rather, to my mind, it simply tends, potentially at least, to circumstantially link Ali-Nur to Lenneil Shaw and, insofar as Poyser said that he did not know Ali-Nur before October 15, 2016, tends, again circumstantially, to link both Ali-Nur to Poyser at points in time close to the homicide.

22 Mr. Bytensky argued strenuously that, because Poyser purported to have no memory of having received any calls from Lenneil Shaw on either the evening before or the morning of the homicide, the impugned evidence is inadmissible for that reason alone, because he cannot meaningfully cross-examine Poyser on these issues. I disagree. It is trite to observe that sometimes witnesses cannot remember things and equally trite that the failure of a witness to remember a fact does not preclude evidence tending to prove that fact being adduced from another source.

23 In a hearsay analysis, the "relevance of [an] out of court statement is not *that the statement was made* but rather *what the content of the statement purports to prove*":*Baldree*, at para. 4. [Emphasis in the original.] I appreciate, of course, that, if one takes Mr. Bytensky's position[11] the fact that there is no explicit factual assertion in any of the calls is not dispositive. That said, in my opinion, this case is only akin to *Baldree* if one circumscribes the relevance of the proffered evidence as narrowly as Mr. Bytensky did in his argument; i.e.: if one asserts that the evidence is proffered only to prove the specific proposition that Lenneil Shaw made the phone calls. Per

the holding in *Seruhungo*, one cannot say from the mere fact that the nickname "Dozey" is associated to the 226 number in Poyser's phone that Lenneil Shaw made the calls. But, with respect, Mr. Bytensky cannot artificially narrow the relevance of the evidence to suit his argument. Rather, the significance of this evidence can only be properly determined by considering its relevance in the full context of the live issues in the case. What, then, is that context?

24 The defence of all three accused is that Poyser is lying[12] about the identities of his companions on the occasion of the homicide. Moreover, it is strongly contended by all defence counsel that there is no evidence independent of Poyser's account that tends to confirm the truth of his assertion that his companions were these three accused.

25 It is important here to consider the concept of relevance. In *R. v. Watson*, *[1996] O.J. No. 2695* (Ont. C.A.), at pp. 323-24, speaking for the court, Doherty J.A. stated:

> In *R. v. Corbett*, *[1988] 1 S.C.R. 670* at p. 714, *41 C.C.C. (3d) 385* at p. 416, La Forest J. (in dissent) described the significance of relevance to our law of evidence:
>
> All relevant evidence is admissible, subject to a discretion to exclude matters that may unduly prejudice, mislead or confuse the trier of fact, take up too much time, or that should otherwise be excluded on clear grounds of law or policy.
>
> In explaining what he meant by relevance, La Forest J. referred to *Morris v. R.*, *[1983] 2 S.C.R. 190*, *7 C.C.C. (3d) 97*, and then said at p. 715 S.C.R., pp. 417-18 C.C.C.:
>
> It should be noted that this passage [from *R. v. Morris*] followed a general discussion of the concept of relevance in which the court affirmed that no minimum probative value is required for evidence to be deemed relevant. The court made it clear that relevance does not involve considerations of sufficiency of probative value. . . . A cardinal principle of our law of evidence, then, is that any matter that has any tendency, as a matter of logic and human experience, to prove a fact in issue, is admissible in evidence, subject, of course, to the overriding judicial discretion to exclude such matter for the practical and policy reasons already identified. (Emphasis added)
>
> While La Forest J. dissented in the result in *Corbett*, his discussion of the significance and meaning of relevance is consistent with previous and subsequent majority decisions of the Supreme Court of Canada: *Morris v. R., supra*, per McIntyre J., at pp. 191-92 S.C.R., pp. 98-99 C.C.C., per Lamer J. (dissenting in the result) at pp. 200-01 S.C.R., pp. 105-06 C.C.C.; *R. v. Seaboyer*, *[1991] 2 S.C.R. 577* at pp. 609-12, *66 C.C.C. (3d) 321* at pp. 389-92. Relevance as explained in these authorities requires a determination of whether as a matter of human experience and logic the existence of "Fact A" makes the existence or non-existence of "Fact B" more probable than it would be without the existence of "Fact A". If it does then "Fact A" is relevant to "Fact B". As long as "Fact B" is itself a material fact in issue or is relevant to a material fact in issue in the litigation then "Fact A" is relevant and prima facie admissible.

26 As it relates to Lenneil Shaw, it is important to bear in mind La Forest J.'s dictum in *Morris* that "no minimum probative value is required" for evidence to be deemed relevant, provided it has, as he later said in *Corbett*, "any tendency (emphasis added), as a matter of logic and

human experience, to prove a fact in issue ..." Surely, undisputed evidence, independent of Poyser, tending to show: (i) that the 226 phone was associated in Poyser's phone to the name "Dozey" (by which name Poyser knows Lenneil Shaw); (ii) that someone using the 226 phone called Poyser's phone three times close in time to the homicide; and (iii) that Lenneil Shaw was in the habit of using other people's phones; tends "as a matter of logic and human experience" to connect Poyser to Lenneil Shaw at the material time. That, in turn, renders Poyser's assertion that he was with Lenneil Shaw on the evening of October 15 and the morning of October 16, 2016, occasion more likely to be true than would be the case without that evidence.

27 In this regard, Mr. Bytensky highlighted Flores' evidence that he could not say whether there was one or more than one "Dozey" contact in Poyser's phone or, more importantly for purposes of his argument, when the Dozey contact(s) was/were entered or deleted from Poyser's phone. This, Mr. Bytensky says, leaves open the possibility that Poyser might have entered the "Dozey" contact(s) after the homicide, at a time when he was anxious to provide the police with some confirmatory evidence that would incline them to accept what Mr. Bytensky contends is his false account. While no doubt possible, this assumes a level of sophistication on Poyser's part that, meaning him no disrespect, I doubt very much Poyser possesses.[13] More importantly, however, for purposes of this discussion, at the risk of stating the obvious, evidence is not inadmissible simply because it admits of competing inferences: *R. v. Smich*, *2015 ONSC 6633*, at para. 122.

28 As for Ali-Nur, it must be remembered that Poyser's evidence is that, unlike the Shaw twins, whom he knew, he had never met Ali-Nur before October 15, 2016. Against that backdrop, one must consider Ms. Bojanowska's position vis-à-vis her client, namely, that Poyser is a person of disreputable character, whose credibility is, by reason of his flawed character, highly suspect. Of equal import on this issue, Ms. Bojanowska asserts that Poyser's evidence should be considered to be highly unreliable because: (i) he was, by his own admission, drunk and high on drugs throughout much, indeed most, of the time he was in the company of the man he now says is Ali-Nur; (ii) during the time Poyser was with him, the conditions for observing the man were much less than ideal; (iii) approximately two and a half months elapsed between Poyser spending time with the man in the hours leading up to the homicide and when he was later asked to identify him; and (iv) the manner in which the police had Poyser identify the man was fatally flawed. In contradistinction, then, to the twins (whom, at the risk of repetition, Poyser knew), surely, *a fortiori*, any evidence, independent of Poyser, that tends to make his identification of Ali-Nur more likely correct than it would be without that evidence must be relevant. The evidence here, of course, is that a phone (respecting which there is evidence upon which Ali-Nur can be associated as the subscriber at the material time) is known to have been used to call Poyser's three times close in time to the homicide.

29 I stress that, in my view, the evidence need only show that someone, not necessarily Lenneil Shaw, made the calls to Poyser's phone using the 226 phone.

30 In summary, then, what matters here is not the substance of the contacts,[14] but, rather, the fact that that there was contact between these two phones: *R. v. Browne*, *2017 ONSC 5061*, at para. 33. So, as I see it, it is not a question of asking the jury to believe an implied assertion; rather, the jury is being asked to infer a fact (to wit: that Poyser is telling the truth about the identities of the persons he was with at the time of the homicide) from other undisputed facts.

RESULT

31 In the result, having determined for the foregoing reasons that the mention of "Dozey" in conjunction with the 226 number did not constitute an implied assertion and, that being so, that the report need not be redacted, I dismissed the application.

R.A. CLARK J.

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1 Exhibit 70 in this trial.

2 On June 27, 2018, Poyser pleaded guilty to the offence of being an accessory after the fact to murder. The charge of first degree murder was withdrawn.

3 Flores could not say whether there was one or more than one "Dozey" contact; nor could he say when the contact(s) was/were entered or deleted.

4 Exhibit 70, Tab 2, lines 208 and 212 show that Poyser saved the 226 number as "Dozey."

5 Now Exhibit 88.

6 Exhibit 91.

7 In allowing an appeal, the Supreme Court, adopted the dissenting reasons of O'Ferrall J.A.: *[2015] A.J. No. 601*.

8 In point of fact, for purposes of this analysis, the calls have no substance, as such. One was not completed and the other two, although completed, were not recorded. Thus, all we know, respecting all three calls, is that they were placed and, in the case of the latter two calls, their duration.

9 Relying on (i) the aforementioned differences between the information in Exhibits 88 and 91; and (ii) the evidence in this trial that Freedom does not verify subscriber information for prepaid cellular telephone accounts; Ms. Bojanowska does not concede that Ali-Nur was the 226 subscriber. Notwithstanding her position, however, it is certainly open to the jury to conclude that Ali-Nur was the subscriber.

10 Subject, of course, to the aforementioned differences.

11 Viz.: that the mere fact of the calls having been made in combination with the association of that number to his client constitutes an implied assertion.

12 As alleged by defence counsel, Poyser's rationale for lying is that he is too afraid of the real perpetrators of the homicide to name them, but, in order to have the murder charge against him withdrawn and to be permitted to plead guilty to being an accessory after the fact to murder, he had to at least appear to cooperate with the police by purporting to name the other parties involved in the homicide.

13 It presupposes that Poyser (i) entered the "Dozey" contact(s) after the homicide; (ii) then deleted all the personalized data from his phone; (iii) (presumably, though not necessarily) before giving it to his girlfriend; and (iv) did all of that anticipating that he would later agree to tell the police how they could recover his phone; (v) knowing that, once they had, they would be able to retrieve data he had previously deleted, including, *inter alia*, the "Dozey" contact(s).

14 Which, as indicated above, is nil.
