IN THE PROVICINAL COURT OF NOVA SCOTIA

Citation: R. v. Tremblett, 2012 NSPC 121

Date: 20120103
Docket: 2288101/2288102/2288103
Registry: Sydney

Between:

Her Majesty the Queen

v.

Augustus Clarence Tremblett

Judge:	The Honourable Judge A. Peter Ross
Heard:	December 13, 2011
Decision:	January 3, 2012
Charges:	s. 5(2) CDSA, s. 5(2) CDSA, s. 4(1) CDSA
Counsel:	Wayne MacMillan, for the Crown Matthew MacNeil, for the Defence

Summary

[1] The accused stands trial for possession of drugs for the purpose of trafficking. Crown seeks to qualify an expert witness about the pricing, distribution and packaging of cocaine in the local area. The witness, a member of the drug enforcement unit of the local police force, had earlier (during the investigation stage) passed along information about the activities of the accused to a fellow police officer. This information, along with other material, was used to formulate grounds for a search warrant application. The resulting warrant led to the seizure of cocaine from the accused's residence. During testimony, the proposed expert expressed his belief that the accused was a notorious drug trafficker.

Issue

[2] Should the witness be qualified as an expert to give opinion evidence concerning the purpose for which the accused possessed the drugs?

Result

[3] The participation of the witness in procuring the search warrant gives rise to an apprehension of bias. Although qualified according to the traditional Mohan criteria, an analysis of the issue of partiality leads to the conclusion that this expert opinion evidence is inadmissible. Admitting but de-weighting the evidence would not sufficiently compensate for the nature and degree of the bias here. Forms of bias are discussed, and how partiality may factor into the cost – benefit analysis which informs the residual discretion to exclude expert opinion evidence.

REASONS FOR DECISION

[1] The accused is being tried on a charge of possession of cocaine for the purpose of trafficking contrary to s.5 (2) of the Controlled Drugs and Substances Act.

[2] Other aspects of this case have been dealt with in earlier sets of reasons. This decision concerns the admissibility of expert opinion evidence.

[3] The final witness for the Crown was Constable Timmons. Crown sought to elicit expert opinion evidence from him about the pricing, distribution and packaging of cocaine in the local area. The significance of the quantity and nature of the drugs seized and the possible meaning of other paraphernalia found in the residence are an important aspect of this. A *voir dire* was held determine whether this opinion evidence ought to be admitted. Defense argues against admission. It says the court should not hear from Constable Timmons because (a) his qualifications are insufficient to qualify him to give expert testimony and (b) he assumes the stand with an apprehension of bias, and actual bias, towards the accused.

[4] To my mind it is the second of these which raises the more significant issue but I will briefly deal with the first.

(a) qualifications

[5] From R. v. Marquard [1993] 4 S.C.R. 223 we know that an expert witness must possess special knowledge going beyond that of the trier of fact. The expertise can be derived from specific studies or by practical training and experience.

[6] Packaging, pricing and distribution are not arcane notions in modern Canadian society. A visitor to the local drug store will see, on display, various quantities of goods, priced according to volume, packaged according to numbers of servings, brought in the back door by a wholesaler and pushed out the front by a retailer. Where the commodity is cocaine the trade occurs mostly out of public view and within a smaller segment of society, but many of the same market principles apply. The special knowledge of a witness such as Constable Timmons derives from the window he has into this underground economy. He is positioned, as most jurors are not, to watch the cocaine trade unfold, to know prices and supplies and consumption patterns. A medical or engineering evidence may require an expert with a substantial academic background; not so a person giving evidence on street-level use of illicit drugs.

[7] Constable Timmons is not without formal training. He took a Drug Investigational Techniques Course at the Canadian Police College and has attended seminars since. He reads material circulated amongst police agencies. Most of his knowledge,

however, comes from actual contact with drug users, from direct contact with confidential sources and from interaction with other police officers involved in the same sort of work. In 2010 he was a "handler" for a covert undercover operator who purchased a large quantity and variety of illicit drugs from multiple traffickers in the local area over a 5 month period. Although this is the first time he has been called to the stand, he has prepared 46 "expert evidence reports" in other cases, presumably containing the same sort of opinion he seeks to offer here. While most of these concerned marijuana, some concerned cocaine. He has been a police officer for 23 years. I suspect police encounter illicit drugs almost as a matter of course. He has been doing drug enforcement, specifically, for about 7 years. In my view he has the necessary expertise to give opinion evidence about street-level packaging, pricing and distribution of cocaine in the local area.

(b) bias

[8] In R. v. Klassen [2003] M.J. No. 417 (QB) the court states at para 31

> Clearly, the degree to which the expert is separated from the investigation is significant. Ideally, the expert should not be an employee of the investigating police service. At minimum, if he works for the same department, he should work independently from the investigating officers. The degree to which the expert is insulated from the investigation should be considered by the court before attaching weight to the expert's evidence. Reliance on the opinion of a witness who carries with him the appearance of bias should be avoided.

[9] Constable Timmons is a member of the Cape Breton Regional Police Service. If it were simply a matter of Constable Timmons' employment by the same police force, or the mere fact that he was a member of its drug squad, I would receive his expert opinion and factor such things into the weight I give it. However, his connection to the investigation is closer than this.

[10] Constable Timmons did not participate in the raid of the accused's residence, but he supplied information to Constable Campbell which supported the grounds for the warrant. A particular source gave information to Timmons who, in turn, passed it on to Campbell. I do not know precisely what that was, but it is a fair inference that it implicated the accused in trafficking in cocaine, and that Constables Timmons and Campbell believed the information to be reliable. At *voir dire*, Timmons testified that at

the time of issuance of the warrant he "most definitely believed" that Mr. Tremblett was involved in the drug trade.

[11] Constable Timmons investigated Mr. Tremblett some years ago in connection with "Operation Haiti", conducting surveillance of the accused during that operation.

[12] When asked his view of whether Mr. Tremblett was a trafficker he said that any police officer who "talk(ed) to anyone on the street in Sydney Mines" would know this.

[13] In R. v. Mohan [1994] 2 S.C.R. 9 the Supreme Court set out four criteria controlling the admissibility of expert opinion evidence, namely (1) relevance (2) necessity in assisting the trier of fact (3) the absence of any exclusionary rule and (4) a properly qualified expert. The fourth criterion has been dealt with above; Constable Timmons possesses sufficient qualifications (expertise) to give the opinion evidence. The third criterion is not in issue here.

[14] The second criteria, necessity, warrants brief mention. Illicit drugs such as cocaine are frequently mentioned in criminal court proceedings. Courts, however, must deal with evidence on a case-by-case basis. A judge cannot simply import evidence heard in one case to another. In a given case there is background and context that the parties may assume are within the cognizance of the court. But where a matter is of central importance to a case, evidence is required to prove it. Evidence is only dispensed with where the matter is so widely known that it would seem foolish, to a reasonable observer, to insist on it. The significance of the quantity of cocaine in this case - its street value - does not rise to the level of "judicial notice".

[15] The amount of drug, and possibly certain other features of the evidence, may theoretically characterize this cocaine as being intended for sale – this is the Crown's stated purpose in seeking to call the expert witness. If this case concerned a truckload of cocaine it may indeed seem pointless to call an expert to prove that it was possessed for the purpose of trafficking (as opposed to personal use). However the amount of drug here is between 6 and 7 grams. The expert evidence is "necessary" in the sense that the court is not able to fully evaluate the significance of the seized items without it.

[16] The first criteria, relevance, has been interpreted to mean logical relevance. Here the evidence meets this criteria also because it would, as a matter of experience and logic, make the existence of the fact or issue (here the purpose of the person possessing it) more (or less) likely.

[17] If the Mohan criteria, thus stated, were the end of the analysis the proffered expert evidence would seem to meet the preconditions to admissibility. Traditionally any bias a

witness possessed would go to the weight to be accorded his or her testimony. Mohan seems not to address the issue of bias. However, some subsequent caselaw suggests that the partiality of the witness may also be a valid consideration at the admissibility stage.

[18] In R. v. Abbey [2009] O.J. No. 3534 the Ontario Court of Appeal found that the trial judge had erred in excluding from evidence expert opinion about the meaning of a teardrop tattoo borne by the accused. In reasoning to this conclusion the court took the opportunity to revisit Mohan and the topic of expert opinion evidence. Doherty, J. held that in addition to the application of the "bright line rules" set out in Mohan, judges also have a "gatekeeper" function which requires the exercise of judicial discretion. His discussion of this function focuses on a cost-benefit analysis. The benefits are "the probative potential of the evidence and the significance of the issue to which the evidence is directed." The costs are described in terms of consumption of time, complication of the proceedings, confusion of the jury, and abdication by the jury of its fact-finding function to a well-credentialed expert (see para 87 to 91).

[19] While Abbey did not deal extensively and explicitly with bias, it ascribes "the extent to which the expert of shown to be impartial" to the aspect of probative potential. In doing so it proceeds from the notion that impartiality is a benefit. It does not consider *partiality* as a cost, but following the cost-benefit paradigm, this is where would seem to belong.

[20] In the subsequent case of R. v. Van Bree [2011] O.J. 3259 the court places partiality, or bias, squarely in the cost side of the ledger (see para.65 to 69). I agree with this approach. Looked at in this way, bias is a factor which a judge would consider in exercising his or her "gatekeeper" function. The Mohan preconditions to admissibility may be met, but there may still be reason to keep the expert evidence from being admitted. Actual or apparent bias of the witness is one such reason.

[21] In Van Bree the court put apprehension of bias on a scale. It suggests that the trial judge should ask whether there are circumstances where it would appear that (1) there was a potential or (2) it was likely or probable or (3) it was strongly suggestive that an expert would testify with partiality so as to favour the party who called him or her at the expense of the other (see para.107).

[22] Whatever terminology is employed, whether described as a sliding scale or in terms of a threshold, this approach recommends itself as being both principled and practical. In cases where there is a slight apprehension of bias the judge may well

decide that the evidence should be admitted but with a caution to the jury about how the bias might affect the weight it is given. In cases where the bias is shown to be high, the judge may preclude the expert evidence altogether.

[23] This approach seems consistent with the way credentials are considered. Persons put forward as experts may possess a wide range of expertise, varying degrees of experience. One "properly qualified expert" may have a more impressive *curriculum*

vitae than another. This would go to weight. Yet there is a threshold below which the qualifications are too flimsy to admit the evidence at all. With "bias" it is when the threshold is exceeded that the evidence becomes inadmissible, but the approach is similar.

[24] Two forms of bias seem possible. I have not taken to time to see whether there is consideration in the case law of this distinction, but I mention it here because it may lend support to the defense position.

[25] An expert might be perceived to be biased towards a certain theory, or a certain segment of society, or a certain scientific enterprise. I use bias here not in the sense of favouring, for valid reasons, a particular point of view, but a predilection to favour or disfavour an idea or opposing opinion for reasons which lie outside the area of expertise. For instance, a pharmacologist may think and have stated publically that a certain drug company is reaping obscene profits. His opinion that a drug manufactured by that company caused harm to a plaintiff may be seen to be biased for that reason, unconnected to any theory he holds of the drug's pharmacological properties.

[26] On the other hand an expert may have a family relationship to a party and thus be seen to bring a certain favoritism to the stand. Unwarranted bias towards a methodology or theory on the one hand, partiality for or against a party to the litigation on the other – this distinction may also factor into how the "gatekeeper" discretion should be exercised. It seems to me that the former may be more likely to go to weight, the latter more likely to go to admissibility.

[27] Constable Timmons assumed the witness box with a clear belief that the accused is a drug trafficker. There is nothing wrong with this *per se.* To obtain a search warrant, as was done here, it would be perfectly appropriate for a police officer to state such a belief, and the bases for it. Such belief may be critical to furthering an investigation. Such belief would not preclude a witness, police or otherwise, from giving any and all evidence at a trial. But in stating an *opinion*, an expert witness should give objective and impartial evidence about a matter in issue.

[28] Mr. Tremblett is not charged with being a drug trafficker, as such. Indeed there is no such offence. Trafficking-type charges must relate to actual substances in the possession of an accused, or actual dealing in illicit drugs. Even a charge of conspiracy to traffic concerns a specific plan or agreement; traffickers are not indicted for their choice of career. An essential element of the offence charged here is the purpose for which the accused possessed the drugs – whether for personal use or for sale. There is an obvious concern that Constable Timmons may be perceived as being predisposed to the latter view.

[29] Having supplied information to support the issuance of the search warrant (and thus the seizure of the very items he is now called upon to interpret) there is a danger that Constable Timmons may be seen to have a vested interest in the outcome of the case. There is a possible perception that he would wish to see his earlier belief vindicated.

[30] Having had dealings with Mr. Tremblett in the past, and having spoken to sources about his activities in the community, there is a danger Constable Timmons may be basing his opinion on facts not before the court. While an expert need not adduce the entire universe of facts that underlie his or her expertise, the *application* of the expertise to the case at bar should proceed from facts established in the case.

[31] One might argue that a member of a police drug squad anywhere, or any police officer for that matter, is "biased" against illicit drug use and drug trafficking. One expects that this sort of "partiality" (if that is what it is) co-exists with a desire only to convict the guilty. It can be considered, if need be, on the question of weight. However the concerns which arise here go beyond any sort of general predisposition.

[32] De-weighting expert opinion may compensate for certain types or degrees of bias, but in some cases mere admission puts the very fairness and integrity of the process under a cloud. Such is the case here.

[33] For the foregoing reasons I am not prepared to qualify Constable Timmons to give expert opinion evidence in this case. This ruling should have no influence on whether he should be permitted to give such evidence in future cases.

[34] I will note, in conclusion, that I have had the benefit of other cases cited by counsel including R. v. L.K. [2011] O.J. No. 2553 (S.C.) and R. v. Kovats [2000] B.C.J. No 2579 (P.C.).

Dated at Sydney, N.S. this day of April, 2012

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Judge A. Peter Ross