SUPREME COURT OF NOVA SCOTIA
Citation: R. v. Al-Rassi, 2013 NSSC 211

Date: 20130703
Docket: CRH 396767
Registry: Halifax

Between:

Her Majesty the Queen

v.

Adnan Al-Rassi

Editorial Notice

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Restriction on publication: Section 486.4 of the *Criminal Code of Canada*

Judge: The Honourable Justice Peter P. Rosinski

Heard: June 18, 2013 in Halifax, Nova Scotia

Oral Decision: June 19, 2013

Written Decision: July 3, 2013

Counsel: Kimberley McOnie, Crown
Donald C. Murray, Q.C., Defence

By the Court:

Introduction

[1] Mr. Al-Rassi is a registered massage therapist and who has been charged with committing a sexual assault upon J. L.. The evidence suggests that after 54 minutes of massage by Mr. Al-Rassi, he obtained Miss L.'s consent to do an "organ massage" which is performed in the abdomen area. Her allegation is that after that latter, the accused masturbated himself to ejaculation, which ejaculate he deposited onto the body of the client/complainant.

[2] Miss L. testified that she did not believe she at any time fell asleep, but conceded she was quite relaxed during the organ massage. In direct examination she estimated the organ massage lasted approximately 5 minutes. She had her eyes closed until she realized that the accused was no longer touching her, and at that time she also felt a wetness strike her abdomen area. Upon opening her eyes she observed the accused naked with his hand around his penis, and what she said was "definitely" ejaculate on her stomach area.

[3] Mr. Al-Rassi also testified and said, consistent with Miss L.'s testimony, that they specifically discussed the organ massage, and that it lasted approximately 3 minutes. He was adamant that Miss L. was never asleep while he was present in the room with her.

[4] However, the defence's position is that after the organ massage, Mr. Al-Rassi left the treatment room, and started the steam shower for her, and that thereafter she drifted into a sleep like a state during which time she would have been susceptible to perceptual disturbances or what are also known as hypnopompic hallucinations. The defence says it is this phenomenon that accounts for her sincere, yet mistaken, belief that she saw the accused naked, and ejaculate upon her.

[5] The defence wished to call psychologist, Dr. Brad Kelln, to give expert opinion evidence about the general characteristics of hypnopompic hallucinations in order to buttress an argument that the complainant would have been susceptible to such hallucinations after the organ massage, and that therefore the jury should

have a reasonable doubt about whether the accused actually sexually assaulted the complainant.

[6] In a related decision [2013 NSSC 204] I have already ruled against the defence in its attempt to have admitted for the truth of its contents the preliminary inquiry evidence of J. L., which was sought to be introduced to buttress the factual basis for the opinion of Dr. Brad Kelln.

[7] Nevertheless, herein I will assume that I permitted the preliminary inquiry testimony of Miss L. to be tendered by the defence, and assess the proposed expert opinion evidence in that light.

The Defence Position

[8] The defence position is contained in a notice of expert testimony and curriculum vitae of Dr. Kelln entered as Exhibit VD1 and filed with the Court on

May 13, 2013. The defence also relies upon its June 10 and June 13, 2013 letters to the Court.

[9] In the June 13 letter defence counsel writes:

> "Dr. Kelln will express the opinion that J. L.'s claim to have observed [the accused] masturbating in her presence on September 6, 2011 may be unreliable or untrustworthy. J. L. has described moving into sleep states and not being present in an intellectual way with her surroundings. Regardless of which position she adopts at trial as best describing her situation on September 6, 2011, J. L. is acknowledging that during the massage on September 6, 2011 she moved into and between altered states of consciousness. Dr. Kelln will express the opinion that as someone moves between altered states of consciousness and full waking there is a recognized phenomenon of perceptual disturbance which can lead to inaccurate unreliable and untrustworthy memories."

[10] At the *voir dire,* defence counsel having had the benefit of hearing the complainant's trial testimony, urged that i) Dr. Kelln was properly qualified to speak to these issues and that the evidence was likely to assist the jury since they would otherwise not be aware of the risk of misperception by the complainant in such a sleep-like state; ii)that the evidence is not prohibited by any exclusionary rule; iii) that as a matter of relevance, the evidence is logically relevant as it tends to undermine the credibility of the complainant which is an issue in dispute, and;

iv) it similarly is legally relevant because its probative value is not overborne by its prejudicial effect.

[11] The defence relied upon as its authority primarily the Supreme Court of Canada decision in *R. v. Mohan* [1994] 2 SCR 9.

Crown Position

[12] The Crown argued that Dr. Kelln was not properly qualified to give the expert opinion sought, and that there was an insufficient factual basis to hear his evidence in any event because the complainant in her testimony did not state that she was asleep at any time nor did she adopt her previous testimony or statements that arguably support that she may have been asleep at the time relevant to the alleged assault.

[13] The Crown furthermore argues that since Dr. Kelln did not see the complainant testifying, nor did he ever interview her or know anything about her other than what he would be presented as a hypothetical, that would be an insufficient basis as a matter of evidence for him to give any meaningful opinion, and consequently as well the prejudicial effect of his evidence significantly outweighed its probative value. His evidence would ultimately either confuse the jury or overwhelm them risking the uncritical acceptance of his opinion as to what ought to be exclusively their factual decision to make.

The Qualifications of Dr. Kelln

[14] Dr. Kelln is a registered psychologist who tends to deal with clients in the criminal context [including those not criminally responsible] alongside a small private practice. He has not previously been put forward to be qualified to, or has been qualified to, give an opinion such as was proposed in this case. He has never testified about such perceptual disturbances as are in issue in this case. He does not have any specialization by training or experience in the area in which it is sought that he give such expert opinion. He fairly admitted that he had to make

additional recent efforts to educate himself by reading some of the available literature in relation to the matter for which his opinion was sought specifically in this case. He has not done any specific research or investigation other than consulting available published research. It is unclear exactly how extensive his examination of the published peer-reviewed research was.

[15] When I asked him with what level of confidence he could give his opinion in the case at bar specifically, that is to say whether the complainant may have experienced perceptual disturbances, he testified that it would not be with a great level of confidence because "so much relies on what actually happened at the end of the [massage] session". Nevertheless he testified generally he would have a high level of confidence in providing the jury with information about the general characteristics of the effect of perceptual disturbances on persons who experience the different stages of sleep.

[16] While Dr. Kelln has significant experience as a psychologist, and specifically as a clinical psychologist with some forensic work as well, I cannot conclude that he is properly qualified to give expert opinion evidence in the case at bar.

[17] He has essentially self-educated himself upon request by the defence based on some of the existing literature; of which only one study from 2000 he specifically referred to in his testimony. He has no personal previous involvement as a psychologist with the specific phenomenon in question here in similar relevant circumstances. He has not done any research personally regarding this phenomenon.

[18] I cannot conclude that training, research or experience have permitted Dr. Kelln to develop a specialized knowledge that is sufficiently reliable to justify placing his opinion before the jury.

The Probative Value of the Expert Opinion Offered

[19] Even if I found Dr. Kelln qualified to give a generalized characterization of these perceptual disturbances, in my view the probative value of his opinion is substantially outweighed by its prejudicial effect – I recognize a different and less rigorous gatekeeper function is sometimes appropriate for judges when defence evidence is offered in contrast to when Crown evidence is offered, but this difference should springboard from a situation where full answer and defence is materially implicated – *R. v. Seaboyer* [1991] 2 SCR 577 at 611. I do not find that to be the situation in this case.

[20] I tend to prefer as well the Ontario Court of Appeal approach to the cost-benefit analysis as set out in *R. v. Abbey* (2009) 246 CCC (3d) 301. In that case the court suggested that before permitting an expert opinion trial judges should be satisfied that [bearing in mind that such evidence is presumptively inadmissible and must be proved by the person tendering the opinion on a balance of probabilities]:

> 1. The evidence is "logically relevant" – that is it tends to make the existence of a fact in dispute more or less likely [in some cases such as here the evidence may be relevant to the reliability of a witness' testimony];
>
> 2. The opinion is necessary because it provides information likely to be outside the experience and knowledge of a jury – that is, it must also not only be helpful it must be "necessary" as conceived by the Supreme Court of Canada in *R. v. DD* [2000] 2 SCR 275 at paragraph 57;
>
> 3. The proposed witness is a properly qualified expert;
>
> 4. There is an absence of any other freestanding exclusionary rules – see paragraph 26 in *Mohan* for example;
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> 5. At this stage the Ontario Court of Appeal would suggest considering the" legal relevance" of the proposed expert opinion evidence – that is the Court is required to make a discretionary decision balancing the costs and benefits of the proposed evidence.

[21] The "benefits" may relate to the materiality, weight and reliability of the evidence – that is do they address a live and material issue; are inferences therefrom compelling; and though scientific reliability is not required, it is recognized that the closer to scientific method that the evidence of the expert approaches, the more likely it will be found to be reliable.

[22] The "costs" may relate to the prejudice that may arise from the presentation of the expert opinion evidence and the impact of such evidence on the trial process

– this could include the risk of the uncritical acceptance by the trier of fact of the opinion; that the trier will give the opinion more weight than it deserves; the danger that the opinion will be misused; and the dangers that the trier will be overwhelmed or confused. As well there is a consideration as to whether it involves an undue consumption of time.

[23] I observe that recently, Chief Justice McDonald of our Court of Appeal approvingly referred to the *Abbey* case in his reasons at para. 26 in *Abbott and Haliburton Co. v. WBLI Chartered Accountants* 2013 NSCA 60.

[24] In the case at bar, I find that:

> 1. The proposed expert opinion evidence could be logically relevant to a jury's assessing the reliability of the complaint's "perception" of what happened;
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> 2. The opinion is dubiously "necessary" – that is I find that, in effect, without the benefit of the expert opinion evidence the jury is not apt to come to a wrong conclusion;
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> 3. I have already found Dr. Kelln not to be a properly qualified expert on the facts in this case;
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> 4. There is no other free-standing exclusionary rule which otherwise would bar the admissibility of the proposed expert opinion evidence in these circumstances;
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> 5. The opinion here is premised on the fact that J. L. was in a state of sleep or near sleep, and the she "awoke" from a stage of that sleep or near sleep during which the incidence of hypnopompic hallucinations are reasonably possible. Miss

> L. denied that she was asleep at any time during her visit to Mr. Al-Rassi's massage business that day. Mr. Al-Rassi confirmed that while he was present she was not asleep. Therefore, only after he left, post abdominal massage, could J. L. have fallen asleep. That massage lasted between 3 to 5 minutes, and both agree that she was awake and speaking to him at the beginning of that portion of the massage treatment. In her preliminary inquiry evidence she conceded at the end of the massage she was "pretty much asleep". However, given the uncertain state of the evidence, including that Dr. Kelln would only offer generalized information on top of a shaky factual premise, I find the prejudicial effect of such opinion evidence would substantially outweigh its probative value.

Conclusion

[25] The defence has not satisfied me on a balance of probabilities that the pre-conditions for admissibility of the proposed expert opinion evidence of Dr. Brad Kelln have been satisfied, and I therefore rule his proposed evidence to be inadmissible at this trial.

Rosinski, J.