COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *R. v. Bornyk,*
2015 BCCA 28

Date: 20150123
Docket: CA041377

Between:

Regina

Appellant

And

Timothy Dale Bornyk

Respondent

Before: The Honourable Madam Justice Saunders
The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice D. Smith

On appeal from: An order of the Supreme Court of British Columbia, dated October 22, 2013 (*R. v. Bornyk*, 2013 BCSC 1927, New Westminster Docket No. X076411).

Counsel for the Appellant: M. Street

Counsel for the Respondent: J. Ray

Place and Date of Hearing: Vancouver, British Columbia
November 20, 2014

Place and Date of Judgment: Vancouver, British Columbia
January 23, 2015

Written Reasons by:
The Honourable Madam Justice Saunders

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice D. Smith

Summary:

This is a Crown appeal from acquittal. The key evidence on one charge of breaking and entering a dwelling house is a sole fingerprint found in the home. The expert witness called by the Crown identified the print as, in his opinion, having been deposited by Mr. Bornyk. After the trial concluded the judge sent counsel four articles critical of fingerprint identification. Counsel made further submissions, following which the judge found the accused not guilty. In doing so the judge referred to the articles and found areas of concern with the expert's evidence on matters not put to the expert witness but which appear to derive from the articles located by the judge. He also made his own comparison of the known and latent prints, identifying "differences" that had not been put to the expert witness. Held: The judge erred in locating and using material that was in the nature of opinion but was not evidence in the trial. By doing so he effectively assumed the multi-faceted role of "advocate, witness and judge", and so compromised the appearance of judicial independence essential to a fair trial. As fingerprint comparison is an area of forensic science in which expert evidence elucidation is required, the judge erred as well in making his own comparison unassisted by expert evidence. The verdict is set aside and a new trial is ordered.

Reasons for Judgment of the Honourable Madam Justice Saunders:

[1] Mr. Bornyk was acquitted on one count of breaking and entering a dwelling house contrary to s. 348(1)(d) of the *Criminal Code*. The Crown appeals from the acquittal, posing as errors of law the judge's consideration of fingerprint evidence.

[2] The key evidence presented by the Crown was a fingerprint found in the study of the home. A police officer qualified as an expert in the identification, comparison, and individualization of fingerprints identified the print as, in his opinion, having been deposited by Mr. Bornyk.

[3] At the conclusion of the trial Mr. Justice Funt reserved judgment. He then sent counsel, who are not counsel on appeal, a memorandum listing four articles critical of fingerprint identification analysis, asking for further submissions. In the course of the ensuing events, Crown counsel sent three additional articles to the judge, and counsel made oral submissions over three days. Crown counsel submitted that the criticisms in the judge's articles did not apply. Counsel for Mr. Bornyk submitted that the criticisms in the articles were appropriate to the testimony of the fingerprint expert already heard by the judge, and pointed to differences he identified between the latent print and known print. In reply, Crown counsel submitted the case must be decided on the evidence, which did not include the articles. Crown counsel also opposed identification of alleged differences between the known and the latent prints by defence counsel or the judge because the alleged differences were not put to the fingerprint witness on cross-examination. The fingerprint witness was not re-called, and so did not have an opportunity to comment on the criticisms of fingerprint analysis propounded in the articles. The articles were not marked as exhibits; they are not part of the record.

[4] In acquitting Mr. Bornyk, the judge reviewed the opinion evidence of the fingerprint witness, referred to the articles found after conclusion of the evidence, and replicated portions of the articles in his reasons for judgment. The judge then turned to what he termed "troubling aspects" of the evidence of the fingerprint witness, identifying eight areas of concern: the possibility of institutional bias; the use

of a photocopied print; non-disclosure of bench notes of the witness; absence of proof of use of "the ACE-V" methodology; use of a partial print; doubts of the subjective certainty of the witness's individualization of the print; failure of the expert to consider another set of fingerprints from the accused taken earlier; and unexplained discrepancies he found existed between the latent print and the known print. In particular as to the issue of the unexplained discrepancies the judge said:

> [55] In argument, defence counsel noted unexplained discrepancies between the latent and the known fingerprints. Of particular note, in the area of the latent fingerprint stated to be of "low tolerance" and "extremely reliable", two gaps on the latent fingerprint are not visible on the known fingerprint.
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> [56] If one goes to the ridge immediately to the left of the respective red dots marking the centre of the delta on the latent and the known fingerprints and traces a line towards the top of the page, on the known fingerprint there is a continuous ridge, whereas on the latent fingerprint there is a gap, a further ridge, another gap, and then a further ridge.
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> [57] In the Evaluation portion of his report, Corporal Wolbeck wrote: "I have found the friction ridge formations were in agreement taking into account the various distortions mentioned during the analysis." His report does not address the gaps. His report states that the area of low tolerance of the latent impression "was not impacted by the existence of the ripples" and does not note this area as "affected by lateral motion of the digit during deposition" (as were the areas near the top and bottom of the impression). Corporal Wolbeck's evidence was also that the latent print was formed as a result of "normal deposition pressure" and that the fingerprints on the C-216 form had been taken properly.
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> [58] The Court has no evidence from Corporal McNaught if, and if so, how she may have viewed the discrepancies noted by defence counsel, including these two gaps and ridges to the left of the red dot marked on the latent print.

[5] The judge concluded:

> [59] As Corporal Wolbeck testified:
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> > In the case of R1 here [the latent print] that we found at the scene, we don't have a complete pattern. All we have is what we call the delta, off to the side, a little bit of our fingerprint.
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> [60] In the usable low tolerance portion of the fingerprint, I see unexplained gaps in the latent fingerprint which do not appear on the known fingerprint. As the Scottish Fingerprint Inquiry stated (at 610):
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> > ... The fact-finder can trust the evidence of his own eyes: either he sees some 'event' in the location indicated or he does not. If not, the evidence of the examiner on that point can be discounted.

> [61] While the usable portion of the latent fingerprint and the known fingerprint are quite similar, I have more than a reasonable doubt that there is a match of the latent fingerprint to the known fingerprint. Accordingly, I acquit the accused.

[6] Before us, the Crown contends the judge erred in law in two ways. First, the Crown says the judge erred in relying upon independently researched literature that was not properly introduced by either party, not tested in evidence, and not put to the fingerprint witness. Second, the Crown contends the judge erred by engaging in his own unguided comparison of the latent print and known print. Both of these questions concern the assessment of evidence on wrong legal principles, and are questions of law: *R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197. Thus they are properly appealable by the Crown. Counsel for Mr. Bornyk does not contend otherwise.

[7] In my respectful view the judge erred in both manners asserted by the Crown.

[8] It is basic to trial work that a judge may only rely upon the evidence presented at trial, except where judicial notice may be taken. In *R. v. R.S.M.*, 1999 BCCA 0218 Mr. Justice Finch (later C.J.B.C.) succinctly observed:

> [20] In my respectful view, there is no merit in the appellant's argument on this ground of appeal. The trial judge had to decide the case on the evidence that was adduced at trial and on his view of its reliability. Judges often have less evidence than they might wish to have, but they are required to try the case on the evidence that counsel puts before the Court.

See also, *R. v. Cloutier*, 2011 ONCA 484, 272 C.C.C. (3d) 291.

[9] Judicial notice, of course, is limited to facts that are notorious or generally beyond debate, as in the assertion the earth is not flat, or are capable of immediate and accurate demonstration from readily accessible sources of indisputable accuracy, as in the assertion that New Year's Day in 2015 fell on a Thursday: *R. v. Find*, 2001 SCC 32, [2001] 1 S.C.R. 863; *R. v. Spence*, 2005 SCC 71, [2005] 3 S.C.R. 458.

[10] In this case, it is apparent from the excerpts found in the reasons for judgment and the descriptive titles of the articles that the articles uncovered by the judge are discussions on the subject of fingerprint analysis, including opinion. As articles commenting on forensic science, their contents are not matters of which the judge could take judicial notice. It is thus axiomatic that it was not open to the judge to embark on his independent investigation.

[11] By his actions, the judge stepped beyond his proper neutral role and into the fray. In doing so, he compromised the appearance of judicial independence essential to a fair trial. While he sought submissions on the material he had located, by the very act of his self-directed research, in the words of Justice Doherty in *R. v. Hamilton* (2004), 189 O.A.C. 90, 241 D.L.R. (4th) 490 at para. 71, he assumed the multi-faceted role of "advocate, witness and judge".

[12] Nor was it open to the judge to consider the fruits of his investigation, given the nature of the materials he located. In *Rex v. Anderson* (1914), 7 Alta. L.R. 102, 22 C.C.C. 455 at 459-460 (S.C.(A.D.)) Chief Justice Harvey, for the Court, explained in reasons still applied today:

> … As all evidence is given under the sanction of an oath or its equivalent, it is apparent that text-books or other treatises as such cannot be evidence. The opinion of an eminent author may be, and in many cases is, as a matter of fact, entitled to more weight than that of the sworn witness, but the fact is that, if his opinion is put in in the form of a treatise, there is no opportunity of questioning and ascertaining whether any expression might be subject to any qualification respecting a particular case. … On principle, therefore, nothing may be given from a text-book, other than as the opinion of a witness who gives it. On cross-examination the Judge should be careful to see that an improper use is not made of text-books, practically to give in evidence opinions of absent authors at variance with those of the witness. It is quite apparent that if the witness is asked about a text-book and he expresses ignorance of it, or denies its authority, no further use of it can be made by reading extracts from it, for that would be in effect making it evidence, but if he admits its authority, he then in a sense confirms it by his own testimony, and then may be quite properly asked for explanation of any apparent differences between its opinion and that stated by him.

[13] In *R. v. Marquard*, [1993] 4 S.C.R. 223 at 251, 108 D.L.R. (4th) 47, Justice McLachlin (now C.J.C.) explained:

> The proper procedure to be followed in examining an expert witness on other expert opinions found in papers or books is to ask the witness if she knows the work. If the answer is "no", or if the witness denies the work's authority, that is the end of the matter. Counsel cannot read from the work, since that would be to introduce it as evidence. If the answer is "yes", and the witness acknowledges the work's authority, then the witness has confirmed it by the witness's own testimony. Parts of it may be read to the witness, and to the extent they are confirmed, they become evidence in the case. This procedure was laid out in *R. v. Anderson* (1914), 22 C.C.C. 455 (Alta. S.C.) and has been followed by Canadian courts. …

[14] Not the least of the problems with the approach adopted by the judge is it opened the door to a mistaken comprehension and application of the information in the articles even if in the field of fingerprint analysis they would be considered authoritative and applicable to procedures employed in this case, an assumption not established in the evidence.

[15] Counsel for Mr. Bornyk observes that Crown counsel did not object to the judge's research, and along with defence counsel, appears to have treated the articles as evidence by making submissions on them. It is regrettable that neither trial counsel objected to the judge's request for submissions on the articles, (although in the end Crown counsel landed on the correct position, that the articles were not evidence and the judge could only consider that which was evidence). Yet, at the end of the day, it was for the judge to ensure a fair trial process. In this case, the steps taken by the judge meant this did not occur.

[16] It is clear from the reasons for judgment that the articles had a material bearing on the acquittal as the judge relied upon them to find that the fingerprint identification was not reliable. Most of the "troubling aspects" he identified were not put to the expert witness, and appear to respond to the articles he located.

[17] On this basis alone, in my view, the acquittal must be set aside.

[18] There is a second reason to allow the appeal. I agree the judge also erred by conducting his own analysis of the fingerprints, absent the assistance of the expert witness. The very point of having an expert witness in a technical area, here fingerprint analysis, is that the specialized field requires elucidation in order for the

court to form a correct judgment: *Kelliher (Village) v. Smith*, [1931] S.C.R. 672; *R. v. Mohan*, [1994] 2 S.C.R. 9, 114 D.L.R. (4th) 419. While it may be desirable that a judge personally observe the similarities and differences between the latent point and known point, such examination should be guided by a witness so as to avoid the trier of fact forming a view contrary to an explanation that may be available if only the chance were provided to proffer it.

[19] The judge relied upon his own observation of what he said was a difference between the latent and known prints. The fingerprint witness however was never questioned on that area of the fingerprint. Whether this "difference" is forensically significant is speculation. This unassisted comparison had a material bearing on the verdict. On this basis alone, also, I would set aside the verdict.

[20] Accordingly, I would allow the appeal, set aside the verdict, and remit the matter to the trial court for a new trial.

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice Kirkpatrick"

I AGREE:

"The Honourable Madam Justice D. Smith"