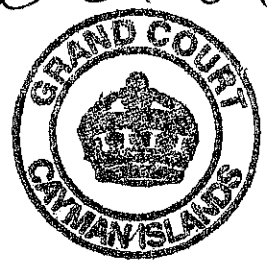
IN THE GRAND COURT OF THE CAYMAN ISLANDS

INDICTMENT NO. 89/08

30-09-09



THE QUEEN

-V-

JOSUE ALEXANDER CARRILLO PEREZ

CORAM: **ANDERSON J. (Acting)**

Appearances: Mr. Trevor Ward and Mrs. Jenesha Borasingh-Simpson (A.G's Department) for the Crown; Mr. Anthony Akiwumi for the Accused

Heard: 29th September 2009

APPLICATION TO EXCLUDE EVIDENCE FROM SGT. ROBERT KENNEDY

1. Yesterday I heard submissions in support of an application that the witness Robert Kennedy be precluded from giving testimony for the Crown in this case. The application is strongly opposed by Counsel for the Crown. The application is made on a number of bases, one of which is that the court in its gate-keeping role must ensure that evidence before it is allowed is admissible. This means that in the case where opinion evidence is to be led on the basis it purports to be expert evidence, the court must satisfy itself that the qualifying or threshold tests laid down in the **Queen v Bonython**, have been met.

2. Having carefully considered the submissions by both the Crown and the Defence, I have concluded that the application must fail. It is wholly misconceived and its premise is logically and conceptually flawed. That premise seems to be that because the witness evidence has been rejected in relation to one area of research in which even he has acknowledged had not been fully developed, (See the questions and answers between the State prosecutor and Sgt. Kennedy in **State of North Carolina v Thomas Jabin Berry** No: COA00-263 Filed May 1, 2001) he should be rejected as an expert for all purposes, whether or not he has demonstrated his expertise in other areas. The application in my view, and with the greatest of respect, appears not to fully appreciate the conceptual difference between admissibility and weight.

3. I shall try to deal with this as briefly as possible. It is the contention of the defence that this witness cannot be put forward on the basis of his testimony being able to identify this accused. If that is so then the question of its relevance is an issue with which the Crown must deal. It is also stated that:

1) The prints that were purportedly found and upon which the witness is to be asked to comment, were "covered" footprints.

2) The comparison which the witness is being asked to make is in respect of the barefoot impression of the accused.

3) There is no evidence before the court as to the standards and procedures used by the taker of the inked print.

4) Even if barefoot impression is reliable, which the defence says it is not, and the witness is an expert, (which the defendant contends he is not for the purposes of this trial), the court should exercise its discretion under section 29 of the Evidence Law to exclude it because its prejudicial effect outweighs its probative value.

4. The defence cites in support of its application two cases which were disclosed to it in which a court refused to accept expert opinion testimony by this witness. The first case is **South Carolina v Jones**. This was an appeal to the South Carolina Supreme Court against conviction in the Lexington County Circuit Court. The appellant argued as ground 2 of his appeal that the circuit court had wrongly admitted evidence which was inadmissible. The impugned evidence which was held to be inadmissible and which accordingly caused the reversal of the conviction was evidence of "barefoot insole impression". It was held by the Supreme Court that that evidence was not "scientifically reliable".

5. It should be noted that the "prematurity" of the test in that case ("premature" was the word the court used) was compounded by the failure of the SLED Agent to "conduct his testing in conformity with any established written protocol". It is obvious that the stricture about protocol is in relation to "barefoot insole

impression", the admissibility of which was what the court was dealing with. Further, both the criticism about lack of quality control as well as the observation that neither Agent Derrick nor any other SLED agent had "ever done this type of test prior to the Jones case", clearly referred to the "barefoot insole impression" test. Kennedy had testified that he had told the agent what tests to carry out in a half hour telephone conversation. The judge at first instance had wrongly qualified Kennedy as an expert in "barefoot impression evidence and insole impression evidence".

6. Secondly, Defence refers the Ontario case of **Regina v Dimitrov**. There, the appellant before the Ontario Court of Appeal challenged the correctness of admitting expert evidence of barefoot impression in a pair of Eagle Rock boots. Evidence of barefoot insole impression it was argued, was "not science". It is clear that the barefoot impression as to which the witness testified as having done an analysis in that case, was the "insole" impression.

7. It is noteworthy that in that case, the witness himself acknowledged that until research is complete, barefoot impression analysis in shoes is not a positive means of identification.

8. In **The Queen v Giancinto Arcuri**, the Court accepted the Sgt. Kennedy was an expert in the field of "footprint analysis" which it held was "a recognized field of expertise". Mr. Akiwumi correctly points out that **Arcuri** was a Superior Court

decision while **Dimitrov** was a Court of Appeal decision. However, that does not take account of the fact that in its judgment, that court adopted and approved the dissenting judgment of Laskin J.A. in **R. v. Ferguson [2000] O.J. No 246** (Ontario Court of Appeal). Minden J. quoted extensively from the judgment of Laskin J.A. in that case in which a new trial was ordered on grounds other than the admissibility of expert evidence.

9. The **Arcuri** case was enthusiastically cited by the Crown in its response to the defence submissions. Mr. Ward for the Crown pointed out that the criticism, such as it has been of Sgt. Kennedy, was in relation to "barefoot insole impressions". There is no indication that the Crown intends to lead any evidence in this case upon that issue. Nor can there be any real doubt that the technique of comparing footmarks is well established and of long standing. Certainly the technique has been around from 1968.

10. Crown counsel cites with approval paragraphs 32 to 40 of the **Arcuri** judgment which I quote hereunder.

*"[32] In considering Ferguson and the other authorities referred to therein, I note the following comment of Justice Hill in **R. v. Chisholm [1997] O.J. No. 1819**:*

"Expert evidence generally recognized by appellant authorities to be the proper subject of expert opinion is a factor worthy of consideration in the legal determination of admissibility."

[33] Mr. Justice Hill continued as follows:

"Nevertheless, I must bear in mind the state of state of scientific knowledge is fluid. Differing challenges may be mounted case-to-case and the evidentiary

record of each prosecution constitutes a case-specific context for the relevant inquiries and balancing of factors which the Court is obliged to undertake."

[34] I adopt all of these observations.

[35] While recognizing that Mr. Justice Laskin's opinion was based upon a trial record which did not include a Mohan application, I nevertheless find his comments to be very persuasive and applicable to this case. I say that for several reasons. I will mention just some.

[36] First, a good deal of the attack here upon Sgt. Kennedy's qualifications was premised upon what was characterized as a lack of formal education and scientific training. That "gap" in Sgt. Kennedy's resume would have been equally apparent in Ferguson. Not surprisingly, Mr. Justice Laskin unequivocally accepted Sgt. Kennedy's qualifications as an expert, notwithstanding Sergeant Kennedy's level of formal education.

[37] For some time it has been recognized that the means by which a proposed expert acquired his or her special skill or knowledge is not determinative. In R. v. Marquard (1993), 85, C.C.C. (3d) 193, the Supreme Court of Canada adopted (at p.224) the following passage from Sopinka, Lederman and Bryant, The Law of Evidence in Canada (1992) pp, 536-7:

"The admissibility of [expert] evidence does not depend upon the means by which that skill was acquired. As long as the court is satisfied that the witness is sufficiently experienced in the subject-matter in issue, the court will not be concerned with whether his or her skill was derived from specific studies or by practical training, although that may effect the weight to be given to the evidence."

[38] Mohan re-affirmed this by emphasizing that the expert's special skill and knowledge may be acquired through study or experience. (emphasis added) : Mohan, supra. par. 27.

[39] Second, in Ferguson there was a clear and convincing record establishing the "international recognition" accorded the field in question and the fact that Sgt. Kennedy is one of its leading experts. The conclusion reached by Mr. Justice Laskin is only fortified by the impressive evidence of Sgt. Kennedy's work, and the recognition given to it, over the nearly two and one half year period since Ferguson was decided.

[40] Third, Mr. Justice Laskin clearly was of the view that Sgt. Kennedy's evidence met all of the Mohan criteria, including the "reliability" component of "relevance" and was not "novel science". The evidence has led me to the same conclusion. Sgt. Kennedy's work, on the development of his hypothesis and on his

techniques of comparative analysis has been in the public domain for well over ten years. It appears to have achieved wide recognition and acceptance. The evidence indicated that in consultation with other specialists, Sgt. Kennedy continues to test his working hypothesis. That hypothesis has consistently been confirmed. As well, Sgt. Kennedy continues to exact high standards in all comparative investigations, wherever conducted.

11. The Crown also adopted the views expressed in **Regina v Norman John Rose** in the South Australia Full Court of Appeal Criminal Division as clear support for the proposition that evidence of footprints is and should be properly accepted as within the definition of those issues which can form the subject of expert opinion evidence.

12. In his response submissions, defence counsel again directed the Court to Dimitrov and reminded that whereas **Dimitrov** was a Court of Appeal decision, Arcuri was a first instance judgment. He also reminded the Court that the effect of **R. v. J.L-J** was to enhance the Mohan standard and that the Court must be vigilant in its gate keeping function. Finally, he pointed out that the witness himself had said that unless there were peculiar characteristics on a foot, it is not possible to make a "categoric" positive identification in relation to a particular individual. He therefore questioned the relevance of the evidence. I deal with that particular issue below.

RULING

13. My point of departure is to consider whether the threshold tests articulated in **Bonython** have been met. In my view, they have been. In that regard, I accept

the submission of Crown Counsel that, based upon the ruling of the Cayman Islands Court of Appeal in **Goulbourne v The Queen (2008) CILR 144**, Bonython represents the applicable law in these Islands. I also accept, as defence counsel submits, that in any event, the evidence must also pass the test of relevance before it is admissible. Further, I accept that reliability is another issue which the court may consider. Nevertheless, in that regard, I refer again to the case of **R v Robb**, the 1993 case in the England and Wales Court of Appeal where it was stated by the Court that the evidence of an expert is still admissible even where, as in that case, the methodology used by the expert is considered unreliable by a majority within the discipline in which the expert is testifying.

14. I accept that this is the correct statement of principle and hold, as stated above, that the evidence of Sgt. Kennedy should be admitted. In that respect I accept that dicta in **Arcuri**, and **R v Rose** are readily applicable to this application.

15. I should note as well that insofar as relevance is concerned, it is not without significance that in justifying the reception of the evidence in **Rose** the Court of Appeal cited with approval the judgment of the judge at first instance where he said:

> *"The expert opinion evidence under consideration here is, as I have indicated, to be given by two podiatrists from whom I heard some evidence during a voir dire hearing. The Crown seeks to adduce this evidence, not on the subject-matter of whether, by reference to a comparison of the accused's feet and wear marks in some shoes allegedly found apparently dumped in a drain near the scene of these crimes, these were shoes that had been worn by the accused, but on the limited subject-matter of whether, by reference to such a comparison, those shoes could*

have been worn by the accused. The subject-matter of the opinion evidence in question is not identification evidence per se, or anything akin to fingerprint identification, or voice print identification, but rather evidence of the characteristics and points of comparison to be seen on both the foot and the shoes from which circumstantial evidence an inference may ultimately be sought to be drawn (in conjunction with other circumstantial evidence) that there was a connection, a 'deductive conclusion', or a correlation, or a correspondence (such as with handwriting comparison, traditional blood testing, speech patterns and the like). The issue here is, therefore, quite different, in terms of how far it was expected that the expert witness would go in expressing an opinion, from that in R v Bonython (1984) 38 SASR 45,

16. I also note the following from **R v Rose**, which I have also dealt with in my written reasons in the earlier application to exclude fingerprint evidence and which should be available tomorrow, and I adopt these dicta for the purposes herein

The first thing that the Crown needs to do is pass, if it can, 'the threshold test', viz to prove that the subject-matter of the opinion evidence in question, that is to say (and I emphasize) the characteristics or points of comparison of both the feet and the shoes (as opposed to the identification of the accused himself) are not, or are not wholly, within the knowledge and experience of ordinary persons and are such that a person, without instruction or experience in the specialized area of knowledge or human experience to do with podiatry, would not be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in that area.

The subject-matter of enquiry in this voir dire hearing is such that persons, without instruction or experience in this area of knowledge or human experience, are unlikely to prove capable of forming a correct judgment upon it without the assistance of the opinion of witnesses possessing special skill.

The Crown, therefore, passes 'the threshold test'. It was not suggested on the accused's behalf that "the threshold test" had not been passed here.

The next two things that the Crown must do are to establish, first, the relevant field of expertise, viz. that the subject-matter of the opinion (that is to say, the characteristics of the feet and points of comparison between wear-marks in the shoes) of each of the so-called experts forms part of a

body of knowledge or experience which is sufficiently organized or recognized to be accepted as a reliable body of knowledge or experience, a special acquaintance with which by the witness would render her opinion of assistance to the Court, and, secondly, the qualification of the witness, viz. that each witness has acquired by study or experience sufficient knowledge of the subject-matter to render her opinion of value in resolving the issue before the Court.

Both are established here, in my judgment, on the evidence of the two podiatrists which I accept as credible and reliable.

There is nothing new or novel about the technique which the podiatrists have purported to use to reach their conclusion that the accused 'could have worn' one or more of the pairs of shoes examined. It may well have been otherwise if the Crown had sought to identify the accused by adducing their opinion (the podiatrists' opinion) to the effect that 'this shoe had been worn by that accused person, whose feet I had examined'.

17. I also refer to the **Dimitrov** case upon which defence counsel places great store. It will be recalled that there the expert's purported ability to identify who wore boots based on the wear pattern or footprint impression in the boots was successfully attacked in the Ontario Court of Appeal in that landmark case which came out of Ottawa; Although the jury used this "expert" evidence to convict Mr. **Dimitrov**, the Ontario Court of Appeal overturned the conviction on December 24, 2003, and he was acquitted on the retrial. I should like to cite an article written by a Canadian jurist, Justice Ian Binnie, a judge of the Supreme Court of Canada, entitled "**SCIENCE IN THE COURTROOM; THE MOUSE THAT ROARED**" published in the University of New Brunswick Law Journal, on January 1 2007.

18. In the article, the learned Justice Binnie, set out his views on the relevance of "barefoot morphology" - as propounded by Sergeant Kennedy. Justice Binnie

published these views in a section of his paper called - Difficulties with the Gatekeeper Function - which explored *the judge's role in protecting accused persons from unproven science*; (My emphasis)

"It must be admitted that many courts are continuing to have serious difficulties in digesting and evaluating scientific evidence, even rather crude scientific evidence,"

This is for both institutional and procedural reasons, Institutionally, judges hesitate to exclude such evidence in a jury case for fear of usurping the fact finding function of the jury. Procedurally, in a judge alone case, there is always a temptation to let the evidence in, fully understood or not, and for the judge to leave it to the end of the trial to determine what weight, if any, it is to be given. Either way, the result can be an enormous waste of time and money and, in some cases, a miscarriage of justice.

In 2005, for example, the media were full of reports of another wrongful conviction based on identification of an accused as a murderer by the novel science of barefoot morphology. Mr. Dimitre Dimitrov, a Bulgarian immigrant living in Ottawa, had been convicted four years earlier of murdering his landlord, who was also Bulgarian, by beating him to death with a blunt instrument. There was some evidence of mutual hostility, but there was nothing to tie Dimitrov to the murder except, according to the prosecution, a pair of boots that were covered with stains of blood which the Crown alleged belonged to the victim. There were no eye witnesses. The onus was on the prosecution to connect the boots to the accused. Royal Canadian Mounted Police *(RCMP) Sergeant Robert Kennedy testified that the impressions people's feet leave on the insoles of footwear are quite distinct and that by applying techniques of barefoot morphology he could say that Dimitrov was "likely" the usual wearer of the boots."*

He continued: "Sgt. Kennedy is an expert in footprint identification. He could opine whether a running shoe imprint in the mud beside a body was consistent with the type of running shoe worn on the day in question by an accused. But here there was none of that; there was only a blood-stained boot. However, Sgt. Kennedy had also developed a sideline expertise trying to identify suspects by the imprint left by feet inside shoes or boots, specifically the pattern left by the weight-bearing portions of the bare foot on the insole. (53) The main proponent of barefoot morphology in Canada and the U.S. is RCMP Sgt. Kennedy himself.

The Ontario Court of Appeal concluded in 2003 that Sgt. Kennedy should have been stopped at "the gateway" by the trial judge. (54) His evidence of "barefoot morphology" failed to meet any of the criteria set out in Daubert

and R. v. J.-L.J.: there was no serious test of Sgt. Kennedy's hypothesis, and as such there was no opportunity for peer review and no error rate could be established. The Court therefore set aside Dimitrov's original conviction on the basis that the trial judge had not performed a proper gatekeeper role. At the retrial in 2006, Dimitrov was readily acquitted."

19. I note, *en passant*, but for the record in light of defence counsel's submissions, that the judge did, in the context of the gate keeping functions of this court, refer **R. v. J L-J** to which defence counsel had specifically referred me.

20. I would also wish to refer to the **Jones** case in South Carolina on which defence counsel seems to place great store. But I would avert to the following: In that case the court found that even though it was not prepared to admit the barefoot insole impression, its own research indicated that it had been accepted in at least three jurisdictions while it had been rejected in two.

21. I wish to make a couple of closing observations. First, it will be recalled that even in the first **US v Plaza** case cited by defence counsel in the application to exclude fingerprint evidence, the court while refusing to allow the witness to give evidence on the ultimate issue, did allow questions to be asked short of that issue. It seems clear that based upon my understanding of the evidence of footprint impressions, as well as tyre track evidence, that the relevance and purpose of this type of evidence is a stated by the judge at first instance in R v Rose to assist in providing or bolstering circumstantial evidence from which a jury may draw inferences, subject to proper direction by the judge.

22. Secondly, in terms of relevance, it is obvious that a witness to a robbery who is not able to definitively identify the perpetrator, may yet give evidence about his appearance. "He was over six feet tall; he appeared to weigh over three hundred pounds; he walked with a noticeable limp, appeared to have one leg shorter than the other and had a cane with a gold handle. I did not see his face but he wore a Mohawk haircut". It is clear that these are matters to which a witness can testify and these are all relevant although the witness cannot say that the accused is in fact the perpetrator. Or another example: "The car which was seen at the scene of the robbery was a 1998 black Buick convertible with white wall tyres" is clearly of relevance if it can be shown that the accused is the owner or regular driver of such a car. In neither of these cases could the witness say that the accused was the perpetrator, but there can be no doubt that these would be relevant matters which could be placed before the jury. So much for the question of relevance.

Evidence Law Section 29

23. I wish to deal briefly with the issue of section 29 of the Evidence Law. Counsel for the defence had invited the court, even assuming the evidence being challenged could be admitted, to exercise its discretion to exclude it pursuant to section 29 of the Evidence Law. I confess that this is an issue over which I believe that there is a real issue of concern. The court must always be alive to the probability and even the possibility of prejudice, notwithstanding some probative value and otherwise admissibility. It is a matter to which reference was made

above in Justice Binnie's article cited above. I accept that there is a certain inertia against refusing the evidence at this stage of the proceedings. But I also believe that given the fact that in this case I am both Judge and Jury, it will be possible to give myself a serious warning about that issue as well as to the question, in any event, of the need to ensure that no evidence is given any more weight than it deserves. In that regard, I am deeply conscious of the injunction in the Book of Micah, to act "Justly", to love mercy and to walk humbly. The commitment to act "justly" has been and must continue to be the essential hallmark of the processes of our courts.

24. Finally, while defence counsel did not make expansive submissions in this application on the question of whether the expert had outlined his criteria so as to allow the court to test the accuracy of his conclusions, I mention this issue as well. In the case of **Robb** (op cit) the court noted that, counsel having failed on the issue of whether the witness could be an expert, took another line of attack. The judge said:

"*Mr. Hill had another string to his bow. He submitted that based upon* ***Davie v Edinburgh Magistrates*** *[1953] S.C.34, and* ***Turner (1975) 60 Cr. Appeal Reports****, that the duty of experts .....*

> *"Is to furnish the judge or jury with the necessary criteria for testing the accuracy of their conclusion, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence.....the bare ipse dixit of a scientist, however eminent, upon the issue in controversy will normally carry little weight for it cannot be tested by cross examination nor independently appraised, and the parties have invoked the decision of*

a judicial tribunal and not an oracular pronouncement by an expert". (Davie's case at page 40).

"Here Mr. Hill complained, Dr. Baldwin had not set out his criteria, so there was no way of testing the accuracy of his conclusions. We do not consider this complaint to be sound. Dr. Baldwin described the features of the human voice to which he paid attention. He testified that he found no significant difference between the voice on the disputed tapes and the voice on the control tape. Had he found differences he could no doubt have identified the differences. But if one concludes that A is distinguishable from B, having identified the features one has considered, one can do no more. If anyone contends that there are differences between A and B, or that other features should be considered, it is for him to point them out and then there will be material for the jury to consider."

It is clear from the foregoing that the failure of an expert to set out a priori the criteria which he uses in the field of his expertise is not a bar to the admissibility of the evidence.

25. In all the circumstances, I am satisfied that the application must be denied and the Witness, Sgt. Robert Kennedy, retired office of the Royal Canadian Mounted Police is allowed to give evidence and be treated for those purposes as an expert witness.

Dated: 30th September 2009

The Hon. Mr. Justice Anderson
Judge of the Grand Court (Acting)