14/11; [2011] VSC 180

SUPREME COURT OF VICTORIA

R v DUPAS

Hollingworth J

15 September, 1 November 2010; 3 May 2011 — (2011) 211 A Crim R 81

EVIDENCE – IDENTIFICATION EVIDENCE – OPINION EVIDENCE – WHETHER PSYCHOLOGICAL EVIDENCE ADMISSIBLE AS TO THE POSSIBLE EFFECTS OF POST-EVENT INFORMATION ON MEMORY – WHETHER PSYCHOLOGICAL EVIDENCE ADMISSIBLE CONCERNING POLICE PHOTOBOARD – WHETHER, IF ADMISSIBLE, SUCH EVIDENCE SHOULD BE EXCLUDED: *EVIDENCE ACT* 2008, SS76, 79, 80 and 135.

D. was charged with murder. The circumstantial Crown case relied in part upon the evidence of three witnesses who identified D. as the man, or resembling the man, they saw at the cemetery on the day of the murder. At the trial D. sought to adduce expert evidence from a psychologist who had expertise in the area of eyewitness identification evidence. D. submitted that the evidence was admissible under s79 of the *Evidence Act* 2008 ('Act').

HELD: Application refused.

1. Section 79 of the Act contains an exception to the opinion rule. The opinion rule is contained in s76 of the Act, and provides that "Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed."

2. Section 79(1) provides that "If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge."

3. Section 80 is also relevant, as it provides that evidence of an opinion is not inadmissible only because it is about (a) a fact in issue or an ultimate issue; or (b) a matter of common knowledge.

4. The psychologist in his report outlined scientific research conducted on human memory and the ways in which memory can be affected by exposure to "post-event information". He said research shows that people can incorporate information that they acquire after an event into their memory of the event without being aware that they have done so. Such information includes information from media sources such as newspapers and television.

5. The psychologist was allowed to give general evidence about exposure to post-event information and its effect on memory. Given the psychologist's own acknowledgement that the research did not allow him to say that post-event information had any impact on the memory of any particular witness, such an opinion was not admissible. Accordingly, that evidence was not allowed to be led from the psychologist but that ruling did not preclude defence counsel from attacking the reliability of the evidence of the witnesses through cross-examination and/or by way of closing address.

6. In relation to the photoboard evidence, the psychologist referred to experimental psychological research which had been conducted in factors which affect the accuracy and reliability of identification evidence collected using photoboards.

7. Had the psychologist opined that the photoboard was biased or unfair based on the results of testing conducted using the established research methods to which he referred, that may well have involved the expression of an opinion based on specialised knowledge. But he had done no such testing. Rather, he had simply given his subjective opinion, based on what he personally saw when he looked at the photoboard. Such an opinion was not one based wholly or substantially on any specialised knowledge, and was therefore not admissible under s79 of the Act. Accordingly, the psychologist was not allowed to express the proposed opinion.

HOLLINGWORTH J:

Introduction

1. The accused was charged with the murder of Mersina Halvagis at the Fawkner Cemetery on 1 November 1997. The circumstantial Crown case relied in part upon the evidence of Katica Melnik, Horst Peter Weller and Laima Burman, identifying the accused as the man, or as resembling the

man, they saw at the cemetery that day. Each of those witnesses identified, or saw the resemblance in, the accused after they had been exposed to photographs of him in the media.

2. The accused applied, unsuccessfully, to exclude the evidence of Melnik, Weller and Burman. That decision is the subject of separate reasons.

3. The accused also sought to adduce expert evidence from Dr Richard Kemp, a psychologist from the University of New South Wales School of Psychology, who has expertise in the area of eyewitness identification evidence.

4. Although the accused's written application had sought leave to admit Dr Kemp's evidence under s108C of the *Evidence Act* 2008 ("the Act")[1], the accused's counsel submitted orally that the evidence was in fact sought to be adduced under s79 of the Act, and the matter proceeded on that basis.

5. Section 79 contains an exception to the opinion rule. The opinion rule is contained in s76 of the Act, and provides that "Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed."

6. Section 79(1) provides that "If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge."

7. Section 80 is also relevant, as it provides that:

> Evidence of an opinion is not inadmissible only because it is about—
> (a) a fact in issue or an ultimate issue; or
>
> (b) a matter of common knowledge.

8. Dr Kemp prepared an initial report, dated 13 July 2010 ("the first report"). On 15 September 2010, prior to the empanelment of the jury, Dr Kemp gave evidence on a *voir dire*, and I heard some argument as to the admissibility of the first report. As a result of various matters raised during that preliminary hearing, I gave the accused the opportunity to obtain a further report from Dr Kemp. I did not rule on the admissibility of the first report, and no further reliance was sought to be placed on it.

9. Dr Kemp prepared a further report, dated 15 October 2010 ("the second report"), annexed to which were scientific articles and papers, which Dr Kemp had cited in the second report. On 1 November 2010, after the jury had been empanelled, Dr Kemp gave further evidence on a voir dire, and I heard argument as to the admissibility of the second report. At this hearing, the Crown accepted that Dr Kemp had specialised knowledge based on his training, study or experience. [2] But the Crown objected to any of the evidence being led, either because: (a) the opinions he had to offer were not based wholly or substantially on specialised knowledge as required by s79; or (b) under s135 of the Act, because they would be unfairly prejudicial to a party, or would be misleading or confusing.

10. On 3 November 2010, I ruled that I would allow some, but not all, of the proposed evidence to be led from Dr Kemp, for reasons which would be published later. These are those reasons.

The second report — Research concerning post-event information

11. The second report outlined scientific research that has been conducted on human memory and the ways that memory can be affected by exposure to "post-event information". Dr Kemp elaborated on this phenomenon, which he also described as the "misinformation effect", in his evidence on the *voir dire*.

12. He spoke about the research which shows that people can incorporate information that they acquire after an event into their memory of the event, without being aware that they have done so. Such information includes information from media sources, such as newspapers and television. It is not only small details that can be modified in this way, entire episodes can be modified.

13. Dr Kemp said that there are a large number of factors that influence how any particular individual may respond to post-event information. They include a person's age[3] and the delay between the original event and encountering the post-event information.[4] The duration of the witness's observation of the subject is not as important as the circumstances of the observation.[5] However, even taking such factors into account, the scientific research does not enable Dr Kemp to opine as to whether any particular witness has definitely (or even probably) succumbed to post-event information.

14. I did not accept the Crown's submission that Dr Kemp's proposed evidence about the post-event phenomenon was not based on any specialised knowledge. It is true that jurors may have a general awareness of matters such as the fact that memory is not static and may be unreliable, or that memory may be affected by subsequent events. But they may not be aware of the extent of the phenomenon, for example how easy it is to make someone "remember" an entire incident which simply did not occur, or the types of factors which might affect the reliability of a memory.[6] And in so far as there were aspects of Dr Kemp's evidence that might be thought to be matters of common knowledge, such evidence was not inadmissible only for that reason.[7]

15. The Crown argued that if the evidence was otherwise admissible, it should be excluded because its probative value would be substantially outweighed by the danger that the evidence might be unfairly prejudicial to a party (s135(a)) or misleading or confusing (s135(b)). The Crown pointed out that the Court of Appeal had made it clear that the trial judge ought to give a full *Domican* warning at the re-trial in this case, which would necessarily include warning the jury about issues such as the displacement effect and the possibility that the reliability of the witnesses' evidence had been affected by that.[8] The Crown was concerned that:

> (a) Dr Kemp's evidence might be given more weight than it deserved; or
>
> (b) Dr Kemp's evidence might undermine the charge, in relation to the use of identification evidence; and/or
>
> (c) The jury may be confused by being told similar, but not necessarily identical, things in the evidence of Dr Kemp and in the judge's charge.

16. In the course of discussions with both counsel, I explored the possibility of confusion between the evidence and the charge, and was initially concerned at the potential for such confusion. But defence counsel vigorously argued that the accused ought to be allowed to call this evidence, and there would be no real potential for such confusion.

17. The identification evidence of Melnik, Weller and Burman was an important part of the Crown case. The accused had been the subject of an enormous amount of pre-trial publicity over many years,[9] some of which had undoubtedly been seen by the three witnesses. There had also been long delays in the identification processes. A strong *Domican* warning would clearly be required. After considering the matter further, I accepted the defence submission that Dr Kemp's evidence would support, rather than undermine, the force of the judicial directions as to the dangers and problems with the identification evidence. I concluded that any potential confusion could be prevented or satisfactorily minimised by discussing the relevant parts of the charge with counsel, prior to charging the jury on the identification evidence.

18. I determined to allow Dr Kemp to give general evidence about exposure to post-event information and its effect on memory. This evidence would go no further than what was contained in the second report or had been the subject of evidence given on the second *voir dire*.

19. In coming to that conclusion, I had regard to the specific and rather unusual facts of this case. In order to help overcome any potential prejudice to the accused caused by the extensive pre-trial publicity, I concluded that it would not be unfairly prejudicial to the Crown if Dr Kemp's evidence were to be given more weight than it might otherwise have deserved. And, in allowing such evidence to be led in this case, I did not mean to suggest that it will always be appropriate for expert evidence to be led as to the misinformation or displacement effect; indeed, in many cases, it will not be appropriate to do so.[10]

Commenting on the evidence of the specific witnesses

20. In the first report, Dr Kemp had proffered his opinion as to the likelihood that the memories of the witnesses Burman, Melnik and Weller had in fact been contaminated or otherwise affected by post-event information.[11]

21. In the second report, Dr Kemp did not directly opine as to the likelihood that the specific witnesses had been affected by post-event information. But he did so indirectly, by reciting what he understood to be the factual circumstances of their relevant identification, and then making some sort of comment to the effect that "research shows that exposure to post-event information such as this increases the danger of memory contamination."

22. Dr Kemp agreed that the research does not allow him to say that post-event information had any impact on the memory of any particular witness; all he could talk about were generalities or averages. It is not possible to predict how an individual person will respond to post-event information.

23. Defence counsel acknowledged[12] that he could not ask Dr Kemp for his opinion about whether or not any of the identifications were valid or reliable, that all he could talk about was the phenomenon of post-event information. But, he nevertheless wanted to be able to ask, in respect of the three witnesses, a question to the effect of "Is this an example of the sort of situation where there might be memory contamination?"

24. Defence counsel argued that *Smith* was authority for the proposition that he could ask such a question. In that case, one of the grounds of appeal was that the absence of fresh evidence at trial had resulted in a miscarriage of justice. The evidence in question was both general psychological evidence about certain aspects of eyewitness identification, and specific evidence to the effect that there was a significant risk that a named witness had misidentified the accused. The NSW Court of Appeal said that:

> [the expert's] purported application of stated general research conclusions to [the witness] and her evidence goes further than is permissible. He would, however be able to state the result of his research and the general state of learning and answer questions based on assumptions. It would be for the tribunal of fact to decide whether they applied to the present case.[13]

25. Unfortunately, nowhere in the reasons in *Smith* did the court give an example of the sort of assumptions that might have been permissible in that case.

26. I do not doubt that, in an appropriate case, an expert might be asked to express an opinion based on assumptions or hypothetical scenarios. But what the accused sought to do here went beyond that; it was, effectively, a "back-door" way of asking Dr Kemp to express an opinion as to the reliability of the named witnesses' evidence, or the likelihood that their memory had been affected by post-event information. Given Dr Kemp's own acknowledgement that the research does not allow him to say that post-event information had any impact on the memory of any particular witness, such an opinion would not be admissible.

27. Accordingly, I did not allow this evidence to be led from Dr Kemp. That ruling obviously did not preclude defence counsel from attacking the reliability of the evidence of each of Weller, Melnik and Burman through cross-examination and/or by way of closing address.

The photoboard evidence

28. In the second report, Dr Kemp referred to experimental psychological research which had been conducted into factors which affect the accuracy and reliability of identification evidence collected using photoboards (what he called "line-ups"). That research had resulted in a list of five recommendations to police regarding the conduct of identifications. One of those recommendations was that the suspect should not stand out in the photoboard or line-up as being different from the other people in it, based on the witness's description of the culprit or other factors which would draw attention to the suspect.

29. Dr Kemp said that there were established research methods which enabled one to test the fairness of a photoboard, but he had not had time to formally test the fairness of the photoboard used in this case.

30. Dr Kemp gave his personal opinion regarding the images used in the photoboard, namely:

(a) Images 1, 5 and 9 appear to have had eyeglasses added or the original eyeglasses altered;

(b) Image 7 shows the accused's face at a different angle to the other images;

(c) The shoulders and collar line of the accused in image 7 appear to have been altered;

(d) These changes "may have made the image of [the accused] stand out from other members of the line-up for the witnesses".

31. Had Dr Kemp opined that the photoboard was biased or unfair based on the results of testing conducted using the established research methods to which he referred, that may well have involved the expression of an opinion based on specialised knowledge. But he had done no such testing. Rather, he had simply given his subjective opinion, based on what he personally saw when he looked at the photoboard. Such an opinion was not one based wholly or substantially on any specialised knowledge, and was therefore not admissible under s79. Accordingly, I did not allow Dr Kemp to express the proposed opinion.

32. That ruling would not prevent defence counsel from pointing out to the jury any features which the defence said make the accused look different to, or stand out from, other persons shown on the photoboard. That could be done through cross-examination of the various witnesses involved with the photoboard exercises (including the police witnesses involved in its preparation or use) and/or by way of closing address.

33. Depending on how the defence chose to deal with the photoboard, any dangers associated with photoboard identification might also be addressed in the charge.

---

[1] Section 108C is concerned with the admission of expert opinion evidence as an exception to the credibility rule in s102.
[2] Abandoning the part of the Crown's written submissions, which had disputed that fact.
[3] The very young and older adults are more likely to succumb to misinformation.
[4] The longer the delay, the greater the probability of incorporating post-event information.
[5] The circumstances might include matters such as whether the parties spoke or otherwise interacted, the "richness of the encounter", or whether there was anything that might increase the witness's attention to the other person.
[6] Dr Kemp discussed such matters at T 442-4.
[7] Section 80.
[8] *R v Dupas* [2009] VSCA 202; 198 A Crim R 454.
[9] Discussed in my ruling on the accused's application for a permanent stay of the proceeding on the basis of pre-trial publicity: *R v Dupas* [2010] VSC 409.
[10] As the NSW Court of Appeal noted in *R v Smith* [2000] NSWCCA 468; (2000) 116 A Crim R at [69]-[70] ("*Smith*") each case must be assessed on its merits, and exclusion under s135(c) may be warranted if such evidence might cause an undue waste of time. Reliance on s135(c) was abandoned by the Crown in this case.
[11] For example: "There is a strong chance that exposure to these images will have affected the witnesses' memory for the appearance of the person they saw" (at [3]) and "There is a considerable danger that the memories of witnesses Melnik and Weller may have been contaminated by exposure to post-event information" (at [28]).
[12] For example, at T421.
[13] At [61].

APPEARANCES: For the Crown: Ms M Williams SC and Mr T Hoare, counsel. Solicitor for Public Prosecutions. For the accused Dupas: Mr G Thomas SC and Mr M Regan, counsel. Victoria Legal Aid.
