17/85

SUPREME COURT OF VICTORIA

R v TILLEY

Beach J

16, 19 November 1984 — [1985] VicRp 50; [1985] VR 505

EVIDENCE – ADMISSIBILITY – OPINION EVIDENCE – OPINION OF EXPERT STYLISTIC ANALYST AS SHOWING WHETHER ACCUSED GAVE ANSWERS AS ALLEGEDLY RECORDED IN RECORD OF INTERVIEW – WHETHER EXPERT OPINION ADMISSIBLE IN SUCH CIRCUMSTANCES.

On a trial on charges relating to robbery and theft, the Crown relied on admissions, contained in an alleged record of interview conducted between the police and the accused. The defence was that no such record of interview was ever conducted and that police evidence concerning it was a complete fabrication. The accused sought to lead evidence from an international authority on stylistic analysis who, after examining the speaking and writing habits of the accused, expressed the opinion that the accused was not the author of the answers appearing in the record of interview. Having heard the evidence of the expert on *voir dire* to determine its admissibility.

RULING: Application to lead evidence refused.
(1) Expert opinion based on stylistic analysis of documents may be received in evidence in appropriate cases where the authenticity of a written document is in question or where words appearing in a document are the words of the particular person.
***Cluster Analysis in Court*, B Niblett and J Boreham [1976] *Crim LR* 175, referred to.**

(2) In the present case, because of the dissimilar events surrounding the making of the alleged record of interview and the accused's written composition, the expert's opinion was not receivable in evidence.
***R v O'Callaghan* [1976] VicRp 43; [1976] VR 441, referred to.**

BEACH J: [1] Mr McLennan for the defence has sought to lead evidence from the Reverend Andrew Queen Morton, an international authority on stylistic analysis relating to the record of interview the Crown allege was conducted between Senior Detective Schipper and the accused at the Coolangatta Police Station on 5th September 1975. The case for the Crown is that during the course of that interview the accused made complete oral admissions in relation to each offence with which he is presently charged. The case for the accused is that no such record of interview was ever conducted and that the evidence given by the witnesses, Schipper, Smith, Meskell and Duncan in relation to it is a complete fabrication.

I have heard the evidence of the Reverend Morton on *voir dire* to determine its admissibility. If my understanding of the evidence is correct, it would seem to come down to this: **[2]** Stylometrics is based on an examination of the speaking and writing habits of the individual. No two human beings arrange words exactly alike. If one knows the writings of an individual one can ascertain from an examination of those writings the writing habits of that individual, e.g. how often he uses the word "and" followed by an adjective and noun, how often he uses the word "it" at the end of a sentence, how often he uses the word "the" as the second last word of a sentence, and how often he uses the word "to" with a verb on either side. Knowing the writing habits of the individual one can then examine a sample of writing and say whether or not the words used are the words of that individual. It is said that if one knows the writing habits of a particular individual one also knows his speaking habits because they will be almost the same. Therefore, if one knows the writing habits of an individual one can say whether oral answers attributed to him were in fact made by him in answer to questions put to him.

The material used by the Reverend Morton as the basis for his analysis consisted of a copy of the record of interview said to have been conducted by Senior Detective Schipper with the accused, and an essay written by the accused at the request of the Reverend Morton on 21st June 1982, i.e. almost seven years later. Having subjected that material to analysis, the Reverend Morton formed the opinion that the style of the answers in the record of interview so closely matched the

style of the questions rather than the essay, that both the questions and answers came from the same source. The four habits the Reverend Morton identified and which caused him to form that opinion were those I have already **[3]** stated, namely, how often the word "and" was followed by an adjective and a noun, how often the word "it" was used at the end of a sentence, how often the word "the" was used as the second last word of a sentence, and how often the word "to" was used with a verb on either side. In the case of the word "and" he found 19 occurrences of it in the questions in the record of interview but only on two occasions was it followed by a noun and adjective. In the answers it occurred 14 times but in no instance was it followed by an adjective and a noun; in the essay it occurred 27 times and was followed by an adjective and a noun on 7 occasions. The word "it" was used on 16 occasions in the questions but only 4 occasions at the end of a sentence; in the answers it occurred on 19 occasions but only as the last word of a sentence on 3; in the essay it was used on 6 occasions but on no occasion as the last word of a sentence. The word "the" occurred on 72 occasions in the questions but was only the penultimate word in a sentence on 15 occasions; it occurred on 42 occasions in the answers but only as the penultimate word on 11; in the essay it appears on 55 occasions but only on 8 occasions as the penultimate word. Finally, the word "to", was used on 41 occasions in the questions but only with a verb on either side on 13 occasions; it was used on 25 occasions in the answers but only with a verb on either side on 5; and it was used on 29 occasions during the essay but only with a verb on either side on 4 occasions.

Based on those findings the Reverend Morton was of the opinion that the accused was not the author of the answers appearing in the record of interview, but that the answers came from the same source as the questions, namely Senior **[4]** Detective Schipper. It is that opinion evidence that the defence seek to place before the jury. The foundation of the rules relating to opinion evidence was laid by Lord Mansfield CJ in *Folkes v Chadd* [1782] EngR 106; (1782) 3 Doug KB 157; 99 ER 58. At page 159 (Doug) His Lordship said:

> "The opinion of scientific men upon proven facts may be given by men of science within their own science."

But as the Court of Appeal said in *R v Turner* [1975] 1 All ER 70 at page 74 (see also [1975] QB 834; [1975] 2 WLR 56; 60 Cr App R 80):

> "An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help then the opinion of an expert is unnecessary."

There can be little doubt but that the Reverend Morton is one of the foremost experts in the field of stylistic analysis, or stylometry as it is more often referred to. Clearly his evidence is of relevance, but relevance does not result in evidence being admissible. It is merely a condition precedent to admissibility. Can it be said on the facts in this case that the members of the jury will be unable to form their own conclusions as to whether or not the statements attributed to the accused were in fact made by him without the help of expert opinion in relation to the matter?

The question as to whether or not the content and nature of a record of interview can be made the subject of expert opinion was considered by Gowans J in *R v O'Callaghan* [1976] VicRp 43; [1976] VR 441. That was a case in which counsel for the accused sought to call a psychologist to give evidence to the effect **[5]** that in his opinion, and for reasons it is unnecessary to presently detail, it was unlikely the accused would have made the answers recorded in a written record of interview. At page 444 His Honour said:

> "The content and nature of an ordinary written record cannot be made the subject of expert opinion; that is for the jury."

Later at page 445 His Honour said:

> "The likelihood or otherwise of the police evidence or the accused's assertion being true is a matter well within ordinary human experience, and the issue is only one of credibility."

The evidence before me establishes that to date evidence of stylistic analysis has been received by a court on four occasions, twice in the year 1975, once in the year 1978, and as recently

as the month of October of this year. However, on three of those occasions the evidence related to the authenticity of a written confession, a testator's will and a tape recording of a conversation. The only occasion upon which evidence of stylistic analysis in relation to a record of interview has been received by a court was in 1975 in a trial at the Central Criminal Court in London involving a man named Raymond. The only material I have been able to discover relating to that trial is that contained in an article entitled "Cluster Analysis in Court" by Bryan Niblett and Jillian Boreham reported in 1976 *Criminal Law Review*, 175. In a paragraph entitled "Circumstances of the trial" the authors said:

> "The trial was held at the Central Criminal Court in February 1975. There was one defendant and 12 counts in the indictment including such **[6]** offences as theft, obtaining property by deception, dishonest handling of stolen goods and the possession of a false driving licence calculated to deceive. The defendant was alleged to have made certain oral statements that were recorded verbatim by the police interrogator. The confessions in the statements, all of which were disputed by the defendant, were crucial to the prosecution case. It so happened that the defendant had previously been prosecuted for murder (of which he was acquitted) and on that occasion had made statements to the police the authenticity of which were not in dispute. Since the two sets of statements were made, or alleged to be made, in precisely similar circumstances, that is in a police station under interrogation and recorded verbatim, it occurred to the defendant that computer analysis of the two sets of statements might be able to test his assertion that the second set was not his. Accordingly he called on the Rev AQ Morton, an international authority on stylistic analysis, to give expert evidence. And he called on one of us (BN) to present evidence on the analysis by computer of the two sets of statements. This article is confined to a discussion of the cluster analysis that we were able to make."

The authors then proceeded to detail the nature and results of their tests and concluded the article by saying:

> "We believe this to be the first occasion that cluster analysis has been used in a criminal trial to provide evidence on the authenticity of statements alleged to have been made by a defendant. In our view it is unlikely that this type of evidence will be used often. In this particular case the circumstances were ideal: two groups of documents of adequate length were available and they were produced, or alleged to have been produced, under identical circumstances. Since the trial in February we have been approached to repeat the analysis for another defendant but we considered the documents unsatisfactory for the purpose. So the occasions on which this technique can be used are likely to be rare. But we report it as a novel additional tool available to the forensic scientist."

One cannot but observe that the situation in the present case is quite different from that in *Raymond's case*. Whereas in **[7]** *Raymond's case* the analysts had two groups of documents of a similar nature produced under identical circumstances with the genuine documents coming into existence before those alleged to have been concocted, in the present case, one has the record of the interview conducted by the police with the accused at Coolangatta Police Station on the 5th September 1975, on the one hand, and an essay written by the accused at his leisure some years later and for the sole purpose of enabling the Reverend Morton to make his analysis, on the other. The two situations could hardly be more dissimilar. In my opinion, the fact that evidence of the type presently in question was received by a court in *Raymond's case* is not of itself sufficient justification for receiving it in this case.

Having considered the evidence called before me on the *voir dire*, I have come to the following conclusions:-

> (i) Stylistic analysis of documents is a science and, in appropriate cases, expert opinion based on such analysis may be received in evidence when disputes arise concerning the authenticity of documents and, more particularly, whether or not the words appearing in a document are the words of the particular person.
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> (ii) The Reverend Morton is an international authority on stylistical analysis. In appropriate cases – that is, where the authenticity of documents is in dispute – his opinion may well be received in evidence.
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> (iii) In the present case, it would be inappropriate to receive his evidence concerning the accused's record of interview. I say that for these reasons: this is not a case in which the authenticity of a written document is in question. What **[8]** is in dispute are the oral answers given by the accused to oral questions put to him. In that connection I am not prepared to accept the proposition that an individual's manner or style of speech is the same as his manner or style of writing. Despite the assertion of the Reverend Morton to that effect, in my opinion, there is no satisfactory evidence

> before me which would justify me making such a finding. Indeed, I consider such a finding would be contrary to human experience. It would seem to me that a person's style or manner of speaking on a particular occasion may well be quite different from his manner of style of speaking on another occasion well removed in point of time.

In the present case, unlike *Raymond's case*, one could not have more dissimilar circumstances concerning the record of interview, on the one hand, and the essay written by the accused, on the other. In the first place, they were separated by a period of almost seven years. The record of interview was compiled in a police station, during the course of an interrogation; the essay was written at leisure and at a time when it would be unlikely that the accused would have been subject to pressure or emotional stress. What was said by the accused in the course of the interview was, to a certain extent, dictated by the nature of the questions asked, because the questions themselves prescribed a form of answer. So far as the essay was concerned, he was free to roam where his fancy took him. I consider it is a matter of notoriety that a person is more particular with his choice and use of language when writing a document such as an essay than he is when speaking and, in this case, when answering a police officer's question. In my **[9]** opinion, the jury in this case will be quite capable of determining whether or not the accused gave the answers the police allege he did from the evidence called in the case. In many respects, this case is little different from *O'Callaghan's case*. The issue is one of credibility, something well within the capability of the jury. The application to call the evidence in question is refused.

I should perhaps make one further observation: much time was taken by the prosecutor in cross-examining the Reverend Morton concerning the content of the two letters written by the accused, those letters being Exhibits "A" and "B" on the *voir dire*. Those letters were written by the accused before he made contact with the Reverend Morton and before he wrote the essay of the 21st June 1978. On the face of them, a layman may well be tempted to conclude that the Reverend Morton's findings, based solely on the record of interview and the essay, are incorrect, and that if one has regard to the style of the writer of the letters, then the writer of the letters is, in fact, the same person, or could well be the same person as the person who gave the answers appearing in the record of interview. Another conclusion might be that although the accused wrote the essay, he was not the author of it. In my opinion, matters of that nature would go to the weight to be attached to the Reverend Morton's evidence, not the question of its admissibility.

Solicitor for the Crown: J M Buckley, solicitor to the Director of Public Prosecutions.
Solicitors for the accused: Campbell and Grace.
