COURT OF APPEAL FOR ONTARIO

CITATION: R. v. Hodge, 2022 ONCA 897
DATE: 20221228
DOCKET: C67377

van Rensburg, Thorburn and George JJ.A.

BETWEEN

His Majesty the King

Respondent

and

Jaimie Hodge

Appellant

James Mencel, for the appellant

Meaghan Hourigan, for the respondent

Heard: October 18, 2022

On appeal from the conviction entered on April 6, 2018, by Justice Gordon D. Lemon of the Superior Court of Justice, sitting with a jury.

REASONS FOR DECISION

[1] The appellant was convicted of importing 1.34 kg of cocaine into Canada. The only issue at trial was whether the appellant knew the drugs were in the lining of her suitcase, which is where customs officials found them upon her return from the Dominican Republic.

[2] The issues in this appeal arise from the expert evidence of RCMP Constable Antonio Castrillon on re-examination. Crown counsel asked him whether it "[made] sense" for a drug importer to arrange for a "corrupt" airport employee to hide drugs in the bag of an unwitting passenger. The officer responded that it was "highly unlikely". The appellant testified that she did not conceal the drugs in her suitcase, did not know they were there, and that she must have been used by traffickers to unknowingly transport their drugs.

[3] The appellant argues that the trial judge: 1) erred by allowing Cst. Castrillon to offer evidence about the likelihood of a drug organization using a blind courier; and 2) erred by not providing a limiting instruction to the jury.

Background Facts

[4] On March 28, 2014, the appellant arrived at Pearson Airport on a flight from the Dominican Republic. She was questioned by a Canada Border Services Agency officer. The appellant said that she stayed alone at an all-inclusive resort as a "last hurrah" before starting school, and that she had purchased the trip from a travel agent the day before she departed. After the appellant was referred for secondary inspection, an officer observed that her suitcase, even after being emptied, was unusually heavy, x-rayed the suitcase, and identified suspected cocaine after inserting a knife into the bottom of the suitcase. An RCMP officer later searched the appellant's belongings, where he found packages of cocaine

(less than two inches thick) in the top and bottom lining of the suitcase. The cocaine was only detectable once the suitcase was disassembled, which took about 15 minutes. The appellant's phone was also in the "factory reset" condition and the power button was damaged.

RCMP Constable Castrillon

[5] At trial, in an agreed statement of facts, the parties agreed that Cst. Castrillon was qualified to provide expert evidence in relation to the cocaine trade, including: methods of importation, jargon, methods of packaging and concealment, pricing, and methods of distribution. In his direct examination he testified, among other things, that a courier would not typically see how the drugs are packaged, prepared, or concealed. According to Cst. Castrillon, preparing a suitcase to conceal drugs in this way would take significant time and effort. He also testified that high-level trafficking organizations would carefully select couriers in order to minimize the risk of losing their valuable product.

[6] On cross-examination, Cst. Castrillon agreed that drug organizations would sometimes involve corrupt airport employees and he acknowledged that they would prefer a courier who would not appear nervous and be unable to identify those who provided them the drugs.

[7] On re-examination, Crown counsel asked the officer this question:

> And I just wanted to ask you in terms of corrupt employees being involved in secreting narcotics into

> luggage, would you typically see that in terms of the scenario that I gave you, the hypothetical scenario where you see the drugs being secreted in the luggage in the manner that I've put to you? And assuming, as well, that the baggage came up on the baggage carousel, and I can ask you to assume, as well, that the courier took – or, sorry – the traveller picked up the luggage and let's assume for a moment the traveller didn't know that there was cocaine in the luggage.

[8] The appellant's trial counsel objected, asserting, in the absence of the jury, that this question would elicit evidence that violates the principles set out by the Supreme Court in *R. v. Sekhon*, 2014 SCC 15, [2014] 1 S.C.R. 272. The trial judge was aware of the risk of expert evidence that, as in *Sekhon*, could stray beyond its proper scope. After some discussion, he asked counsel to take some time to speak and hopefully come to an agreement on how the question could be asked:

> [I]t seems to me that both of you are agreeing that the topic can be entered into, the question can be asked. The concern is, how is that question may at least – or maybe I could tell you, that's my thinking is that you – given that you've raised the corrupt employee, the Crown should be able to investigate that area but cannot breach the *Sekhon* principles.

[9] After speaking with each other, counsel advised the trial judge that they had reached an agreement and that the following rephrased question could be put to the officer:

> So, officer, does it make sense to you, given what you know about drug investigations, generally, for an organizer to have a corrupt employee either in the Caribbean or the recipient country, have the corrupt employee put the drugs in the luggage of an

> unsuspecting traveller and then allow the traveller to pick up the luggage from the baggage carousel and leave the airport with it?

[10] The trial judge indicated that he would make no comment, and would "stay out of it" if counsel were satisfied with the question. Then, with counsel's agreement, he ensured that the question was first answered in a *voir dire*. There, Cst. Castrillon responded that it "[did] not make any sense" because it would involve following the passenger with the luggage to try to obtain the drugs from their luggage. He concluded by saying "Is it possible to happen? Anything is possible and it can happen. Is it probable? Probably not." When the question was put to Cst. Castrillon in the presence of the jury, he gave substantially the same answer, but modified his conclusion, saying, "Is it possible it can happen? Yes, it is possible. Does it happen often? Is it probable it can happen? Highly unlikely."

[11] In his final charge to the jury, the trial judge recited the typical instruction about expert evidence. He gave no specific limiting instruction regarding Cst. Castrillon's evidence about the unlikelihood of a drug importer using a blind courier.

Analysis

[12] In *Sekhon*, the Supreme Court provides helpful guidance on the scope of expert evidence in drug importing cases. While there was a split in the result (with respect to the applicability of the curative *proviso*), the unanimous opinion of the court was that an officer's testimony that he had never before encountered a "blind"

courier was anecdotal, and therefore legally irrelevant to an accused's guilt. This type of evidence was held to have minimal probative value, and its prejudicial effect was high as it was essentially a statement by a police officer (who had been qualified as an expert) that someone in Mr. Sekhon's position – who drove a pickup truck across a land border crossing with 50 one-kilogram bricks of cocaine secreted inside a hidden compartment – would always know about drugs in their vehicle.

[13] In deciding as it did, and concluding that the impugned evidence was inadmissible, the Supreme Court adopted, at para. 50, the dissent of Newbury J.A. of the British Columbia Court of Appeal, who wrote that:

> Anecdotal evidence of this kind is just that – anecdotal. It does not speak to the particular facts before the Court, but has the superficial attractiveness of seeming to show that the probabilities are very much in the Crown's favour, and of coming from the mouth of an "expert".[1]

Did the trial judge err by allowing Cst. Castrillon to give evidence about the likelihood of a drug organization using a blind courier?

[14] The appellant submits that the trial judge should have exercised his gatekeeping function and prevented Cst. Castrillon from testifying about the likelihood of a drug organization using blind couriers and corrupt airport

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[1] 2012 BCCA 512, at para. 27.

employees. According to the appellant, the officer's evidence on this point was legally irrelevant and had no probative value.

[15] As we explain, the trial judge did not err in this case in refusing to exclude the impugned evidence, particularly in light of how the expert evidence was elicited and treated by trial counsel.

[16] Both Crown and defence counsel agreed that it was appropriate for Cst. Castrillon to offer expert evidence, and there was no objection to his evidence-in-chief. It is important to remember that in *Sekhon* the appellant did not take issue with the expert's opinion "that the owners of such a significant amount of cocaine would want a trusted and reliable individual handling the shipment" or with the suggestion that "'[w]ith that proven reliability and trust naturally comes some knowledge'". The evidence in *Sekhon* became problematic when the expert, after referring to his experience in past drug investigations, spoke of how he had never encountered a blind courier. The prejudicial impact of this type of evidence was held to be too high, for two reasons. First, it tended to show that the "probabilities are very much in the Crown's favour", and second, it placed a burden on the accused to prove that their situation was different. The court also concluded that it was legally irrelevant – as the guilt of other, unrelated persons could not possibly have any bearing on the question of guilt of the accused before the court – and it was unnecessary to assist the trier of fact: *Sekhon*, at para. 49.

[17] The problem with the appellant's position is twofold. First, it was her counsel, during cross-examination, who first asked this witness about corrupt airport employees; Crown counsel did not attempt to go down this road during examination-in-chief. Second, defence counsel participated in formulating the modified question, and gave his blessing to the question that was ultimately asked.

[18] We note also that trial counsel is described in the materials as experienced and competent. As such, this was not the by-product of inadvertence, ignorance of *Sekhon*, or of the other principles that guide the admissibility of expert evidence. This was a considered decision by counsel who appears to have turned his mind to all relevant factors.

[19] What *Sekhon* enjoins is evidence that invites a trier of fact to reason from a generalized conclusion based on prior experience to a specific state of mind of the person charged: *R. v. Burnett*, 2018 ONCA 790, at para. 75. At the end of the day, Cst. Castrillon's evidence did not suggest that he had never seen a blind courier, or for that matter a corrupt airport employee who was involved with drugs transported by a blind courier. Also, when asked about blind couriers in cross-examination, he did not foreclose their use. If anything, he elevated the likelihood of their use by highlighting for the jury the benefits of using a blind courier, when he agreed that a blind courier would not present as nervous to customs officials and would have no ability to identify the source of the drugs or anyone who played a part in organizing the importation scheme. Lastly, Cst. Castrillon did not weigh in

on the ultimate issue, which was whether the appellant knew that drugs were in her suitcase upon her return from the Dominican Republic. He was permitted to opine on the various methods of importation and in the end, in respect of this one method (a corrupt airport employee involved with a blind courier), he said that while it was possible, it was "highly unlikely" because it would involve following the passenger to try to obtain the drugs. This answer was grounded in logic and common sense.

[20] As defence counsel introduced the impugned topic, assisted in the formulation of the question, and did not object to the final instruction on expert evidence, there is no reason to interfere.

[21] We would therefore reject this ground of appeal.

Did the trial judge err by not providing the jury a limiting instruction?

[22] As the evidence did not prejudice the appellant, there was no need for the trial judge to provide a limiting instruction.

[23] Moreover, while not dispositive, we observe that the appellant's trial counsel did not seek a limiting instruction, which is a clear indication that he did not view this evidence as prejudicial. This is also evident in defence counsel's submissions during the pre-charge conference and in his closing address, where he highlighted for the jury two things: first, that corrupt airport employees had the opportunity to hide drugs in the appellant's luggage (and had opportunities to retrieve it), and

second, that a corrupt employee might have planned to confront the appellant after she cleared customs. That is to say, exploring this area was a tactical decision made by the defence. In these circumstances, we see no reason to interfere.

Conclusion

[24] The appeal is dismissed.

"K. van Rensburg J.A."
"J.A. Thorburn J.A."
"J. George J.A."