

IN THE COURT OF APPEAL OF MANITOBA

Coram: Mr. Justice Michel A. Monnin
Madam Justice Diana M. Cameron
Mr. Justice William J. Burnett

BETWEEN:

<i>HER MAJESTY THE QUEEN</i>)	<i>J. G. Neufeld</i>
)	<i>for the Appellant</i>
<i>Respondent</i>)	
)	<i>A. Y. Kotler</i>
<i>- and -</i>)	<i>for the Respondent</i>
)	
<i>CODY JOSEPH KAKEEWAY</i>)	<i>Appeal heard and</i>
)	<i>Decision pronounced:</i>
<i>(Accused) Appellant</i>)	<i>April 4, 2017</i>

On appeal from 2016 MBQB 34

CAMERON JA (for the Court):

[1] The accused appeals his conviction after trial by judge alone on a charge of second degree murder. At the hearing of the matter we dismissed the appeal with reasons to follow. These are those reasons.

[2] The deceased was shot twice, once (fatally) in the neck and once in the leg while walking down a back lane in Winnipeg. At the trial, the theory of the Crown was that the accused shot the deceased because he believed the deceased belonged to a rival gang. Three affiliates of the accused's gang (the affiliates) identified the accused as the shooter. In considering their evidence, the trial judge cautioned herself in accordance with *Vetrovec v The Queen*, [1982] 1 SCR 811, to ensure that their evidence was given special scrutiny as required by the legal principles governing unsavoury witnesses.

When reflecting on the credibility and reliability of each affiliate, she took into account independent confirmatory evidence arising outside of that of the affiliates. Further, she determined that the evidence of each of the affiliates was sufficiently independent to confirm the evidence of the other two. Ultimately, she found that the evidence of the affiliates was sufficient to satisfy her beyond a reasonable doubt that the accused was the shooter and was therefore guilty.

[3] Relying on *R v Khela*, 2009 SCC 4, the accused argues that the trial judge erred in finding that there was material and independent evidence capable of confirming the evidence of each of the affiliates. He argues that the independent evidence that the trial judge relied on to confirm the evidence of each of them was not material and did not implicate him as the shooter. Further, he argues that the trial judge erred in considering the evidence of each of the affiliates as confirmatory in relation to one another. In his view, there existed “collusory conduct” between the affiliates resulting in evidence that was not independent and therefore incapable of being confirmatory.

[4] The decision regarding the question of whether evidence is capable of being confirmatory of a *Vetrovec* witness is a question of law, reviewable on the standard of correctness. However, if the evidence is capable of being confirmatory, the decision of the trial judge to identify it as such is an exercise of judicial discretion and is owed deference. See *R v Labossière*, 2014 MBCA 89 at para 41.

[5] The standard of review regarding whether a piece of evidence is capable of being considered independent is reviewable on the standard of

deference. As stated in *R v Magno*, 2015 ONCA 111 (at para 43):

It is the duty of the trial judge to carefully scrutinize the evidence and determine if it is capable of being independent. If there is any reasonable basis for it to be considered independent, the trial judge must allow the jury to exercise its fact-finding function. In my view, considerable deference is owed to a trial judge who is engaged in this analysis, as he or she is best positioned to determine whether the jury could reasonably conclude that the evidence is independent.

[emphasis added]

[6] Regarding materiality, the accused argues that, because the only issue in this case was whether he was the shooter, in order to be held material, the potentially confirmatory evidence had to speak directly to that issue. I disagree. As noted in *Labossière*, “confirmatory evidence need not incriminate an accused” (at para 44). In this case, the trial judge considered independent evidence that tended to support that of the affiliates including: evidence from an associate of the deceased and nearby neighbors indicating that there was a confrontation in the back lane; the location of the deceased’s body; ballistics evidence concerning the direction of the shots fired; the discovery of a bag containing ammunition in a location where one of the affiliates said that the accused retrieved the gun from; and, video surveillance confirming the evidence of one of the affiliates that he fled the scene in the same taxi as the accused.

[7] Moreover, absent disqualification on the ground that it was not independent, the evidence of each of the affiliates was capable of confirming the other as to the identity of the accused as the shooter.

[8] Regarding the issue of independence, the mere fact that witnesses

speaking about an incident, or even that they discuss false evidence to be provided to the police, does not automatically disqualify the witnesses' evidence from being capable of being confirmatory. As explained in *Magno* (at para 37):

The question is ultimately not whether the witnesses colluded, but rather whether there was collusion that rendered the evidence of one not independent from the evidence of the other. The independence inquiry looks to the impact of collusive conduct on the independence of the evidence, not the independence of the witnesses from each other.

[9] In this case, the trial judge held that two of the affiliates spent time together and talked about the incident after the event but before giving a statement to the police. She also held that they would have had the opportunity to speak to the third affiliate. However, after carefully considering the arguments of counsel regarding suspicious consistencies in the evidence of the first two affiliates, she held that there were also significant differences between them. She concluded that they did not collude “to the point that the [evidence] on the fundamental issue as to whether [the accused] was the shooter are tainted to the point that they are not independent” (at para 56). She further held that the third affiliate’s evidence was different in “respects which suggest that he did not work in collaboration with the other two [affiliates]” (at para 57).

[10] The trial judge gave careful consideration to the evidence of collusion. Her finding that the evidence was independent is subject to deference. In my view, the accused has not shown her conclusion was unreasonable.

[11] It is for these reasons that the appeal was dismissed.

Cameron JA

Monnin JA

Burnett JA
