

Ontario Supreme Court
R. v. Pinkus
Date: 1999-10-25

Regina

and

Pinkus

Ontario Superior Court of Justice McKinnon J.

Judgment rendered: October 25, 1999

Andrejs Berzins, Q.C., and Mark Moors, for the Crown.

Lawrence Greenspon and Ann McNaughton, for accused.

[1] MCKINNON J.:—The accused is charged with the second degree murder of Danny Jones arising out of a botched robbery attempt at a gas bar located on a county road in the Regional Municipality of Ottawa-Carleton. The Crown has called a former girlfriend of the accused as a witness. Her evidence implicates the accused as being the person who killed Danny Jones with a shotgun. She has testified before the jury that in conversations with her following the event the accused admitted shooting Mr. Jones in the back during the course of the robbery. For approximately a two-year period following the homicide this same witness maintained in various statements to the police that the accused had nothing to do with the robbery and informed her that he was innocent. Crown counsel now wishes, during examination-in-chief, to lead the evidence of these prior inconsistent statements as part of the narrative of events. Mr. Berzins wishes to question the witness as to her reasons for changing her story and agreeing to provide a sworn statement to the police implicating the accused. The witness would testify that her statements previous to the sworn statement were lies and that she is now telling the truth. Mr. Greenspon objects to the Crown proceeding in this fashion, arguing that the evidence sought to be adduced is properly within the domain of cross-examination, is self-serving and offends the rule against oath-helping.

[2] Mr. Berzins argues that he should be able to present this witness “warts and all”, as part of his strategy in the trial. He argues that his strategy is not prohibited by the authorities and cited three cases which he believes support his position. He argues that there are no cases which hold that a party calling a witness is prohibited from bringing out the fact that previous inconsistent statements were made when the purpose is not to impeach the credibility of the witness. In such a case, he argues, the prosecution is simply leading the narrative in relation

to the witness's change of heart and is essential background as to why the witness is now telling a different story. It goes without saying that the Crown believes that this witness is now telling the truth and believes that the witness was formerly telling a lie.

[3] Mr. Berzins argues that there are no cases specifically on point because his right to lead the evidence is self-evident. He likens this to the rule of evidence relating to the leading of a criminal record. The leading of a witness's prior convictions is a recognized exception to the general rule against discrediting one's own witness. See *R. v. St. Pierre* (1974), 17 C.C.C. (2d) 489 (Ont. C.A.), and *R. v. Boyko* (1975), 28 C.C.C. (2d) 193 (B.C.C.A.), both of which stand for the proposition that the strict wording of section 12 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5, permits the leading of a criminal record during examination-in-chief.

[4] In *R. v. Beland* (1987), 36 C.C.C. (3d) 481, McIntyre J., speaking for the majority of the Supreme Court of Canada in very helpful reasons, confirmed the wisdom of a general rule against oath-helping. After reviewing the authorities on point Justice McIntyre concluded that [at p. 489]:

From the foregoing comments, it will be seen that the rule against oath-helping, that is, adducing evidence solely for the purpose of bolstering a witness's credibility, is well grounded in authority.

[5] Among the authorities to which Justice McIntyre referred is *R. v. Kyselka*, a decision of the Ontario Court of Appeal reported at (1962), 133 C.C.C. 103. In that case a new trial was ordered where a trial judge permitted the Crown to call a psychiatrist to give evidence that because of the low mental age of a complainant, the complainant lacked sufficient imagination to concoct a story. It was held that the sole purpose of the evidence was to bolster the credibility of the complainant. Porter C.J.O. stated at page 107:

While the credit of any witness may be *impeached* by the *opposite party*, *R. v. Gunewardene*, [1951] 2 All E.R. 290 at p. 294, there is no warrant of authority for such oath-helping as occurred in the circumstances in this case, reminiscent as it is of the method before the Norman Conquest by which a defendant in a civil suit or an accused person proved his case by calling witnesses to swear that the oath of the party was true. If this sort of evidence were admissible in the case of either party no limit could be placed on the number of witnesses who could be called to testify about the credibility of

witnesses as to facts. It would tend to produce, regardless of the number of such character witnesses who were called, undue confusion in the minds of the jury by directing their attention away from the real issues and the controversy would become so intricate that truth would be more likely to remain hidden than be discovered. For these reasons this evidence was not admissible.

[6] Justice McIntyre also referred to the case *R. v. Clarke* (1981), 63 C.C.C. (2d) 224 (Alta. C.A.), where a Crown witness, who was a fellow prison inmate of the accused, was permitted to testify under the anonymous name “John Doe”, was at the time of trial attending bible classes, was in regular attendance at Alcoholics Anonymous classes, had made restitution for certain offences in respect of which he had not actually been prosecuted, had changed his attitude to the police and society generally, had come to realize that his social problems were of his own making, and now despised and rejected violence. In that case, McClung J.A., speaking for the Alberta Court of Appeal held that the examination exceeded the permitted limit [36 C.C.C. (3d) 481 at p. 487]

because its overriding and dominant objective was the bolstering of the witness’s character and, therefore, his credibility.

[7] McClung J.A. supported his view by quoting *Wigmore on Evidence* (Chadbourn rev. 1972), vol. 4, pp. 233-234 where it is stated:

“1104(A) *Proving good character in support; in general, inadmissible until impeached.* Good character for veracity is as relevant to indicate the probability of truth-telling as bad character for veracity is to indicate the probability of the contrary. But there is no reason why time should be spent in proving that which may be assumed to exist. Every witness may be assumed to be a normal moral character for veracity, just as he is assumed to be of normal sanity. Good character, therefore, in his support is excluded *until his character is brought in question* and it thus becomes worthwhile to deny that his character is bad.”

[8] As well, McClung J.A. quoted Lacourcière J.A. speaking for the Ontario Court of Appeal in *R. v. Martin* (1980), 53 C.C.C. (2d) 425 at p. 433. In that case evidence had been admitted at trial that a Crown witness had previously been tried and acquitted of the murder with which the accused was charged. Lacourcière J.A. commented [at p. 233]:

It is difficult, however, to justify the introduction of this evidence during examination-in-chief. It was wrong if it was an attempt to bolster and support the credibility of the prosecution's own witness which was not yet under attack notwithstanding the obvious direction of the defence theory.

[9] McIntyre J. goes on to refer to other authorities which all establish that the rule against oath-helping is alive and well. He notes that the rule is consistent in principle with the rule against prior consistent statements. In that regard, the Supreme Court of Canada has recently confirmed the rule in *R. v. Evans* (1993), 82 C.C.C. (3d) 338, wherein Cory J. speaking for the court stated [at p. 348]:

Ordinarily, other persons may not be called to testify as to a witness's out-of-court statements. Nor may a witness repeat, in court, her own earlier statements. Generally, a narration by a witness of her previous declarations made to others outside of the court should be excluded because of its general lack of probative value and because such a repetition is, as a rule, self-serving. However, they may be admitted in support of the credibility of a witness in situations where that witness's evidence is challenged as being a recent fabrication or contrivance: see *R. v. Campbell* (1977), 38 C.C.C. (2d) 6 at p. 18... (Ont. C.A.), *per* Martin J.A., and *R. v. Beland* (1987), 36 C.C.C. (3d) 481 at p. 489...

[10] A further reason to justify the rule is pointed out by McIntyre J. in *Beland*, *supra*, namely, that such statements could be too readily manufactured for use in later proceedings. Thus, the rule against oath-helping is based upon the same principle as the rule against leading prior consistent statements.

[11] As stated, the Crown relied on three cases as authority for the procedure it wished to adopt. The first of these is *R. v. Lawrence* (1989), 52 C.C.C. (3d) 452 (Ont. C.A.). That case involved an appeal of a conviction for manslaughter which resulted in a new trial being ordered. At page 456 of the decision reference is made to the fact that evidence was given by a Crown witness which implicated the appellant in the killing. During the course of her testimony the witness admitted that she had made a number of inconsistent statements and that she had lied in her earlier statements because of fear of the appellant. The learned trial judge prohibited the Crown from eliciting from her the reason for her fear during examination-in-chief.

It is implicit from the report of the decision that she was permitted to refer to the fact she had earlier made inconsistent statements and had lied at that time because of fear. The case notes that during cross-examination, defence counsel pursued a line of questioning which opened the door for the Crown to lead evidence as to the reasons for her fear. One of the grounds of appeal in the case was that the re-examination should not have been permitted. The court found no merit in that ground of appeal.

[12] I acknowledge that the line of questioning referred to in the case report is analogous to the line of questioning which Crown counsel wishes to pursue in the present case. It is clear that the trial judge put limits upon the examination-in-chief, and the specific issue of whether the witness should have been permitted to testify as she did during examination-in-chief was not explored on appeal. As such, I do not read the case as being authority for the proposition being advanced before me.

[13] The next case relied upon by Crown counsel is that of *R. v. Hamilton* (1994), 94 C.C.C. (3d) 12 (Sask. C.A.). In that case the chief Crown witness decided to change his initial story to the police involving a drug importing scheme. The very issue in the case was the timing of the change of his story. Crown counsel during examination-in-chief led evidence as to the point in time where he decided to change his story and the reasons for so doing. The case itself relates to the issue of disclosure and, in particular, disclosure of the timing of the Crown witness's change of heart. The timing of the change in the witness's story was a very live issue in the trial and constituted essential narrative. Once again, I do not view this case as authority for the procedure sought to be followed by Crown counsel in the case at bar.

[14] The final authority relied on by Crown counsel is *R. v. Eisenhauer* (1998), 123 C.C.C. (3d) 37 (N.S.C.A.). This case dealt with the issue whether defence counsel could make substantive use of a prior statement of a key Crown witness. It is apparent from the case report that the witness during examination-in-chief made reference to the fact that a previous statement had been made, that she had lied in that statement and the reason she lied was that she was protecting the accused. Extensive cross-examination was directed as to the previous statement. Defence counsel tried to convince the trial judge to admit the statement for the truth of its contents. The trial judge refused. The appeal was successful. The Court of Appeal determined that the particular statement met the requirements of *R. v. B.*

(K.G.) (1993), 79 C.C.C. (3d) 257 (S.C.C.). The decision of the Court of Appeal is now under appeal to the Supreme Court of Canada.

[15] Once again, it is acknowledged that the examination-in-chief in *Eisenhauer* is analogous to that which Crown counsel seeks to engage in this case. However, I do not read the case as authority for the procedure. Clearly, the Court of Appeal was putting its mind to the issue of the substantive use of the previous statement, and not to the manner in which the examination-in-chief was conducted.

[16] None of the three cases cited disclose that the examinations-in-chief were at any time the subject of objection, save and except the examination-in-chief in *Lawrence, supra*, where, in any event, limits were placed upon the examination-in-chief by the trial judge. While it may be argued that it is implicit in these cases that the practice is acceptable, I do not regard any of the cases as constituting express authority on the point.

[17] In my opinion, the rule against oath-helping is a sound one and worthy of application in the present case. To permit Mr. Berzins to lead the witness through an explanation as to why she made previous inconsistent statements would inevitably take some of the sting out of the cross-examination.

[18] My reason for saying this is rooted in a belief in the wisdom of the adversary system. It is through the tool of cross-examination that the credibility of a witness is best tested. Cross-examination is a tried and true method of ascertaining the truth. It has no substitute. If the presumption of innocence is the “golden thread” which weaves the fabric of the criminal law, then it may be said that cross-examination is the needle without which the thread would be of little use. The procedure sought to be adopted by Crown counsel would weaken the effect of the cross-examination and potentially be of diminished value to the trier of fact.

[19] In my opinion, the overriding purpose and intent of the procedure sought to be adopted is to bolster the credibility of the witness. The fact of the previous inconsistent statement does not constitute essential narrative in this case. While Crown counsel is permitted to present witnesses in the best light, and while some latitude is often permitted, it remains a question of where the line is to be drawn on a case-by-case basis. I find the proposed line of questioning to be akin to that which was held to be objectionable in *Clarke, (supra)*, a decision specifically approved by the Supreme Court of Canada in *Beland, supra*.

[20] While the Crown believes that the witness is now telling the truth, it is for the trier of fact to determine whether that is in fact the case. The trier of fact in this case would not be assisted were the explanation for the change of heart presented in advance of cross-examination. While Mr. Berzins argues that once explained, the witness can then be cross-examined without restriction, in my view the trier of fact is assisted to a greater degree when the initial questions are asked by the cross-examiner rather than the examiner, particularly in a case such as this where the witness is testifying as to the ultimate issue in the trial, namely an admission of guilt by the accused to a charge of murder.

Order accordingly.