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Case Name:

R. v. Zwezdaryk

Between
Her Majesty the Queen, and
Shane Zwezdaryk, James Voong, and Guiseppe Marini

[2004] O.J. No. 6137

S.C.J./Jury No. 00/04128

Ontario Superior Court of Justice
Newmarket, Ontario

R.A. Clark J.

Oral judgment: October 7, 2004.

(162 paras.)

Criminal law — Evidence — Admissibility — Prejudicial evidence — Confessions and statements by the accused — Opinion evidence — Expert evidence — Criteria for admissibility — Voir dire — The co-accused were charged with first degree murder, attempted murder, manslaughter, aggravated assault, robbery and conspiracy to commit robbery — The Crown was permitted to adduce expert evidence regarding cellular telephone systems to place co-accused near scene and establish communication — Initial statement by co-accused V to police ruled admissible because he was not detained, was read his rights, and was adequately told purpose of interview — Second statement ruled inadmissible due to persistent interrogation despite indication by V of desire to exercise right to silence.

Constitutional law — Canadian Charter of Rights and Freedoms — Legal rights — Procedural rights — Protection against self-incrimination, right to silence — Right to retain and instruct counsel without delay — Voir dire to determine admissibility of statements made by co-accused V to police — The co-accused were charged with first degree murder, attempted murder, manslaughter, aggravated assault, robbery and conspiracy to commit robbery — Initial statement by co-accused V to police ruled admissible because he was not detained, was read his rights, and was adequately told purpose of interview — Second statement ruled inadmissible due to persistent interrogation despite indication by V of desire to exercise right to silence.

Criminal law — Rights of accused — Application by co-accused V and M to sit at counsel table dismissed — Application by the Crown for an order that co-accused Z remain in prisoner box shackled allowed in part — The co-accused were charged with first degree murder, attempted murder, manslaughter, aggravated assault, robbery and conspiracy to commit robbery — V and M were on judicial interim release and Z was in custody — The court held that there was no evidence that the co-accused would be prejudiced by being seated in the prisoner box throughout trial — Z was required to remain in the box due to an escape risk, but was permitted to remain unshackled.

Voir dire to determine admissibility of evidence for the trial of the co-accused, Zwezdaryk, Voong and Marini — The co-accused were charged with first degree murder, attempted murder, manslaughter, aggravated assault, robbery and conspiracy to commit robbery in connection with the armed robbery of a jewelry store — The Crown sought to adduce expert evidence regarding the operation of cellular telephone systems in order to place the co-accused near the scene and establish that they were in communication — The co-accused submitted that the evidence did not

meet the threshold test of reliability — In addition, the co-accused sought to exclude two statements made by Voong to police — The first statement was given in a police car at roadside, and the second, three weeks later, resulted from an interrogation upon Voong's arrest — The Crown also applied to have Zwezdaryk shackled throughout the trial on the basis that he was an aggressive prisoner during pre-trial custody and posed an escape risk — Voong and Marini, who were not in custody, sought permission to sit with their counsel — HELD: The evidence of the Crown's expert witness was admissible — The science underlying the cellular telephone system was sufficiently reliable to be left to the jury to make whatever factual determinations were appropriate — The evidence was relevant, necessary, offered by a witness sufficiently qualified to be considered an expert, and there was no rule that required its exclusion — The first statement made by Voong to police was admissible — No detention occurred because Voong was free to leave at anytime, and did so — Voong exercised his own volition in determining which questions he answered and which he refused — The questioning was general and non-confrontational — Voong was read his rights in adequate fashion prior to questioning and was given adequate information regarding the purpose of the questioning — The second statement was excluded because police persisted with an aggressive interrogation in the face of a clear indication by Voong of a desire to exercise his right to silence — There was no evidence that the co-accused would be prejudiced by being seated in the prisoner box throughout trial — Zwezdaryk was ordered to remain in the prisoner box, unshackled, due to a reasonable inference of escape risk.

Statutes, Regulations and Rules Cited:

Canadian Charter of Rights and Freedoms, 1982, s. 7, s. 10(b), s. 24

Counsel:

R. Scott, Esq., Crown Attorney.

N. Courville, Ms., Crown Attorney.

B. Moss, Esq., Counsel for Mr. Zwezdaryk.

C. Kostopoulos, Esq., Counsel for Mr. Young.

G. LaFontaine, Esq., Counsel for Mr. Marini.

RULING

R.A. CLARK J. (orally):--

Background:

1 In the early morning hours of Sunday, January 16, 2000, two masked men attempted to rob a jewelry store at 155 East Beaver Creek in the Town of Richmond Hill. The owner, Mark Lash, was shot by one of the robbers. Although seriously injured, he survived. His employee, Neve Erez, was shot and killed. Arising from that incident the three accused are charged variously on one indictment with a series of offences, including First Degree Murder, Manslaughter, Attempted Murder, Aggravated Assault, Robbery and Conspiracy to Commit Robbery. Several pre-trial motions were made upon which the court conducted voir dires. What follows are the rulings on those hearings.

Voir Dire No. 1

Seating of Accused During Trial and Shackling of Mr. Zwezdaryk

2 The three accused are charged variously on one indictment with a series of offences, including murder, attempted murder, robbery and conspiracy to commit robbery. The accused Marini and Voong are on bail. Mr. Zwezdaryk is in custody.

3 At the outset of the trial, counsel for the accused Mr. Marini and Mr. Voong applied to have their clients sit at counsel table during the portion of the trial to be held in the presence of the jury. This is necessary, defence counsel contend, for the practical reason that their clients will be better able to assist them in defending the case and for the further reason that it is more consonant with the presumption of innocence than having the accused seated in the prisoner's box.

4 Although counsel for Mr. Zwezdaryk did not bring a motion to have his client sit at the counsel table, he did submit that if the Court were to acquiesce to the motion by Messrs Voong and Marini then Mr. Zwezdaryk should also be entitled to sit at counsel table. This is so, counsel contends, because it would be prejudicial to Mr. Zwezdaryk to be the only one of three accused persons to be seated in the box. It would invite speculation on the part of the jury that Mr. Zwezdaryk is in custody because he is more likely than the other accused to be guilty of the offences charged or that he is otherwise a dangerous person.

5 At the same time, for reasons of courtroom security including the need to prevent escape, the Crown applied to have Mr. Zwezdaryk shackled with leg irons throughout the trial. Although the Crown is not concerned with security as it relates to the accused Mr. Marini and Mr. Voong, the Crown opposed defence counsels' application to have the other two accused seated at counsel table when the jury is present, seeking instead to have them seated in the prisoner's box. This is necessary, the Crown contends, in order to prevent any unfairness to Mr. Zwezdaryk such as might arise if he were to be seated in the prisoner's box alone, while the other two accused sit at counsel table.

6 On the consent of all parties the applications were heard together.

The Evidence:

7 The Crown called one witness, P.C. Jason Low of the York Regional Police Service, to attest to certain misbehaviour on the part of the accused Zwezdaryk. On consent, the officer related certain hearsay information concerning the accused's behaviour while in custody.

8 Mr. Zwezdaryk is said to have been an aggressive prisoner during approximately two years of pre-trial custody on these charges. Authorities at the Toronto West Detention Centre ["TWDC"] have separated him from other inmates because of what they consider to be his aggressive tendencies.

9 Sometime in the summer of 2002, Mr. Zwezdaryk refused to come out of "the bullpen", a large holding cell in this courthouse, when it was time for him to go to court. At the time there were approximately 60 prisoners in the holding cell. A supervisor called the police tactical squad. Mr. Zwezdaryk finally relented and exited the cell only after the tactical squad arrived and threatened to use a Taser gun to extract him.

10 For a time during 2002, prisoners attending court in Newmarket were being held in temporary facilities due to repairs being effected to this courthouse. On one occasion, in November of 2002, Mr. Zwezdaryk was shackled by one arm to a metal bar in the temporary holding area. For reasons best known to himself, Mr. Zwezdaryk broke a makeshift wooden bench and brandished one of its slats as a weapon. After a supervisor spoke to him for approximately ten minutes, the accused eventually relinquished the weapon. During the time he was in possession of the slat he made no attempt to strike anyone with it.

11 Filed on consent was a transcript of a guilty plea by Mr. Zwezdaryk to the offence of Assault

Causing Bodily Harm that described an incident in which he viciously beat a fellow prisoner with his fists and feet in a holding cell facility in a Toronto courthouse.

12 Also filed was a copy of Mr. Zwezdaryk's criminal record. Among approximately 21 criminal convictions, there are two entries for offences of violence, one being the aforementioned incident while in custody.

13 There is also a concern regarding escape. When searched on one occasion upon his return to TWDC, Mr. Zwezdaryk was found to be in possession of a paper clip fashioned into a makeshift handcuff key. In a similar vein, a transcript of an interception, captured by means of an authorization pursuant to Part VI of the *Criminal Code*, was filed on this application. That transcript chronicles a conversation between the accused and an unknown male in the course of which the accused brags that he routinely manages to take his handcuffs off in the police van during transport to and from court. He says that he does this for his own comfort and not for the purpose of escape.

Crown's Motion re: Zwezdaryk:

14 The decision whether an accused is to sit in the prisoner's box or not is one that is within the discretion of the trial judge. The decision must reflect a balancing of the duty of the judge "... to ensure the safety of all participants to the proceeding and to prevent escape on the one hand, and the need to maintain the dignity of the prisoner in the context of the presumption of innocence on the other": *R. v. McNeill* (1996), 108 C.C.C. (3d) 364, (Ont. C.A.), citing *R. v. Cambridge Justices and the Chief Constable of Cambridgeshire ex parte Peacock* (1992), 156 J.P.R. 895, (Q.B.). There is a presumption that an accused is to be unshackled during criminal proceedings unless there is a good and sufficient reason that he should be restrained. There is an onus on the Crown to rebut that presumption: *R. v. Jones and Francis* (1996), 107 C.C.C. (3d) 517, (Ont. G.D.), citing *R. v. McC. (T.)* (1991), 4 O.R. (3d) 203, (Ont. Prov. Ct.).

15 Respecting Mr. Zwezdaryk, the Crown argues that the foregoing evidence of misbehaviour is sufficient to satisfy that onus, especially if one considers the heinous nature of the charges before the Court. I respectfully disagree. The incidents mentioned are all somewhat dated. The latest of them is nearly two years old. The others are more than two years old. All occurred in the holding cell areas of one or more court facilities. None of the incidents is alleged to have happened in a courtroom. Respecting the nature of the crimes alleged, it is the norm in this province for persons in custody, even those charged with the most heinous of murders, to be unfettered while their trials are actually proceeding. No case has been presented to me, nor am I aware of any case, holding that the nature of the crime itself is a reason, much less a sufficient reason, to restrain an accused person in the courtroom while the trial is ongoing. Moreover, the proposition is, to my mind, inconsistent with the presumption of innocence.

16 There is, however, a reasonable basis on the evidence to infer that Mr. Zwezdaryk is an escape risk. For him to be seated at counsel table, he would necessarily have to be unfettered. To allow that, in my view, would give him too great an opportunity to escape.

17 Mr. Lafontaine, in arguing that the rights of the out of custody accused ought not to be sacrificed because of concerns respecting Mr. Zwezdaryk, suggested that the furniture and seating arrangements could be re-arranged and court security staff placed strategically so as to allow Mr. Zwezdaryk to be outside the prisoner's box while accommodating the security concerns respecting Mr. Zwezdaryk. This would allow Mssrs. Voong and Marini to be outside the box as they should be entitled to be.

18 The suggestion that furniture and seating arrangements could be altered to take account of the security concerns is not viable, in my view. Firstly, the trial will be of many months duration and there is no guarantee that it will necessarily proceed from start to finish in the same courtroom. It is, in my experience, not uncommon for trials in this jurisdiction to be shifted from one courtroom to another, from time to time, in order to accommodate the exigencies of a busy

courthouse, including, but not limited to, picking juries on other trials, the civil sittings that occur twice annually and the occasional sitting of the Divisional Court in this jurisdiction. If that were to happen in this case, new arrangements might have to be made on the sudden. This would be disruptive to the orderly running of the courthouse and this trial in particular. Secondly, and more importantly, even if the trial were to proceed in only one courtroom, it is not clear to me that the simple re-arrangement of the furniture adequately addresses the legitimate security concerns respecting Mr. Zwezdaryk.

19 In the face of a perceived risk of escape where the accused is to sit at counsel table, other judges have sought to overcome this risk by requiring the authorities to assign additional court security officers to the trial. I am, with respect, not inclined to do so. The prisoner's box has a long tradition in Anglo-Canadian courts. The jury, as intelligent adults, can surely be taken to be aware of that fact. To the extent that any particular juror is unaware of this tradition, logic would compel a person of average intelligence to conclude that the physical appurtenances of the courtroom, including the prisoner's box, were not specially constructed for a particular trial. Having said that, I am of the view that the presence of an accused in the prisoner's box does not implicitly reflect in a negative way on that particular accused in terms of being either dangerous or more apt to be guilty than any other accused person. Rather, it reflects a well-established norm, no more and no less so than the presence of the judge on a raised dais.

20 On the other hand, the presence of additional security officers sufficient to overcome the risk of escape would add an air of special circumstances which, in the context of a criminal trial, could only be understood as implying dangerousness, risk of escape or a presumption of guilt respecting one or more of the accused. I note in this context that the court security in this jurisdiction consists of Special Constables who are uniformed and, to the average member of the public, untutored in the organization of the police, are at a glance indistinguishable from regular police constables. To my mind, the presence of a large number of such officers than might reasonably be expected would be more apt to have a prejudicial impact upon an accused than having him seated in the prisoner's box.

Defence Motion re: Marini and Voong:

21 The defence argues that the accused Mr. Voong and Mr. Marini, who are out of custody, should not be forced to sit in the prisoner's box for two reasons: (i) it offends the presumption of innocence and (ii) it interferes with the right to make full answer and defence in that it renders effective communication between counsel and client more difficult. Counsel asserts that the fact that Mr. Zwezdaryk has misconducted himself so as to require that he be seated in the prisoner's box is no reason that the rights of Voong and Marini should be diminished to "the lowest common denominator".

22 The argument proceeds from the assumption that there is a prejudice inherent in the mere fact of an accused being seated in the box. There is no evidence before me to support that proposition. Rather, there is simply the bare submission that this is so. It is, in my view, conjectural at best to assume that the jury will be influenced by the fact that the accused is in the prisoner's box: *R. v. Gervais*, [2001] O.J. No. 4942, (Ont. S.C.); *R. v. Heyden*, [1998] O.J. No. 6253, (Ont. (Gen. Div.). In *Heyden, supra*, McIsaac J. stated that he was "not prepared to act upon the conjectural possibility that the jury will ignore their sworn duty to presume the innocence of the accused despite the fact that they have been charged with this offence and are seated in the dock during the trial." I agree with that approach.

23 Mr. LaFontaine relies heavily on the decision of the Court of Appeal in *R. v. LaLande* (1999), 138 C.C.C. (3d) 441, for the proposition that, other things being equal, the accused should be entitled to sit at counsel table. In that case, Borins J.A. referred to the policy of the Attorney General of Ontario, flowing from the recommendations of the Kaufman Inquiry, to the effect that the Crown should normally consent to a motion by the accused to sit at counsel table. He pointed out, however, that the policy was "... with respect to persons who are not in custody and who present no security concerns ...". that is not this case. Having indicated that I do not see

a prejudice to an accused person sitting in the prisoner's dock *per se*, I accept the argument of counsel for Mr. Zwezdaryk that it would be potentially prejudicial to Mr. Zwezdaryk to be in the prisoner's box when the other two are not. While it is true that Mr. Marini and Mr. Voong do not present security concerns, the fact that Mr. Zwezdaryk does dictates that the court must find a solution that will result in a fair trial for all three accused.

24 I do not see any prejudice to any accused occasioned by all three being in the prisoner's box. I am not convinced that there is any significant impediment to communication between counsel and the client engendered by the fact that the accused is in the box as opposed to seated at counsel table. This is not a case where there is any special reason for which the accused Mr. Voong or Mr. Marini must be seated at counsel table: *R. v. Gervais* [2001] O.J. No. 4942, (Ont. S.C.)

25 That said, it remains to be determined how the accused Mr. Marini and Mr. Voong can be seated in the prisoner's dock while allowing the custodial authorities to maintain sufficient security respecting Mr. Zwezdaryk. It has been suggested by defence counsel that Mr. Voong and Mr. Marini would have to be searched prior to each time they go into the prisoner's dock and on each occasion when they leave the box in order to ensure that no contraband is smuggled to Mr. Zwezdaryk. This would amount to an unwarranted intrusion into their privacy made doubly offensive, according to counsel, by virtue of the fact that it is only the alleged misbehaviour of Mr. Zwezdaryk that makes the intrusion necessary.

26 Frankly, I do not understand why it is necessary to search them upon leaving the box. Mr. Zwezdaryk is presumably searched each time he is transported from the detention center. That being the case, presumably there is virtually nothing he could possess that could be passed to the accused Voong or Marini. Understanding that he is incarcerated and they are not, it is hard to conceive of what he could have that he could possibly want to convey to them, in any event.

27 The more troublesome issue is the perceived need to search both Marini and Voong prior to them entering the box. The real concern, it seems to me, is the possibility that weapons or contraband might be brought to Mr. Zwezdaryk by Mr. Marini or Mr. Voong. This possibility is minimized by virtue of the fact that there will be court officers sitting in the customary position on either end of the dock who will be in a position to observe the accused at all times and whose job it is to keep the accused under observation. Moreover, the prisoner's docks in any of the jury courtrooms in this building are long enough that the three accused can be kept some distance apart. To my mind, it is unlikely that, even if so inclined, either Mr. Marini or Mr. Voong could bring a weapon to Mr. Zwezdaryk for the reason that there is electronic wanding of all members of the public upon entry to the courthouse. As for contraband, the risk of anything being successfully smuggled to Mr. Zwezdaryk could be overcome by simply searching Mr. Zwezdaryk each time he is removed from the box.

Result:

28 In the result, the accused Mr. Zwezdaryk will sit in the prisoner's box throughout the entirety of the trial, both before the jury and in its absence. He will be entitled, however, to have his restraints removed while the trial is in progress. For greater certainty, the custodial staff will be entitled to bring him into the court room using such restraint mechanisms as they see fit to employ provided that such mechanisms are removed prior to the commencement of proceedings. Equally, they are entitled to apply the mechanisms within the confines of the courtroom at the conclusion of proceedings for the purpose of transporting him back to the cells.

29 The accused Mr. Marini and Mr. Voong will sit in the prisoner's box during the portion of the trial that takes place before the jury. I have already ruled, on consent, that they may remain at counsel table during all pretrial proceedings. They will not be routinely searched upon either entering or leaving the prisoner's box. Rather, any security concerns may be met by searching Mr. Zwezdaryk upon his leaving the prisoner's box. For greater certainty, however, nothing in this ruling should be construed as preventing the authorities from searching Mr. Voong or Mr. Marini,

within the courtroom or the courthouse, as the case may be, if there are reasonable grounds to believe that either is smuggling contraband to Mr. Zwezdaryk or committing any criminal offence.

Voir Dire No. 2

The Admissibility of Expert Evidence:

30 The Crown proffers for admission expert evidence respecting the operation of cellular telephone systems. All three accused, through their counsel, object to the admission of this evidence. On consent of counsel for Mr. Zwezdaryk and Mr. Voong, Mr. Lafontaine, counsel for Mr. Marini, dealt with this issue on behalf of all three accused.

31 The evidence is said to be relevant in the following way. Cellular telephone records in possession of the Crown reveal that certain telephone calls were made close to the time these offences occurred, using telephone registered to the accused, or in the case of Mr. Marini to his wife, and characteristically used by the accused round about the time of these offences. According to the records, the calls utilised cellular telephone towers in close proximity to the crime scene. The Crown contends that this evidence, when considered together with other evidence, will show:

(i) that the accused men made the calls in question,

(ii) that they were, at times material to these offences, in close proximity to the towers and, thus, to the scene of the crime, and

(iii) that they were in communication with one another.

32 The contested evidence is that of Mr. Paul Wang, who is employed by Telus, a large telecommunications firm that provides cellular telephone service across Canada. The Crown seeks to have Mr. Wang qualified as an expert in the field of radio frequency engineering and cellular telephone operation. Mr. Wang testified on the voir dire respecting his qualifications and the nature of the evidence that, if permitted, he would put before the jury.

(i) Expertise:

33 Mr. Wang holds both a Bachelor's and Master's degree in Applied Science. Mr. Wang is a professional engineer and has a specialty in electrical engineering, including the study of radio, semi-conductors and power sources. He teaches in-house at Telus in these fields. There was no objection to the proffered evidence on the basis of Mr. Wang's qualification as an expert and I have concluded he is amply qualified to give the evidence it is contemplated he would give. Rather, the complaint is that the evidence is not, given the purpose for which it is said to be relevant, sufficiently reliable to warrant its reception.

(ii) Nature of the Evidence:

34 If permitted, Mr. Wang would give evidence that a cellular telephone is a type of radio transmitter/receiver and operates by means of utilising radio frequencies. Telus and other cellular telephone service providers each maintain a series of sites [also called towers] that are designed to receive radio signals emanating from cellular telephones. In the Greater Toronto Area, Telus has approximately 200 such towers. They are in closer geographic proximity to one another in denser urban areas than in suburban or rural areas.

35 Once the signal is emitted by the cellular telephone and received by the tower, the call is then directed to the appropriate destination, that is to say, the telephone number called by the cellular caller. Generally, when a subscriber initiates a cellular telephone call, the tower nearest to the telephone receives the signal from the telephone. That is because the tower also emits a signal. The cellular telephone is designed to acquire the strongest signal among competing signals